



*Scenes from the Kuala Lumpur War Crimes Tribunal  
Hearing from 20 - 25 November 2013*

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KUALA LUMPUR WAR CRIMES COMMISSION v. AMOS YARON & THE STATE OF ISRAEL ~

KLWCT Report 2013

## KUALA LUMPUR WAR CRIMES TRIBUNAL

REPORTS OF JUDGMENTS,  
RULINGS AND ORDERS  
(INCLUDING NOTES OF PROCEEDINGS)

CHIEF PROSECUTOR OF  
THE KUALA LUMPUR WAR CRIMES COMMISSION  
v.  
AMOS YARON AND THE STATE OF ISRAEL

JUDGMENT OF 25 NOVEMBER 2013



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*Chief Prosecutor of the Kuala Lumpur War Crimes Commission*  
*v. Amos Yaron and The State of Israel*

**JUDGMENT**



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1      Chief Prosecutor of the Kuala Lumpur War Crimes Commission  
v.  
Amos Yaron and the State of Israel

5      Kuala Lumpur War Crimes Tribunal - Case No. 3-CHG-2013 and  
Case No. 4-CHG-2013  
Coram: Judge Tan Sri Dato' Haji Lamin Bin Haji Mohd Yunus  
(President), Judge Tunku Sofiah Jewa, Judge Shad Saleem Faruqi,  
10     Judge Mohd Saari Yusuf, Judge Salleh Buang, Judge John Philpot  
and Judge Tunku Intan Mainura.

25 November 2013.

15     *Public international law – war crime – crime against humanity – genocide –  
impleading a sovereign State – State immunity – State liability for its organs  
– jus cogens – whether Tribunal has jurisdiction – command responsibility.*

20     *Procedure – charges served on defendants – defendants not in court –  
defendants did not submit to the jurisdiction of the Tribunal – Amicus  
Curiae appearing for the defendants.*

25     *Evidence – burden of proof – proof of genocide intent – knowledge – mens  
rea – the Kahan Commission report and findings – the effect of UN General  
Assembly resolutions to prove genocide.*

The Kuala Lumpur War Crimes Tribunal (Tribunal) was convened  
on 20 November 2013 to hear two charges against Amos Yaron (first  
Defendant) and The State of Israel (second Defendant).

30     The first Defendant was charged with war crimes, crimes against  
humanity and crime of genocide, whilst the second Defendant was  
charged with the crime of genocide and war crimes. The charges  
(together with the particulars of the charges) had been duly served  
35     on the Defendants, and were read in open court by the Registrar as  
these proceedings commenced. Neither Defendant was present in  
these proceedings, but they were represented by the Defence Team  
as *Amicus Curiae*.

40     At the start of the proceedings, the *Amicus Curiae* Team filed two  
preliminary objections – the first contending that there are defects

in the charges preferred against the first Defendant, and the second contending that the State of Israel cannot be impleaded in these proceedings on the grounds of State immunity.

The *Amicus Curiae* Team submits that the trend in modern international criminal tribunals is either to have jurisdiction for acts that have been committed after these tribunals have been constituted such as the International Criminal Court (ICC), or alternatively its jurisdiction is for a limited duration of time, such as the International Criminal Tribunal for Rwanda (ICTR) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The *Amicus Curiae* Team further submits that this Tribunal came into existence on 6 June 2008, whilst the various acts allegedly committed by the first Defendant in charge no. 3 occurred in the month of September 1982, while the acts allegedly committed by the second Defendant in charge no. 4 occurred since 1948 and continue up to the present day.

The *Amicus Curiae* Team also submits that the State of Israel has not entered appearance in these proceedings and has therefore not submitted to the jurisdiction of this Tribunal. The *Amicus Curiae* Team submits that the State of Israel enjoys immunity for the crimes of genocide and war crimes and therefore Charge 4 should be dismissed.

In its response, the Prosecution Team submits that the jurisdiction issue must be established by reference to the founding Charter that sets up the Tribunal. In the Charter, there is no temporal limit. The Charter is identical to the 'open ended' temporal jurisdiction of the Military Tribunal at Nuremberg or the International Military Tribunal for the Far East.

With regard to the second preliminary objection, the Prosecution Team submits, *inter alia*, that these two Charges are international criminal war crimes being adjudicated by an international tribunal. States have no immunity for such crimes before such tribunals.

Before these proceedings began, the *Amicus Curiae* Team had also submitted two (2) applications to quash the charge against

- 1 the two Defendants. The grounds of applications were as follows:
1. The charge is defective for duplicity, and / or latent duplicity.
  - 5 2. The charge is defective for uncertainty.
  3. The charge is an abuse of process and / or oppressive.
- 10 The *Amicus Curiae* Team contends that there were multiple offences within one charge and multiple forms of alleged instances of criminal conduct within one charge. The *Amicus Curiae* Team submits that the Rules against Duplicity must be strictly adhered to in a criminal proceeding.
- 15 In rebuttal, the Prosecution Team submits that this Tribunal is governed by its own Rules and these Rules are silent on the application of the Rule against Duplicity in drafting charges. This rule against duplicity, as it exists in national legal systems, does not, and
- 20 cannot, apply in the same way in proceedings before international criminal courts. More importantly, the Tribunal should take into account the heinous nature of these crimes and the scale they were alleged to be perpetrated.
- 25 Having considered the submissions by both parties the Tribunal unanimously ruled that the Preliminary Objections and Two Applications have little merit and were accordingly dismissed.
- The Prosecution's case against the first Defendant is that the first
- 30 Defendant had committed War Crimes, Crimes Against Humanity, and Genocide in his capacity as the Commanding Israeli General in military control of the Sabra and Shatila refugee camps in Israeli-occupied Lebanon in September of 1982 when he knowingly facilitated and permitted the large-scale Massacre of the Residents
- 35 of those two camps. These crimes were in violation of, *inter alia*, the Fourth Geneva Convention of 1949, the 1948 Genocide Convention, *jus cogens*, International Humanitarian Law; and Articles 9, 10, and 11 of the Charter.
- 40 The Prosecution's case against the second Defendant is that from 1948 and continuing to date the State of Israel had systematically carried

out against the Palestinian people a series of acts namely killing, causing serious bodily harm and deliberately inflicting conditions of life calculated to bring about physical destruction – with the intention of destroying in whole or in part the Palestinian people.

These acts constitute the Crime of Genocide under international law including the Convention on the Prevention and Punishment of the Crime of Genocide 1948 ('the Genocide Convention') in particular Article II and punishable under Article III of the said Convention. It also constitutes the crime of genocide as stipulated in Article 10 of the Charter.

The Prosecution called 11 witnesses, some of whom were physically present when they gave their testimony, whilst others gave their testimony through Skype.

## **Issues**

### *As against the first Defendant*

1. The burden of proof
2. Proof of genocide intent
3. State liability for the actions of its organs or persons
4. Relationship between the Lebanese militia and the first Defendant
5. Whether the first Defendant has knowledge of the acts committed by the militias
6. The impact of the Kahan Commission report and findings
7. The failure to accuse Ariel Sharon
8. The effect of General Assembly resolutions on proving genocide
9. Command responsibility
10. What crimes had been committed by the first Defendant

### *As against the second Defendant*

1. Whether the Tribunal's jurisdiction is open-ended
2. Whether only natural persons can be charged
3. State of Israel's sovereign immunity and the impact of *jus cogens*

- 1           4. What amounts to genocide
5.          Was there *mens rea*

5      **Held**

*As against the first Defendant*

1.         The burden of proof is beyond all reasonable doubt. All elements of an infraction must be proven beyond all reasonable doubt. This applies to war crimes, crimes against humanity and the crime of genocide.
2.         Proof of genocide intent can be done by inference in the light of all the facts and does not require a specific plan. If there is any alternative interpretation of the state of mind of the Defendants, the Prosecution will fail. The inference must be the only reasonable inference available on the evidence.
3.         State liability is incurred if an organ of the State or a person or group whose acts are legally attributable to the State commits any of the acts described in Article III of the Genocide Convention.
4.         The evidence before the Tribunal clearly shows without doubt that the first Defendant and the Israeli Defence Force (IDF) collaborated with the Phalangist militias and used the militias to carry out Israeli policy of destroying the Palestinian people. The first Defendant worked with the militias personally.
5. (a)         There is no room for doubt that the first Defendant had knowledge of the acts being committed by the militias. The first Defendant had sent these militias into the Sabra and Shatila camps knowing what they would do. As reports emerged of the killings, the first Defendant failed in his duty as Commander of an occupying and invading force to protect civilian population.
- 30           (b)         The evidence shows that the first Defendant consciously refused to protect the Palestinian population in the two camps. His responsibility however goes much further. He and the Israeli army used the militias to destroy the Palestinian people in the camps. He was informed throughout the progress of the massacre. The only reasonable inference is that the first Defendant intended mass murder and that the Palestinian population must be destroyed.
- 40           6.         The Tribunal is not bound by the Kahan Commission report,

- but its factual observations are useful in the search for the truth.
7. As regards the failure to charge Ariel Sharon, it is up to the Chief Prosecutor to decide whom to charge and the Tribunal cannot intervene in prosecutorial discretion.
8. With regard to the use of the UN General Assembly resolutions to prove genocide, the Tribunal holds that the finding of intent to commit genocide by the General Assembly is soft law, but it is useful in the context to help evaluate the intentions of the two Defendants.
9. Since the Tribunal has made a definite finding that the first Defendant is personally responsible, it declines to consider his liability for command responsibility.
10. On the evidence, the Tribunal finds the first Defendant guilty of the crimes against humanity and genocide, and declines to convict him for war crimes as such would be a cumulative conviction.

*As against the second Defendant*

1. The offences of genocide and war crimes for which the second Defendant is being charged were not created by the Charter. These offences existed since the middle of the last century. The Charter sets up a machinery to investigate and prosecute these charges and to create a War Crimes Tribunal to adjudicate on them. The Charter does not specify any dates or time frames as was the case for the ICTY, the ICTR and the ECCC. The Tribunal holds that it is not prevented from adjudicating on events that occurred decades ago. The Tribunal holds that its jurisdiction is open-ended and not confined to any time period.
2. The *Amicus Curiae* Team had argued that there cannot be a charge against the second Defendant because the Charter envisages jurisdiction over natural persons only and not against nation States. The *Amicus Curiae* Team however concedes that the Tribunal has jurisdiction over a "government". The Tribunal is of the view that being a tribunal of conscience, and created to adjudicate on serious crimes, it must reject such technical and esoteric distinctions as between a "state" and a "government". States operate through their governments. Furthermore, Chapter III Article 6(b) of the Charter is conclusive proof that the Tribunal is empowered to try States as well as individuals.
3. (a) The *Amicus Curiae* Team submits that international law

1 does not permit the State of Israel to be impleaded as an  
accused. This concept stipulates that a State is immune from  
jurisdiction in a foreign court unless it consents. In some  
countries, the State jealously guards this "absolute" concept  
5 of State immunity. However other States prefer a "restrictive"  
interpretation, such as the practice in the United States of  
America. (b) The jurisprudence of the ICJ as well as that of  
national courts shows that the prohibition of genocide as a  
jus cogens norm of international law has been recognised.  
10 On the other hand, there is no legal authority which shows  
that the doctrine of State immunity has acquired the status  
of *jus cogens*. (c) It is trite law that when there is a conflict  
between two principles of law, the one hierarchically higher  
in importance should prevail. The Tribunal therefore holds  
15 that the doctrine against impleading a foreign State, being  
hierarchically lower in importance than that of the prohibition  
against genocide, resulted in the charge against the second  
Defendant to be maintained to full trial. (d) The idea of absolute  
State immunity from prosecution for crimes like genocide  
20 appears inconsistent with other wholesome developments in  
international law. Absolute State immunity is an antiquated  
doctrine and given the choice of precedents, this Tribunal is  
inclined to break free of the icy grip of this past dogma. (e)  
Another reason the Tribunal rejects the doctrine of absolute  
25 State immunity from prosecution for genocide, war crimes  
and crimes against humanity is that the existing international  
law on war and peace and humanitarianism is being enforced  
in a grossly inequitable manner. Small and weak nations are  
periodically subjected to sanctions, military interventions and  
30 regime changes. But the atrocities and brutalities inflicted on  
the weak nations in Latin America, Africa and Asia by powerful  
nations in North America and their allies go unscrutinised and  
unpunished. (f) The Tribunal takes note that the perpetrators  
of the Sabra and Shatila massacre had never been punished,  
35 but instead rewarded. The Military Advocate General of the  
IDF had informed an human rights group in Israel that he had  
closed the investigation of the Israreli air strike which had  
killed 21 members of the al-Samouni family.

4. (a) In simple terms, genocide means any designated acts  
40 committed with intent to destroy in whole or in part of a  
nation, ethnical, racial or religious group as such. The definition

of genocide is found in Part I Article 10 of the Charter, and  
is taken verbatim from Articles 2 and 3 of the Genocide  
Convention. (b) The Tribunal has heard 11 witnesses and  
examined documentary evidence that clearly indicated a  
catalogue of incredible crimes conceived as long ago as 1945  
and continuing until the present day. These are not isolated  
acts in the heat of the moment but repeated pattern of atrocities  
committed against the inhabitants of Palestine. Many of these  
atrocities were, now and then, condemned by the UN Security  
Council, the UN General Assembly and other international  
organisations. (c) The *Amicus Curiae* Team has submitted an  
ingenious argument that there is no genocide in Palestine  
because the population of Palestine is continuing to grow.  
Unless there is significant decrease in population, there can  
be no genocide. The Tribunal finds this submission insensitive  
and inhuman. In determining whether genocide has been  
committed, one cannot play a game of numbers. Even if one  
person is killed on account of his race, ethnicity or religion with  
intention to kill others for the same reason, that is genocide.  
5. What is also significant is that these acts have been  
systematically directed against the same group and by the  
same offenders over the last 67 years. The scale of atrocities  
committed and their general nature indicate a clear genocidal  
intention. The Tribunal accepts the evidence of expert witnesses  
for the Prosecution that the ethnic cleansing of Palestine is a  
world historic tragedy that is the result of deliberate State  
policies of succeeding governments of Israel since 1948.

The Tribunal unanimously finds, beyond reasonable doubt, the first  
Defendant guilty of the crimes against humanity and genocide, and  
the second Defendant guilty of genocide.

#### Cases referred to by the Tribunal

*Armed Activities on the Territory of the Congo (New Application : 2002)  
(Democratic Republic of the Congo v. Rwanda), Jurisdiction and  
Admissibility, Judgment, I.C.J. Reports 2006, p. 6.*

*Application of the Convention on the Prevention and Punishment of the  
Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),  
Judgment, I.C.J. Reports 2007, p. 43.*

- 1    *KL War Crimes Commission v George W Bush and Anthony L Blair*  
      *KLWCT Reports 2011 p 1.*  
      *Krstic ICTY 19 April 2004.*  
      *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, 12*  
5    *June 2002.*  
      *Blockburger v United States 284 US 299, 304 (1931).*  
      *Bagosora and Nsengiyumya ICTR.*  
      *The Schooner Exchange v McFaddon 11 US 116, 136 (1812).*  
      *Mighell v Sultan of Johor (1894) 1Q 149.*  
10   *The Porto Alexandra Case (1920).*  
      *Duff Development Co v Kelantan Government [1924] AC 797.*  
      *The Cristina Case (1938) AC 485.*  
      *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor [1990]*  
      *1 MLJ 475.*  
15   *The Philippine Admiral [1976] 2 WLR 214.*  
      *Trendtex Trading Corporation Ltd v Central Bank of Nigeria.*

**Legislation, Conventions, referred to by the Tribunal**

- 20   *Hague Regulations on Land Warfare 1907*  
      *Fourth Geneva Convention 1949*  
      *Genocide Convention 1948*  
      *Nuremberg Charter 1945*

25

**Documents referred to by the Tribunal**

- 30   *Kahan Commission Report 1983*  
      *Sean MacBride Report 1983*

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40

Tan Sri Dato' Haji Lamin bin Haji Mohd Yunus, President of the Kuala Lumpur War Crimes Tribunal (*delivering the judgment of the Tribunal*). 1

The Kuala Lumpur War Crimes Tribunal (Tribunal) reconvened<sup>1</sup> on 20 November 2013 to hear two charges against Amos Yaron (first Defendant) and the State of Israel (second Defendant). The first Defendant was charged with war crimes, crimes against humanity and genocide, whilst the second Defendant was charged with the crime of genocide and war crimes. 5  
10

The charge against the first Defendant is as follows –

*"The Defendant Amos Yaron perpetrated War Crimes, Crimes Against Humanity, and Genocide in his capacity as the Commanding Israeli General in military control of the Sabra and Shatila refugee camps in Israeli occupied Lebanon in September of 1982 when he knowingly facilitated and permitted the large-scale Massacre of the Residents of those two camps in violation of the Hague Regulations on Land Warfare of 1907; the Fourth Geneva Convention of 1949; the 1948 Genocide Convention; the Nuremberg Charter (1945), the Nuremberg Judgment (1946), and the Nuremberg Principles (1950); customary international law, jus cogens, the Laws of War, and International Humanitarian Law"* 15  
20

The charge against the second Defendant is as follows – 25

*"From 1948 and continuing to date the State of Israel (hereafter 'the second Defendant') carried out against the Palestinian people a series of acts namely killing, causing serious bodily harm and deliberately inflicting conditions of life calculated to bring about physical destruction."* 30

*The conduct of the second Defendant was carried out with the intention of destroying in whole or in part the Palestinian people.*

*These acts were carried out as part of a manifest pattern of similar conduct against the Palestinian people.* 35

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<sup>1</sup> See Appendix "A" for Ruling on the adjourned Hearing dated 22nd August 2013. 40

- 1    *These acts were carried out by the second Defendant through the instrumentality of its representatives and agents including those listed in Appendices 1 and 2.*
- 5    *Such conduct constitutes the Crime of Genocide under international law including the Convention on the Prevention and Punishment of the Crime of Genocide 1948 ('the Genocide Convention') in particular Article II and punishable under Article III the Crime of the said Convention. It also constitutes the crime of genocide as stipulated in Article 10 of the Charter.*
- 10    *Such conduct by the second Defendant as an occupying power also violates customary international law as embodied in the Hague Convention of 1907 Respecting the Laws and Customs of War on Land, and the Fourth Geneva Convention of 1949.*
- 15    *Such conduct also constitutes War Crimes and Crimes against Humanity under international law."*
- 20    The charges (together with the particulars of the charges) had been duly served on the Defendants, and were read in open court by the Registrar as these proceedings commenced.

Neither Defendant was present in these proceedings, but both were represented by the *Amicus Curiae Team*.

- 25
1. *Preliminary objections and applications by the Amicus Curiae Team*
- 30    The *Amicus Curiae Team* filed two preliminary objections to these proceedings – the first contending that there are defects in the Charges preferred against the first Defendant, and the second contending that the State of Israel cannot be impleaded in these proceedings on the grounds of State Immunity.
- 35    In respect of its first preliminary objection the *Amicus Curiae Team* contends that the trend in modern international criminal tribunals is either to have jurisdiction for acts that have been committed after these tribunals have been constituted such as the International Criminal Court (ICC), or alternatively its jurisdiction is for a limited duration of time such as the International Criminal Tribunal for

Rwanda (ICTR) or the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The *Amicus Curiae* Team submits that this Tribunal came into existence on 6 June 2008, whilst the various acts allegedly committed by the first Defendant in charge no. 3 occurred in the month of September 1982, while the acts allegedly committed by the second Defendant in charge no. 4 occurred since 1948 and continue up to the present day.

In respect of its second preliminary objection the *Amicus Curiae* Team submits that there is no authority conferred by the Charter to hear any action against the government of a country, for example, the government of Israel. The *Amicus Curiae* Team also argued that international law does not allow the "State of Israel" to be impleaded as an accused. The State of Israel is a nation State, recognised by the United Nations, and as a nation State, it has rights under international law.

The *Amicus Curiae* Team further submits that the State of Israel has not entered appearance in these proceedings and has therefore not submitted to the jurisdiction of this Tribunal. The *Amicus Curiae* Team submits that the State of Israel enjoys immunity for the crimes of genocide and war crimes and therefore Charge 4 should be dismissed.

On behalf of the Prosecution Team, it was argued that with regard to the first preliminary objection, the jurisdiction issue must be established by reference to the Charter that sets up the Tribunal. The Charter states that the jurisdiction of the Tribunal shall be governed by the provisions of this Charter: **Part 1, Article 1**. There is no temporal limit. In particular, Article 7 sets no time limit. In this sense the Charter is identical to the 'open ended' temporal jurisdiction of the Military Tribunal at Nuremberg or the International Military Tribunal for the Far East.

The Prosecution Team also submitted that the Tribunal had convicted Bush and Blair of war crimes committed in 2003 – which also predates its setting up: *KL War Crimes Commission v George W. Bush and Anthony L. Blair, KLWCT Reports 2011*, p. 1. The verdict by the KLWCT against

1 Bush, Cheney, and Rumsfeld *et al* went back to torture committed  
from 2001.

5 With regard to the second preliminary objection, the Prosecution  
Team submits, *inter alia*, that these two Charges are international  
criminal war crimes being adjudicated by an international tribunal.  
States have no immunity for such crimes before such tribunals.

10 Before these proceedings began, the *Amicus Curiae* Team had also  
submitted two (2) applications to quash the charge against the two  
Defendants. The grounds of applications were as follows:

15 1. The charge is defective for duplicity, and / or latent  
duplicity.

2. The charge is defective for uncertainty.

3. The charge is an abuse of process and / or oppressive.

20 On behalf of the two Defendants, the *Amicus Curiae* Team sought for  
the Tribunal to make the following orders:

25 1. That the charge against the two Defendants be quashed.

2. That the Prosecution against the two Defendants be  
permanently stayed.

3. In the alternative, that the Charges be redrafted according  
to the principles of criminal law.

30 The *Amicus Curiae* Team contends that there were multiple offences  
within one charge and multiple forms of alleged instances of criminal  
conduct within one charge. The *Amicus Curiae* Team submits that  
the Rules against Duplicity must be strictly adhered to in a criminal  
35 proceeding.

40 In rebuttal, the Prosecution Team submits that this Tribunal is  
governed by its own Rules and these Rules are silent on the  
application of the Rule against Duplicity in drafting charges. This rule  
against duplicity, as it exists in national legal systems, does not, and  
cannot, apply in the same way in proceedings before international

criminal courts. More importantly, the Tribunal should take into account the heinous nature of these crimes and the scale they were alleged to be perpetrated.

On the *Amicus Curiae* Team's submission that the charge is defective due to uncertainty, the Prosecution Team submits that it is premature for anyone to say so without appreciating the particulars contained in the charge. The particulars in the charge are facts that the Prosecution seeks to prove in the course of the proceedings.

Having considered the Preliminary Objections raised by the *Amicus Curiae* Team and the Two Applications filed by the *Amicus Curiae* Team and the submissions by both the *Amicus Curiae* Team and the Prosecution Team in the several documents already filed with this Tribunal, and having considered further oral submissions by both parties, the Tribunal unanimously ruled that the Preliminary Objections and Two Applications have little merit and were accordingly dismissed.

A written ruling of the Tribunal was read out by Judge Tunku Sofiah Jewa on 20 November 2013.<sup>2</sup>

## 2. Prosecution's Case

The Prosecution's case against the first Defendant is that the first Defendant had committed War Crimes, Crimes Against Humanity and Genocide in his capacity as the Commanding Israeli General in military control of the Sabra and Shatila refugee camps in Israeli-occupied Lebanon in September of 1982 when he knowingly facilitated and permitted the large-scale Massacre of the Residents of those two camps. These crimes were in violation of, *inter alia*, the Fourth Geneva Convention of 1949, the 1948 Genocide Convention, *jus cogens*, International Humanitarian Law; and Articles 9, 10, and 11 of the Charter.

The Prosecution's case against the second Defendant is that from 1948 and continuing to date the State of Israel had systematically carried

<sup>2</sup> See Appendix "B" for Ruling on Preliminary Objections raised by the *Amicus Curiae* Team.

1 out against the Palestinian people a series of acts namely killing, causing serious bodily harm and deliberately inflicting conditions of life calculated to bring about physical destruction – with the intention of destroying in whole or in part the Palestinian people.

5 These acts constitute the Crime of Genocide under international law including the 1948 Genocide Convention in particular Article II and punishable under Article III of the said Convention. It also constitutes the crime of genocide as stipulated in Article 10 of the Charter.

10 In his opening statement, the Chief Prosecutor Prof Gurdial Singh said that the Prosecution will adduce evidence to prove the counts in the indictment through oral and written testimonies of victims, witnesses, historical records, narrative in books and authoritative commentaries, resolutions of the United Nations and reports of international bodies.

### 3. *Testimony of Witnesses*

20 The Prosecution Team called 11 witnesses to testify on its behalf.

The Prosecution's first witness (PW1) was Chahira Abouardini, a 54 year old resident of Camp Shatila, Beirut, Lebanon.

25 She testified that when the Israelis invaded Lebanon in May 1982, they attacked the area near Camp Shatila, which was then the base of the Palestinian resistance. She also testified that her father and sister were shot and killed by the Lebanese Phalangist militia.

30 She also said that there were a lot of dead bodies everywhere, strewn all over – bodies of men, women, children and even animals. Armed militiamen had started the killing from the houses near the sports complex where the Israeli forces were based. They entered homes and killed people. Anyone who moved was killed.

PW1 also testified that at one location on the way to the stadium, she saw her cousin's daughter's body. The killers had opened her body and taken out her baby and then placed the baby on her dead body.

40 PW1 testified that the victim was actually deaf and dumb and was living in a home for the disabled.

PW1 testified that there were bodies piled up everywhere because the militiamen had collected the people together and then shot them all at one time. As a result it was difficult to identify the dead victims, and families had to dig between dead bodies to find their relatives.

PW1 said that in the 36 hours of the attack, some 3,500 people from Shatila and Sabra had been massacred. She said that the Phalangist militia who committed these atrocities worked together with the Israelis. They were puppets of the Israeli forces.

When PW1 was offered by the Prosecution to the *Amicus Curiae* Team for cross-examination, the *Amicus Curiae* Team declined to cross-examine the witness.

The second Prosecution witness (PW2) called by the Prosecution Team was Bayan Nuwayhed al-Hout. She gave her testimony as an expert witness through Skype. She was not physically present before the Tribunal.

The Prosecution tendered (as an exhibit) excerpt of a book titled "SABRA AND SHATILA – SEPTEMBER 1982" written by PW2 where she said "*For 40 continuous hours between sunset on Thursday 16 September and midday on Saturday 18 September 1982, the massacre of Sabra and Shatila took place, one of the most barbaric of the twentieth century*".

When asked by the Prosecutor to give her comments on the published figure of 3,500 being the number of people killed, PW2 said that according to her research she estimated the figure to be around 1,350. She said that she had approached various international organisations to collect the list of victims, but she never received them.

When PW2 was offered to the *Amicus Curiae* Team for cross-examination, the latter also said that they have no desire to cross-examine the witness.

The Prosecution's third witness (PW3) was Mahmoud A.H. al Sammouni, a 15 year old resident of Sammouna Street, Gaza Zaitun, Gaza City. He gave his testimony through Skype.

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- 1 PW3 testified that the Israeli forces attacked his place on January 3, 2009 with bombs and missiles. He said that he saw parachutists coming down and landing on the highest buildings.
  - 5 He testified that more than 50 soldiers came to his house, all with weapons. They shot at the inner walls of the house and all over his home. They demanded the owner of the house to come out and when PW3's father came out, the soldiers shot him, killing him on the spot. The soldiers continued shooting into the house for 15
  - 10 minutes, injuring his brother Ahmad and 5 other members of his family, including his sister Amal – who sustained serious injuries, including a shrapnel in her head. His brother Ahmad subsequently died.
  - 15 PW3 was not cross-examined by the *Amicus Curiae* Team.

The Prosecution's fourth witness (PW4) was Salah Al Sammouni, a 34 year old resident of al-Zaytoun neighbourhood in Gaza City. He gave his testimony through Skype.

- 20 He said that on January 3, 2009, he received information from his father's cousin that Israeli military tanks had entered Gaza City and surrounded the al-Zaytoun neighbourhood and the surrounding areas.
- 25 He further testified that 21 members of his family were killed by the Israelis on January 5, 2009. He tendered as an exhibit a list of the names of these dead family members.
- 30 When this witness was offered to the *Amicus Curiae* Team for cross-examination, the *Amicus Curiae* Team declined to cross-examine him.

- 35 The Prosecution's fifth witness (PW5) was Paola Manduca, currently residing in Genova, Italy. She gave her testimony as an expert witness through Skype.

- 40 She told the Tribunal that she had conducted and co-ordinated in 2011 two research projects relating to the impact of weapons on reproductive health arising from the Israeli attacks on Gaza. The outcome of her research reveals the degradation of the reproductive health and increase in major structural birth defects.

She also testified that 66% of Gaza parents with a birth defect child had been exposed to bombing or white phosphorus shelling during Operation Cast Lead in 2008/2009.

Her research led her to the conclusion that there is a long term effect on reproductive health associated with metal contamination by exposure to weaponry during the war and by war remnants.

When PW5 was offered to the *Amicus Curiae* Team for cross-examination, the *Amicus Curiae* Team declined to cross-examine her.

The Prosecution's sixth witness (PW6) was Dr Ang Swee Chai, a consultant orthopaedic and trauma surgeon, currently residing in London, England. She was physically present during the proceedings and was orally examined by the Chief Prosecutor and subsequently cross-examined by the *Amicus Curiae* Team.

She testified that she arrived in Beirut in August 1982 as part of a British medical team, volunteering her services as an orthopaedic surgeon. She started work as an orthopaedic surgeon in Gaza Hospital on August 22. The Hospital was an 11 storey building in the Sabra and Shatila Palestinian refugee camps, officially opened on August 23, 1982.

PW6 gave a detailed account of the events that took place from 15-22 September 1982.

On 15 September, Israeli planes flew from the sea towards the direction of the camps, and then the shelling began in all directions, clearly seen from the Gaza Hospital. On 16 September, casualties poured into the hospital, whilst shootings and shelling continued outside. Shootings continued into the night.

On 17 September, the witness said that she operated on an eleven year old boy, shot with 27 members of his family. All 27 died, but the boy survived.

On 19 September PW6 said members of the hospital medical team were able to return to Sabra and Shatila camps, where they saw dead bodies everywhere, whole families obviously shot together. She said

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1 that according to the International Red Cross, the total number of  
dead people was 1,500.

5 The witness testified that from the Israeli headquarters in the Kuwait  
Embassy most of the area of the massacre in the two camps could  
be easily seen. She was told by Palestinian survivors that they could  
not escape during the massacre because the Israelis had sealed off  
the camps. When the Norwegian Ambassador came in to try to  
evacuate the Norwegian medics, he told the witness that he had to  
10 get the Israeli authorities to agree.

15 The witness also said that from recently declassified materials from  
the British National Archives, she discovered that the death toll in  
the two camps was 3,500 people. When the Israelis surrounded and  
invaded the Akka Hospital on 15 September, they killed patients,  
nurses and doctors.

PW6 was cross-examined by the *Amicus Curiae* Team, but her  
testimony remained intact and unshaken.

20 The Prosecution's seventh witness (PW7) was Nabil Alissawi, a  
resident of Karkfa Street, Bethlehem.

25 The witness said that whilst he was a student of Ahliya University  
in 2008, he took part in a peaceful street demonstration near the  
Azah Refugee Camp and Paradise Hotel. At about 12.30pm whilst  
the demonstrators were thus engaged, he was shot by a sniper. He  
passed out and was taken to a hospital.

30 He later discovered that a dum dum bullet had pierced his stomach  
and then broke into 3 pieces, going into 3 different directions – 2  
exiting his body but the third remained stuck in his bladder. He was  
hospitalised for 2½ months where he underwent 3 operations. He  
35 subsequently received treatment for another 2½ months where he  
underwent more surgical operations to repair his intestines.

40 As a result of his injuries, his life had been totally altered. He  
carried an abdominal scar, he cannot sit upright, nor can he swim  
competitively. He is prohibited from entering Israel, and is always  
in a state of fear and anxiety. He is a victim with no freedom in his  
own country.

The Prosecution's eighth witness (PW8) was Ilan Pappe, an Israeli historian and social activist. He gave his oral testimony via Skype. Author of 15 books, including "The Ethnic Cleansing of Palestine" (2006), "Gaza in Crisis" (co-authored with Noam Chomsky, 2010) he is one of Israel's New Historians who have been rewriting the history of Israel's creation in 1948 and the expulsion of 700,000 Palestinians in the same year. He has written that the expulsion was not decided on an *ad hoc* basis as other historians had argued, but constituted the ethnic cleansing of Palestine in accordance with Plan Dalet, which was drawn up in 1947 by Israel's future leaders.

The witness testified that the people behind Plan Dalet was a small group of people (about 30) comprised of generals in the Jewish military outfit, experts on Arab affairs, with the Chairman who would be the first Prime Minister of Israel. They turned this plan into a Master Plan with a blueprint for the systematic expulsion of the Palestinians from their country.

When asked by the Chief Prosecutor what happened to those Palestinians who refused to move, the witness said that in certain places, elder villagers were executed to intimidate the rest. And in some places, all male members were massacred. Palestine had some 800 villages. 530 villagers had their residents expelled.

The witness also testified that the villages that were occupied were wiped out physically and on the ruins they built settlements or recreational places. In the cities, the Palestinian neighbourhoods were repopulated by Jewish immigrants from Europe or from other countries.

Asked about Gaza, the witness said that Gaza is a huge prison, incarcerating 2 million people.

Cross-examined by the *Amicus Curiae* Team whether he would agree that the body of his work and his views "could be to assuage the guilt of being alive because of Zionism", the witness replied that he does not feel that way. He said that because his parents were victims of genocidal policies of the Nazi, he does not want be part of the new genocide.

Responding to another question from the *Amicus Curiae* Team, the witness said that the Jews who escaped from Germany and Europe

1 in the 1930s were indeed refugees looking for safe haven, but the  
Jews who came in 1982 and in subsequent years came as colonisers.

5 The Prosecution's ninth witness (PW9) was Taghreeb Khalil Nimat,  
a resident of Nablus, West Bank. She lives with her parents and 9  
siblings.

10 The witness testified that in 1979 or early 1980, her father was arrested  
by the Israeli forces and detained in prison for 18 days for singing a  
song about Palestinian freedom. A year later, he was again arrested  
and detained in prison for 21 days for the same offence.

15 In 1987 the witness applied for employment at the government  
office but her application was rejected. It was commonly understood  
that if any family member has a history of being detained by the  
Israeli government, it would be difficult to seek employment at the  
government office.

20 The witness testified that on 15 April 2004, whilst travelling from  
Nablus to Bethlehem (a distance of 80 km) she was stopped by an  
Israeli military car and then detained for 29 hours without food or  
water. During detention, the witness was put under interrogation and  
insulted verbally. Following the incident, the witness was stigmatised  
by her community, including her friends and colleagues.

25 The Prosecution's tenth witness (PW10) was Dr. Walid Elkhatib, a  
resident of Beit Jalla City, Bethlehem District, West Bank. He is a  
qualified medical doctor, specialising in public health.

30 The witness testified that as a general practitioner, he worked at  
an emergency clinic during the first *intifada*, where he saw many  
patients with different kinds of injuries as a result of Israeli violence  
– gun shot wounds, exposed to tear gas and physically abused by  
35 Israeli soldiers. Over the last 17 years he had been in charge of child  
health and protection, social health and Palestinian child law and  
rights.

40 He also testified that the invasion of Palestinian cities by Israeli  
forces (including the shelling and bombing, usage of tear gas, the  
building of walls to separate Jerusalem and the West Bank, check  
points which restrict the movement of the Palestinian people) have  
affected Palestinian health and education, especially that of children.

The witness said that the first *intifada* (1987-1993) was not military in nature. It involved demonstrations against the Israeli occupation. There were then no roadblocks, no wall, no shelling and no airplane bombings.

The second *intifada* (2000-2009) began when Ariel Sharon went to the Al-Aqsa Mosque. The Palestinians protested against this visit. On that day, Israeli soldiers killed 20 people outside a mosque.

During the second *intifada*, the witness said that 77.8% of Palestinian families suffered mental problems. From 2001-2011, there were 2,282 cases of disability – mostly due to injuries sustained by those involved in the *intifada*, caused by live ammunition, shrapnel, rubber bullets and explosions. Disabilities means that many of these people have less opportunities for work and they end up in poverty.

The witness testified that poverty is rife in the West Bank and Gaza, increasing from an average of 20% (prior to *intifada*) to 51% (during the *intifada*). Anemia became prevalent amongst the children (42%) as a result of imbalanced diet and amongst pregnant women (21%).

On the subject of checkpoints, the witness testified that there were about 730 checkpoints between cities, towns and villages in the West Bank. There had been many cases of pregnant women (forced to stop and wait at these places) delivering their babies at these checkpoints. There had also been many emergency cases who had been stopped at these checkpoints and prevented from going through to hospitals. In such cases, people had died at these checkpoints.

The witness also testified that before the second *intifada*, he believed that Israel was looking for peace with Palestinians. After the second *intifada*, he no longer had that belief.

The Prosecution's eleventh witness (PW11) was Jawad Musleh, a resident of Beit Sahour, Bethlehem District. He is a programme co-ordinator in a travel agency.

The witness, a Christian, testified that he was arrested in August 1985 by the Israeli authorities and released 20 months later, in March 1987. He was first detained at a prison in West Jerusalem, and later

1 transferred to another prison in Haifa and finally to another prison in the West Bank. He was then only 15 years old, a student of a Catholic School at Beit Sahour.

5 The witness testified that he was tortured in the first prison in West Jerusalem, during interrogation. The Israelis used mental and psychological torture to make him confess to crimes he did not commit – that he was a member of the Palestine Front for the Liberation of Palestine (PFLP). He refused to confess but he  
10 continued to be beaten, and if not beaten, put in confinement with his hands tied behind his back and a hood over his head.

He finally confessed, after which he was detained for 20 months. He continued to be tortured when he was incarcerated. He said that  
15 there are now more than 5,000 prisoners in Israeli prisons.

The witness also testified that more Israeli colonies are being built on lands in the West Bank and Jerusalem. There are now 700,000 Jewish settlers living in the West Bank and Jerusalem.

20 The West Bank is now divided into 3 Areas – A, B and C. Area A are lands under the Palestinian authority and cover main cities and towns like Bethlehem, Hebron, Nablus, Ramallah, Jenin and others. Area B are small villages surrounding the main cities, where Israel is  
25 in control of security whilst civil services like health and education are the responsibility of the Palestinian authority. Area C, which is the rest of the West Bank, is under the complete control of the Israeli authorities. Checkpoints and roadblocks are set up throughout Areas A, B and C. These checkpoints are often closed arbitrarily and  
30 without prior notice, for long hours.

The witness further testified that Area C is the richest source of water supply. Water supply is therefore under the complete control of the Israeli authorities. Water is supplied to the Israeli settlers at  
35 a cheaper price, and 5 times more in volume, compared to water supplied to the Palestinians – which is often inadequate for their daily use, causing great hardship and suffering.

**4. Prosecution's closing submission**

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In his closing submission, the Chief Prosecutor said that he had called 11 witnesses (some of whom had testified through Skype), tendered 15 exhibits and furnished several documents and reports to the Tribunal during the course of the proceedings.

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He urged the Tribunal to bear in mind that this is a Tribunal of Conscience and the case before it is an extraordinary case, which Winston Churchill used to call as a "crime without a name".

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He said that the Prosecution had provided evidence of facts which, examined as a whole, will show that the perpetrators had committed acts against the Palestinians, with intent to kill, cause serious bodily or mental harms and deliberately inflict conditions of life calculated to bring about the physical destruction of the Palestinians as a whole or in part.

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From the testimony of Prof Pappe (PW8) the Prosecution had shown that before 1948, before UN Resolution 47, there was already a plan in place to take over the Palestinian territory, and this plan would be activated the moment the British relinquished its mandate over the territory.

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At that point in time, the Palestinians were on 94% of the land, with the Jewish population settling over a mere 6% of the land. Under the UN partition plan, more than 50% of the land was to be given to the Jews.

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Plan Dalet might not legally be genocidal in form at its inception, but as it took shape the ethnic cleansing metamorphised into killing, massacre and creating impossible conditions of life for the Palestinians – either they leave or they die. The Prosecution submits this is genocide within the meaning of Article 2 of the Genocide Convention.

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On Sabra and Shatila, prosecution witnesses (PW1 and PW6) had testified that the Palestinian refugees in those camps had been killed by the Phalangists, aided and abetted by the Israelis who were in complete control of the two camps.

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1 According to the Kahan Report, all of Beirut was under Israeli control, and there was clear symbiotic relationship between Israel and the Christian forces (the Lebanese Maronite Christian militia or the Phalangists or Keta'ib).

5 On Operation Cast Lead in 2008, the Chief Prosecutor said that the IDF had used all kinds of weapons, including white phosphorus – which is an incendiary weapon. The use of incendiary weapons is prohibited under Protocol III on the Prohibitions or Restrictions on  
10 the Use of Incendiary Weapons.

As a result of the Israeli occupation of Gaza, nowhere in Gaza is safe for civilians. 1.5 million Palestinians are now trapped in despair, their fragile economy ruined. Under the Dahiya Doctrine (October  
15 2008), the complete destruction of Gaza is the ultimate objective, the whole place must be flattened.

The Prosecution submits that the cumulative effect of the actions taken by the Israeli government, as shown by the Prosecution  
20 witnesses and the several documents tendered to the Tribunal, have shown beyond reasonable doubt that Israel is guilty of the crime of genocide under the Genocide Convention and the Charter.

Co-Prosecutor Tan Sri Abdul Aziz, submitting on the first charge  
25 against Amos Yaron, said that Amos Yaron was the commanding officer in charge of the IDF, in charge of the area of Beirut, and camps Sabra and Shatila. He said that there were two issues which he had to deal with – first, whether or not there was a large scale massacre of the residents of the two camps, and second, whether or  
30 not Amos Yaron facilitated and permitted such massacre, in violation of international law and Articles 9, 10 and 11 of the Charter?

On the first issue, he submitted there was a large scale massacre, as testified by PW1. She was there, and she saw the massacre with her  
35 own eyes. There was corroborating testimony by PW6, and further acknowledged in the Kahan Report.

On the second issue, Amos Yaron was in charge, to ensure that there would be peace, law and order. The Kahan Report itself concluded  
40 that anybody who knew about Lebanon would know that by releasing the Phalangists into Beirut, there would be massacre.

Surely, Amos Yaron, the General in charge, must have known that by allowing the Phalangists to go into the two camps, the massacre would take place. But he decided to do nothing.

He received the reports of the killing of women and children, but he did not check the report. He did not pass the report to his superiors. The Co-Prosecutor submits that by ignoring all these despite knowing the circumstances, he himself had the intention of causing the deaths of the people in the two camps.

#### *5. Whether the Prosecution has established a *prima facie* case*

After the Prosecution Team had submitted its closing submission, the *Amicus Curiae* Team submitted there is no case to answer – as provided in Article 28 of Chapter VII (Mode of Proceedings) of Part 2 of the Charter.

The Tribunal then had a short recess to enable the Judges to deliberate and consider the totality of the evidence adduced by the Prosecution.

When the Tribunal reconvened a short while later, the President of the Tribunal ruled that the Tribunal had unanimously agreed that a *prima facie* case had been established in both charges and the *Amicus Curiae* Team is therefore invited to present the Defence case.

#### *6. The Defence case*

Mr. Jason Kay Kit Leon of the *Amicus Curiae* Team submitted that in the charges against the two Defendants, the Prosecution had listed war crimes, crimes against humanity and crimes against peace. Apparently the Prosecution had abandoned these charges, concentrating only on genocide.

He said that the offence of genocide is defined in Article 2 of the Genocide Convention 1948, whilst the Oxford English Dictionary defines it simply as “the deliberate killing of a large group of people, especially those of a particular nation or ethnic group”.

1 He submitted that the charge of genocide is unique; it means that you don't like a group, you kill them; you kill them in a grand manner. Genocide means that at the end of the act, you have a lesser number of victims than before the genocide started.

5 He further submitted that when one talks of "massive killing", it is many hundreds of thousands to millions of people. To suggest that an isolated event, the unfortunate murder of 3,000 people (Sabra and Shatila) is the same as massive killing is almost disrespectful of the true horror of massive killing (as in Rwanda, where 800,000 people were killed in 100 days).

10 With regard to the Kahan Report, the *Amicus Curiae* Team said that it also identified other people as being responsible, with two other names other than Yaron still alive. The question is why only Yaron was charged? Why was Defence Minister Ariel Sharon spared.

15 He also submitted that the PLO had repeatedly violated the July 1981 cease-fire agreement. By June 1982, when the IDF went into Lebanon, the PLO had made life in northern Israel intolerable through its repeated shelling of Israeli towns.

20 On Operation Cast Lead, the *Amicus Curiae* Team submitted that the IDF had come out with two reports. The point is if you are going to kill people nilly willy, you do not report it.

25 On the issue of the wall, the *Amicus Curiae* Team submitted that the primary consideration is one of security of the Israeli settlers. The State of Israel has a duty to defend their lives, safety and well-being.

30 On the issue of checkpoints, the *Amicus Curiae* Team said countries have a right to immigration laws.

35 With regard to Plan Dalet, the *Amicus Curiae* Team said that it is subject to divergent opinions, with historians on one side asserting that it was entirely defensive, while other historians assert that the Plan aimed at an ethnic cleansing.

**7. Finding by the Tribunal of the Charge against Amos Yaron**

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***Sabra and Shatila Massacres***

Under Charge 3, the Defendant Amos Yaron is charged with War Crimes, Crimes against Humanity, and Genocide. As the Commanding Israeli General in military control of the Sabra and Shatila refugee camps in Israeli occupied Lebanon in September of 1982, he knowingly facilitated and permitted the large-scale Massacre of the residents of those two camps in violation of the Hague Regulations on Land Warfare of 1907; the Fourth Geneva Convention of 1949; the 1948 Genocide Convention; the Nuremberg Charter (1945), the Nuremberg Judgment (1946), and the Nuremberg Principles (1950); customary international law, *jus cogens*, the Laws of War, and International Humanitarian Law; and their related provisions set forth in Articles 9, 10, and 11 of the Charter.

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Israel invaded Lebanon beginning June 6, 1982. The Israeli siege and bombardment of West Beirut continued throughout the summer of 1982. In spite of the devastation caused to Lebanon and the civilian population, Israel did not succeed in its goal of defeating or dislodging the Syrian and P.L.O. forces.

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An agreement was brokered on August 19, 1982 between Lebanon, the United States, France, Italy, Israel, and the P.L.O. for the evacuation of the P.L.O. and Syrian forces under the auspices and protection of a multi national force. The agreement further provided that the IDF would not attempt to enter or occupy West Beirut following the evacuation of the P.L.O. and Syrian forces.

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Pursuant to that agreement, the multinational American, French, and Italian forces oversaw the evacuation of the P.L.O. and Syrian forces until completed on September 1, 1982. The multinational forces left Lebanon from September 10-12, 1982, after the completion of the evacuation.

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On September 14, 1982, Lebanese President Bashir Gemayel, a Phalangist, was assassinated in Beirut.

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- 1 Israeli Prime Minister Begin, Prime Minister of Defense Sharon, and Chief of Staff Eitan decided that the IDF would immediately enter and occupy West Beirut.
- 5 Pursuant to the decision, on September 15, 1982, the IDF entered West Beirut under the command of Defendant Brigadier General Amos Yaron, the Defendant in this case. The IDF established a forward command post on the roof of a seven-story building southwest of the Shatila camp, and Defendant Brigadier General Yaron commanded 10 the IDF from that post. The area surrounding the two camps, Sabra and Shatila, was thereafter under the command and control of the IDF, and all forces in the area, including the Phalangists, were considered to be operating under the authority of the IDF and acting according to its instructions.
- 15 The Tribunal heard detailed testimony about the events occurring between September 16 and September 18, 1982. A horrible systematic massacre of defenceless Palestinian refugees occurred with the deaths of up to 3,500, largely women and young children in the two camps.
- 20 Brigadier General Amos Yaron was commander of the operation in Beirut. He was asked by Major General Drori to coordinate the entry of Phalangist force at the forward command post.<sup>3</sup>
- 25 After these massacres, the Israeli government was under immense pressure to set up a commission of enquiry under the chairmanship of Yitzuk Kahan ('the *Kahan Commission*'), to enquire into the massacre. This Commission held 60 sessions hearing 58 witnesses.<sup>4</sup>
- 30 The Kahan Commission made the following observations:
- (a) Defence Minister, Ariel Sharon and Chief of Staff, Eitan declared on Sept 16 1982 before the massacres began that all of Beirut was under Israeli control and the camps were closed and surrounded.<sup>5</sup>

<sup>3</sup> The Kahan Report, Ariel Sharon and the Sabra and Shatila Massacres in Lebanon: Responsibility Under International Criminal Law for Massacres of Civilian Populations, Linda A Malone, Utah Law Review, 373, herein after Malone.

<sup>4</sup> Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut, hereinafter the Kahan Report. February 8, 1983, p.2.

<sup>5</sup> Kahan Report. p. 16, Malone p. 402.

- (b) There was a clear symbiotic relationship between Israel and the Christian forces (the Lebanese Maronite Christian militia) known as the Phalangists or Keta'ib assisted by the Israeli Mossad. Even the uniforms of the South Lebanese Army (SLA) and the Phalangists were the same as those of the IDF – and provided by Israel.<sup>6</sup> 1
- (c) The Israelis exercised some degree of control of the SLA.<sup>7</sup>
- (d) The Phalangists' plan to use force to remove Palestinians was discussed at several meetings with Israel.<sup>8</sup> 10
- (e) Three key officials of the Israel Cabinet decided that the IDF under the command of Brigadier General Amos Yaron would enter West Beirut: the PM Begin, Defence Minister Sharon and Chief of Staff Eitan. The IDF would not enter the camps but rather would delegate the entry into the camps to the Phalangists. Eitan said that he and Sharon agreed on the entry of the Phalangists into the Sabra and Shatila camps: the operational order provided: "...Searching and mopping up of the camps will be done by the Phalangists-Lebanese army".<sup>9</sup> Also a summary of the Defence Minister's instructions: "Only one element, and that is the IDF, shall command the forces in the area. For the operation in the camps the Phalangists should be sent in".<sup>10</sup> 15 20 25
- (f) The use of terms such as:

"purifying and purging" (*NY Times*, Sept 20 1982 at A6, col 5; *Washington Post* Sept 21 at A14, col 6); 30

"mopping up" (*NY Times*, Sept 23, 1982 at A8, col 4); and

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<sup>6</sup> Malone p. 381, Kahan Report p. 7.

<sup>7</sup> Malone p. 372, Kahan Report p. 7.

<sup>8</sup> Malone p. 382-383, Kahan Report p. 8.

<sup>9</sup> Malone p. 383, Kahan Report p. 12.

<sup>10</sup> Malone p. 386.

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1 "cleaning up" (*NY Times*, Sept 23 1982 at A8, col 6;  
Sept 26 1982, A11, col 2) the camps

5 shows the actual intent of the Israeli officials and its  
commanders.<sup>11</sup>

- 10 (g) The camps were surrounded and under the complete control of the Israelis, preceding the killings.<sup>12</sup>
- (h) The Chief of Staff Eitan, after acknowledging that the Phalangists 'had gone too far' gave the thumbs up to continue the "mopping up".

15 An International Commission was set up to enquire into the reported violations of international law by Israel during its invasion of Lebanon.

20 It produced a Report in 1983: Israel in Lebanon: *Report of the International Commission to Enquire into Reported Violations of International Law by Israel during its Invasion of Lebanon* 196 (1983):<sup>13</sup>

- 25 (a) The Commission was chaired by Sean MacBride, former Irish Foreign Minister, and former United Nations Commissioner for Namibia and Nobel Peace Prize winner in 1974.
- (b) Four of the Commission's six members concluded that Israel embarked on "deliberate destruction of the national and cultural rights and identity of the Palestinian people amounting to genocide".
- 30 (c) It concluded that:

35 The massacres that took place at Sabra and Shatila in September 1982 can be described as genocidal massacres,

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<sup>11</sup> Malone p. 432.

<sup>12</sup> Malone pp. 387-388.

40 <sup>13</sup> The Sabra and Shatila Massacres : Eye-Witness Reports, Leila Shahid, Journal of Palestinian studies. Vol 32 No. 1. p. 36 at p. 43.

and the term "complicity in genocide" is wide enough to establish the responsibility of Israel for these acts."<sup>1</sup>

- (d) The Report placed the massacre in context:

"[Sabra and Shatila] massacres were low-technology sequels to earlier high-technology saturation bombardment by Israel from land, sea and air of every major Palestinian camp situated anywhere near the combat zone throughout southern Lebanon. The underlying Israeli objective seems clearly directed at making the Palestinian camps uninhabitable in a physical sense as well as terrorizing the inhabitants and thereby breaking the will of the Palestinian national movement, not only in the war zone of the Lebanon, but possibly even more centrally, in the occupied West Bank and Gaza": p. 121,<sup>14</sup>

- (e) That this represents a comprehensive policy to destroy an entire ethnic group is again illustrated by Amnon Kapeliouk, *Sabra and Shatila* (p. 45-6):

"Since the beginning of the war in June 1982, the Israelis have repeatedly used bulldozers to destroy homes and force the residents to flee. The refugee camps of South Lebanon were bombarded and then destroyed with explosives and bulldozers. In Israel, this operation was known as "the destruction of the terrorist infrastructure." The objective was to prevent the Palestinians from forming a national community in Lebanon. Therefore, it was necessary to destroy not only homes, but also Palestinian institutions such as schools, hospitals, and social service centres. In addition, the Israelis sought to deprive the Palestinian population of all males by arresting thousands of men and forcing thousands more to flee."<sup>15</sup>

<sup>14</sup> cited in Shahid at p. 43.

<sup>15</sup> Shahid. P. 44.

## 1 The Defendant Amos Yaron

5 The Commander, Brigadier General Yaron, and the Phalangists agreed that a Phalangist Liaison Officer with communications equipment would be present at all times in the IDF command post with a Mossad Liaison Officer at the Phalangist headquarters.<sup>16</sup>

10 Yaron knew about Phalangist combat ethics. He was pleased with his decision and was quite content to have the Phalangists participate and not leave the operation up to the IDF.

15 Yaron could not explain his lack of action or intervention by the Israeli army to protect civilians when he learnt on the first night, September 16, after the intervention of the Phalangists that massacres were occurring.<sup>17</sup>

20 Even when Israeli military authorities were well aware of the exactions by the Phalangists on Friday 17 September, they did not intervene to protect the Palestinian civilians but rather allowed them to bring in tractors to do what they wanted.<sup>18</sup>

The following testimony confirms that from the command posts, the Israelis, including of course Brigadier Commander Amos Yaron, could see into the camps and observe the massacres:

- 25 (a) From the command post, it was possible to see into the camps, even into the narrow alleys. One could see the mass grave 300 meters away dug by the Phalangists and the bulldozer used to bury the hundreds of victims.<sup>19</sup>
- 30 (b) Similarly, the testimony of Dr Ang Swee Chai.
- (c) Reports of Senior Journalists.<sup>20</sup>

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<sup>16</sup> Malone p. 388.

<sup>17</sup> Kahan Commission p. 81.

<sup>18</sup> Malone p. 392.

40 <sup>19</sup> Malone page 384-385.

<sup>20</sup> Malone page 384-385.

*Washington Post*, senior foreign correspondent, Jonathan Randal: noted this as an 'obviously wrongheaded factual error';

5 Israeli journalist, Amnon Kapeliouk;

Israeli newspaper *Yedi'at Aharonot* ridicules finding;

A *New York Times* article Sept 26 1982 at A9, col 2.

10 Loren Jenkins, *Washington Post* Beirut correspondent, Sept 20 1982: Israel aided and abetted.

(d) Doctors and nurses testified they heard constant shooting and shelling from Shatila and knew later that a massacre might be taking place: *New York Times* Sept 20 1982 at A6, cols 3-4.<sup>21</sup>

(e) Leila Shahid quotes an Israeli officer saying that watching from the roofs of one of the buildings occupied by the Israelis was like watching 'from the front row of a theatre'.<sup>22</sup>

(f) Israeli soldiers prevented Palestinian refugees from fleeing and returned them to the camps. Soldiers reported to their superiors that massacres were taking place.<sup>23</sup>

The United Nations condemned the Sabra Shatila killings... Security Council Resolution S/RES/521(1982): 19 September 1982 condemned the criminal massacre. The General assembly went much further than the Security Council. In the General Assembly Resolution 37/123: on 16 December 1982, it held:

35 Section D.1: Condemned in the strongest terms the large scale massacre of Palestinian civilians in the Sabra and Shatila refugee camps (Vote: 123 -0; 23 abstentions).

<sup>21</sup> Malone pa. 385, fn 52.

<sup>22</sup> Shahid, p. 44.

<sup>23</sup> Shahid, pp. 40-41.

1       Section D.2: Resolves that the massacre was an act of genocide  
(vote: 98-19; 23 abstentions).

5       **Legal Issues**

Burden of proof

10      The burden of proof in this Tribunal is beyond all reasonable doubt.  
All elements of an infraction must be proven beyond all reasonable  
doubt.<sup>24</sup> This applies to War Crimes, Crimes against Humanity and  
the Crime of Genocide.

15      A person is guilty of genocide if he acts with an intention as described  
in the Genocide Convention at Article 2.<sup>25</sup>

In the present Convention, genocide means any of the following acts  
committed with intent to destroy, in whole or in part, a national,  
ethnical, racial or religious group, as such:

- 20           (a) Killing members of the group;  
             (b) Causing serious bodily or mental harm to members of  
                the group;  
25           (c) Deliberately inflicting on the group conditions of life  
                calculated to bring about its physical destruction in  
                whole or in part;  
             (d) Imposing measures intended to prevent births within  
                the group;  
             (e) Forcibly transferring children of the group to another  
                group.

35      This intention is known as the *mens rea* of specific intention in  
criminal law as opposed to the concept of general intention. The

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40      <sup>24</sup> Charter, Article 2, subsection (i).

<sup>25</sup> As adopted in Article 10 of the Charter.

expression *dolus specialis* has been adopted by the *ad hoc* Tribunals to describe this requirement with respect to the criminal state of mind. To convict, an accused must have the intention to destroy, in whole or in part the group described in the Convention.

Proof of genocidal intent can be done by inference in the light of all the facts and does not require a specific plan.<sup>26</sup> This intent must be proven beyond all reasonable doubt. If there is any alternative interpretation of the state of mind of the Defendant, the Prosecution will fail. The inference must be the only reasonable inference available on the evidence.<sup>27</sup>

State liability is incurred if an organ of the State or a person or group whose acts are legally attributable to the State commits any of the acts described in Article III of the Convention.<sup>28</sup>

### Evidentiary Conclusions

The findings below are only made if the Tribunal is convinced beyond all reasonable doubt of the finding.

#### **The Status of the IDF in Lebanon from 15 September 1982**

The evidence described above shows that Israel had invaded Lebanon illegally and had become an occupying force for part of Lebanon. Defendant Yaron was in charge of the occupation. As discussed below, this amounts to a Crime against Peace incurring the criminal responsibility of the State of Israel and the Defendant Yaron.

#### **The relationship between Lebanese militia and the first Defendant**

The evidence described above shows without doubt that the first Defendant and the IDF collaborated with the Phalangist militias and used the militias to carry out Israeli policy of destroying the Palestinian people. The first Defendant Yaron worked with the militias personally.

<sup>26</sup> Akayesu Trial Judgement, ICTR, para 560.

<sup>27</sup> Krstic, ICTY, Appellate Judgment, 19 April 2004, para. 41.

<sup>28</sup> Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Decision of 26 February 2007 para. 179.

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**1      Victims**

5      The evidence shows that a large number of men woman and children were killed. Most were Palestinian. There was little or no resistance to the invaders. This is a part of the Palestinian nation and as such satisfied the requirements of the Genocide Convention.

**Knowledge by the first Defendant and his acts and omissions**

10     There is no room for doubt that the first Defendant Yaron had a thorough knowledge of the exactions being committed by the associated militias. The first Defendant actively sent these militias into the Sabra and Shatila camps knowing what they would do. As reports emerged of their killings of unarmed civilians: men, woman and children, he failed in his duty as commander of an occupying 15 and invading force to protect civilian population.

**Intention of the State of Israel, Intention of the first Defendant Amos Yaron**

20     This evidence shows beyond all reasonable doubt that the first Defendant Yaron consciously refused to protect the Palestinian population in the Sabra Shatila camps. His responsibility however goes much farther. He and the Israeli army used the militias to 25 destroy the Palestinian population in the camps. There was almost no resistance. The massacres were fully observed by the Israeli army from its vantage points. No persons could escape from the area cordoned off by the Israeli army. He was informed throughout about the progress of the massacre. The only inference reasonably possible 30 is that Amos Yaron intended mass murder and that the Palestinian population be destroyed.

35     The Defence argued that Yaron did nothing to commit the crimes in Sabra and Shatila and cited exculpatory findings of the Kahan commission to attempt to clear Yaron for the charges.

40     This Tribunal is not bound by the Kahan Commission but its factual observations are useful in the search for truth. The Kahan Commission findings were made in Israel whereas the Tribunal is an international tribunal of opinion independent of Israel and the major

powers. The Tribunal does not accept Defence arguments concerning the acts and omissions of the first Defendant Yaron.

The Defence argued that the Prosecutor erred in not accusing Ariel Sharon. As for the failure to accuse Ariel Sharon, it is up to the Prosecutor to decide whom to charge, and barring abuse or oblique motive by the Prosecutor, the Tribunal cannot intervene in Prosecutorial Discretion.

The Defence objected to the use of General Assembly resolutions to prove genocide. The finding of intent (to commit genocide) by the General Assembly is soft law but is useful in the context to help to evaluate the intention of Israel and Amos Yaron.

The Tribunal considers the actions of Amos Yaron as engaging his personal criminal liability.

### **Command responsibility**

Given the finding that the first Defendant Amos Yaron is personally responsible for the crimes committed, it declines to consider his liability for command responsibility.

### **Legal consequences**

The Tribunal will examine the facts proven in the light of the crimes provided for in the Charter, namely Crimes against Peace, Crimes against Humanity, Genocide and War Crimes, provided for in articles 8, 9, 10, and 11 of the Charter.

### **Cumulative convictions**

The Tribunal recalls the law with respect to cumulative convictions. The Appeals Chamber of the International Tribunal for former Yugoslavia held at paragraph 168:<sup>29</sup>

168. The Appeals Chamber accepts the approach articulated in

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<sup>29</sup> Prosecutor V. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. It-96-23 & It-96-23/1-A, Judgement, 12 June 2002.

1 the Čelebići Appeal Judgement, an approach heavily indebted  
to the *Blockburger* decision of the Supreme Court of the United  
States.<sup>30</sup> The Appeals Chamber held that:<sup>31</sup>

5 "fairness to the Defendant and the consideration that only  
distinct crimes justify multiple convictions, lead to the  
conclusion that multiple criminal convictions entered under  
different statutory provisions but based on the same conduct  
are permissible only if each statutory provision involved has  
10 a materially distinct element not contained in the other. An  
element is materially distinct from another if it requires proof  
of a fact not required by the other.

15 Where this test is not met, the Chamber must decide on the  
basis of the principle that the conviction under the more specific  
provision should be upheld".

The Tribunal will follow this principle.

## 20 Crimes Against Peace

Lebanon is a sovereign State which was invaded by Israel on 15 September 1982. The first Defendant Amos Yaron participated in this aggression of Lebanon and became Brigadier General of this  
25 occupation force. The Tribunal recalls the Nuremberg Principles I and VI

Principle I states, "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to  
30 punishment".

35  
<sup>30</sup> *Blockburger v United States*, 284 U.S. 299, 304 (1931) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one is whether each provision requires proof of an additional fact which the other does not.").

<sup>31</sup> Čelebići Appeal Judgement, paras 412-13. Hereinafter referred to as the Čelebići test.

Principle VI states,

1

"The crimes hereinafter set out are punishable as crimes under international law:

5

(a) **Crimes against peace:**

10

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

15

We recall the terms of the Nuremberg judgement under the pen of Mr Justice Birkett states:

20

"The charges in the Indictment that the Defendants planned and waged aggressive wars are the charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.

25

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from the other war crimes in that it contains within itself the accumulated evil of the whole".

25

The State of Israel has committed the mother of all international crimes by invading Lebanon and this has led the first Defendant Yaron to commit crimes against humanity and genocide.

30

### **Crimes against humanity**

35

The Tribunal repeats the relevant parts of Article 9 of the Charter.

#### *Crimes against humanity*

35

For the purpose of this Charter, "*crime against humanity*" means any of the following acts when committed as part of a widespread

40

1 or systematic attack directed against any civilian population, with  
knowledge of the attack:

- 5 (a) Murder;
- (b) Extermination...;

10 The crime of extermination is the act of killing on a large scale.<sup>32</sup> The expression "on a large scale" does not, however, suggest a numerical minimum.<sup>33</sup> In addition to the threshold *mens rea* requirements for all crimes against humanity, the *mens rea* of extermination requires that the Defendant intend to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their deaths in a widespread or systematic manner.<sup>34</sup>

15 The Tribunal has found above that the first Defendant Amos Yaron (and the second Defendant, the State of Israel) participated directly with the Lebanese militias in the mass murder and destruction of the Palestinians in Sabra and Shatila camps.

20 For this reason, the Tribunal finds the first Defendant Amos Yaron guilty of a crime against humanity as charged.

### Genocide charge

25 As found above, the first Defendant Yaron intended the mass murder and the destruction of the Palestinian population at Sabra and Shatila. This population constituted a national group as envisaged by the Genocide Convention. Not only did the first Defendant Amos  
30 Yaron intend the mass murder of these Palestinian refugees and their destruction as a group, he succeeded in killing of up to 3,500 Palestinians.

35 <sup>32</sup> *Bagosora and Nsengiyumva* ICTR, Appeal Judgement, para. 394; *Rukundo* Appeal Judgement, para. 185, citing *Ntakirutimana* Appeal Judgement, para. 516.

<sup>33</sup> *Bagosora and Nsengiyumva* ICTR Appeal Judgement, para. 394; *Rukundo* Appeal Judgement, para. 185, citing *Ntakirutimana* Appeal Judgement, para. 516.

<sup>34</sup> *Brđanin* Appeal Judgement, ICTY para. 476; *Stakic* Appeal Judgement, paras. 259-260; *Gacumbitsi* Appeal Judgement, para. 86; *Ntakirutimana* Appeal Judgement, para. 522.

The first Defendant Amos Yaron intended the destruction of this part of the Palestinian people and therefore had the specific intent as required by Article 10 of the Charter. 1

The Tribunal notes that as Brigadier General of the Israeli Army occupying force, the first Defendant Amos Yaron engages the criminal responsibility of the Israeli State implying the guilt of the Israeli State as was found in the Chapter of this Judgement on Charge 4. 5

The Tribunal finds the first Defendant Amos Yaron guilty as charged of genocide. 10

### War crimes

This Tribunal will decline to consider war crimes since the crimes against humanity are more specific. A war crimes conviction would be a cumulative conviction. 15

### *8. Finding of the Tribunal of the Charge against the State of Israel*

In relation to the charges against the State of Israel for genocide and war crimes, the Tribunal is conscious of the novelty of the issues raised. It wishes to confront these issues head-on with a view to furthering the ideals of international law and to interpret existing precedents in such a way as to make them as good as can be from the point of view of justice and morality. 25

We take note that the Prosecution did not pursue the charge of war crimes vigorously and instead concentrated on the charge of genocide. The Tribunal too will, therefore, confine itself to the issue of genocide. 30

The main legal points raised before us were the following: 35

#### **Preliminary Objection About Retrospectivity Of Laws**

Learned counsel for the *Amicus Curiae* Team argued that the general moral rule against retrospective laws prevents the Tribunal from 40

1 hearing cases that occurred prior to its establishment on 6th June  
2008. The charges against Israel relate to facts that occurred well  
before 2008.

5 This issue was raised by the *Amicus Curiae* Team as a preliminary  
objection and was unanimously rejected by the Tribunal for the  
following reason: the offences of genocide and war crimes for which  
the State of Israel is being charged were not created by the Charter.  
These offences have existed since the middle of the last century.  
10 The Charter sets up a machinery to investigate and prosecute these  
charges and to create a war crimes tribunal to adjudicate on them.  
The Charter does not specify any dates or time frames as was the  
case for the International Criminal Tribunal for the former Yugoslavia  
(ICTY), the International Criminal Tribunal for Rwanda (ICTR), the  
15 Extraordinary Chambers in the Courts of Cambodia (ECCC) and  
the Special Court for Sierra Leone (SCSL).

Defence counsel was magnanimous to concede that open-ended  
20 temporal jurisdiction did indeed exist for the Nuremberg Tribunal,  
the Tokyo Tribunal and under the US Military Commission Act 2006  
for the Guantanamo detainees.

The Tribunal holds that as our Charter does not confine the Tribunal  
25 to any time frame, it is not prevented from adjudicating on events that  
occurred decades ago. The Tribunal notes that almost all international  
tribunals that deal with genocide are created to exercise jurisdiction  
over crimes committed well before the creation of the tribunal. The  
Tribunal holds that the jurisdiction of the Tribunal is open-ended and  
not confined to any time period. The Tribunal has full jurisdiction  
30 to try this case.

#### Preliminary Objection That Only Natural Persons Can Be Charged

Learned Defence counsel argued that there cannot be a charge against  
35 the State of Israel because under Article 2(1)(iii) of the Charter and  
the Rules of Procedure and Evidence in Articles 2, 3, 4, 5, 11 and 12,  
the Charter envisages jurisdiction only over natural persons and not  
against nation States. However, Defence counsel conceded that the  
Charter in Article 2(1)(ii) permits jurisdiction over a "government".  
40 The Tribunal is of the view that being a Tribunal of Conscience, and  
created to investigate serious crimes, it must reject such technical

and esoteric distinctions as between a "state" and a "government".  
1 States operate through their governments. The Tribunal will not refuse jurisdiction simply on this technical ground.

Further, it rules that Chapter III Article 6(b) of its Charter explicitly  
5 lays down that "if the charge involves a sovereign state, a current head  
of state / government or a former head of state / government, service  
of a copy thereof to any relevant Embassy or High Commission shall  
suffice..." This is conclusive proof that under its Charter, the Tribunal  
is empowered to try States as well as individuals.  
10

### Preliminary Objection That Israel Has Sovereign Immunity

Defence counsel submitted that international law does not allow the  
15 State of Israel to be impleaded as an accused. It was submitted that no matter what the facts may be and how serious the alleged crime may be, the State of Israel enjoys absolute immunity in international law from being impleaded in a domestic court or tribunal unless it voluntary subjects itself to such jurisdiction.

To our mind, the impugned preliminary objection of the *Amicus Curiae* Team raises the need for an appraisal of the dichotomy  
20 between the concept of State Immunity on the one hand and the doctrine of *jus cogens* on the other.

The concept of State immunity stipulates that a State is immune from  
25 jurisdiction in a foreign court unless it consents.

On the other hand, the doctrine of *jus cogens* refers to that body of  
30 peremptory principles or norms recognised by the international community as a whole as being fundamental to the maintenance of an international legal order and from which no derogation is permitted.

As corollary to a study of these two doctrines, the following three questions need to be considered, namely:  
35

- (a) What principles of law, relevant to the issue at hand, constitute *jus cogens*?  
40
- (b) Can the doctrine of State Immunity be considered as having acquired the status of *jus cogens*?  
45

- 1           (c) If there is a conflict between two principles of law, one  
being a *jus cogens* but not the other, which should prevail?

5 Well into the middle of the twentieth century, nations had accepted the proposition that a sovereign State could not be sued before its own municipal Courts. When that dogma ceased to exist, e.g. in the UK with the passage of the Crown Proceedings Act 1947, it was replaced by the equally unhelpful doctrine that a sovereign State was exempt from the jurisdiction of a foreign municipal court. The  
10 Latin maxim upon which the proposition is based was *par in parem imperium non habet*, i.e. an equal has no power over an equal.

This practice which provided *carte blanche* immunity to foreign States became known as the "*Absolute State Immunity* principle".

15 Support for the *Absolute State Immunity* principle can be found in most, if not all, of the cases, appearing in Bundle 3 of the authorities submitted by learned *Amicus Curiae* Team in support of their preliminary objection application. These cases include *The Schooner Exchange*<sup>35</sup>; *Mighell v. Sultan of Johore*<sup>36</sup>; *The Porto Alexandre Case*<sup>37</sup>; *Duff Development Co. v. Kelantan Government*<sup>38</sup>; *The Cristina Case*<sup>39</sup>; *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor*<sup>40</sup> and *Jurisdictional Immunities of the State (Germany v Italy)*<sup>41</sup>.

25 Jurisdictional Immunities of the State (*Germany v. Italy: Greece Intervening*) was a 2012 International Court of Justice case where the Court, *inter alia*, found by a 14 to one majority, that the Italian Republic had violated its obligation to respect the immunity which the Federal Republic of Germany enjoyed under international law  
30 by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945.

35 11 U.S. 116, 136 (1812).

36 (1894), 1Q149.

37 36 *Times Law Reports*, 66.

38 [1924] A. C. 797.

39 (1938) AC 485.

40 [1990] 1 MLJ 475.

41 <http://www.icj-cij.org/docket/files/143/16883.pdf>.

At page 10 paragraph 31 of their notes on Preliminary Objection, Defence Counsel, quoted a passage from the second edition of Judge Tunku Sofiah's work, *Public International Law – a Malaysian Perspective*, as follows:

"Judgments... of the International Court of Justice are always considered as pronouncements of what the most authoritative international judicial body holds to be in international law on a given point, having regard to a given set of circumstances."

The learned Judge Tunku Sofiah, however, agrees with us that the outdated concept of Absolute State Immunity must be read along with other compelling considerations relevant to our times and especially to the situation before us.

Laws, unless they concern that of the Almighty, can neither be immutable nor static. And when justice so demands, through the passage of time, shifts and changes to laws that are unjust invariably take place.

In some countries, like China, for example, the State jealously guards the "absolute" concept of State Immunity and denies any attempt by anyone to implead a State unless that State consents.

Other States prefer a "restrictive" interpretation of the concept and allow immunity to States only in respect of the States' "public" acts as opposed to their "private" ones.

As evidence of State practice, one can point to the example of the United States. It is to the credit of the United States Government, that through a proposal made in a letter by the U.S. State Department's Acting Legal Adviser, Jack B. Tate, to the Acting Attorney-General dated 19 May 1952, there was a shift in policy of the U.S. Government from support for the absolute theory of State immunity to support for the restrictive theory.

Let us now briefly turn to the subject of *jus cogens*. What principles of law, relevant to the issue at hand, constitute *jus cogens*?

If one were to look into the jurisprudence of the ICJ as well as that of national courts, there are numerous instances where the prohibition

1 on genocide as a *jus cogens* norm of international law has been  
2 recognised. See, for example:

- 3 (a) the ICJ judgment in the *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6 at para 64;
- 4 (b) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*,  
5 26 Feb. 2007 (ICJ Judgment) at paragraphs 161, 162, 173 & 174.  
6 A historical account of the Convention reveals many currents  
7 and cross-currents. But what is clear is that obligations relating  
8 to the prevention and punishment of genocide are part of  
9 customary international law (para 161). The undertaking is  
10 unqualified (para 162). There is dual responsibility on the part  
11 of individuals as well as the State. "Genocide is an international  
12 crime entailing national and international responsibility on  
13 the part of individuals and States" (A/RES/180(II)) (paras 161  
14 & 163). "Contracting parties are bound by the obligations under  
15 the Convention not to commit, through their organs or persons  
16 or groups whose conduct is attributable to them, genocide and  
17 the other acts enumerated in Article III. Thus if an organ of the  
18 State, or a person or group whose acts are legally attributable  
19 to the State, commits any of the acts proscribed by Article III  
20 of the Convention, the international responsibility of that State  
21 is incurred" (para 179).
- 22 (c) "Duality of responsibility continues to be a constant feature  
23 of international law. This feature is reflected in Article 25,  
24 paragraph 4, of the Rome Statute for the International Criminal  
25 Court, now accepted by 104 States: "No provision in this  
26 Statute relating to individual criminal responsibility shall affect  
27 the responsibility of States under international law".
- 28 (d) "Where crimes against international law are committed by  
29 State officials, it will often be the case that the State itself is  
30 responsible for the acts in question or for failure to prevent  
31 or punish them. In certain cases, in particular aggression, the  
32 State will by definition be involved. Even so, the question  
33 of individual responsibility is in principle distinct from the

question of State responsibility. The State is not exempted from its own responsibility for international wrongful conduct by the Prosecution and punishment of the State officials who carried it out" (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10,2001 Commentary on Article 58, para 3). 1  
5

- (e) *Requests for Provisional Measures*, 13 Sept. 1993 (ICJ Rep.325) Separate Opinion of Judge Lauterpacht at para. 100.

Eminent scholars of international law, such as M. Bassiouni<sup>42</sup>, too, have confirmed the prohibition on genocide as a *jus cogens* norm of international law. 10

So has the influential *Restatement on Foreign Relations of the United States*. 15

We can find no legal authority which states that the doctrine of State Immunity has acquired the status of *jus cogens*, that Latin tag which, in English, simply means "compelling law". 20

On the other hand legal authorities abound that as a source of law, *jus cogens* is hierarchically higher.

It is also trite law that where there is a conflict between two principles of law, the one hierarchically higher in importance should prevail. 25

To our mind the international law doctrine against impleading a foreign State, being hierarchically lower in importance than that of the prohibition against genocide, resulted in the Charge against the State of Israel to be maintained for full trial. 30

#### **Decline Of State Sovereignty: The Distinction Between Sovereign & Commercial Acts**

By the so-called "Tate Letter", the United States confers immunity on foreign States only for their public and governmental acts, but not 35

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<sup>42</sup> M. Bassiouni, 'International Crimes: Jus cogens and Obligatio Erga omnes' (1996) 40 Law and Contemporary Problems 58(4), p.68.

1 their commercial activities. It is worth observing that the commission  
of a war crime or genocide or crime against humanity can never be  
a sovereign or governmental act.

5 This preference for restrictive State immunity was given statutory  
effect in the United States by the Foreign Sovereign Immunities Act  
of 1976.

10 The United Kingdom came later in 1976 in adopting the restrictive  
immunity approach. That occurred in the case of *The Philippine  
Admiral*<sup>43</sup> where the Privy Council held that in cases where a State-  
owned merchant ship involved in ordinary trade was the object  
of a writ, it would not be entitled to sovereign immunity and the  
litigation would proceed.

15 In 1978 the State Immunity Act of 1978, adopting a restrictive  
approach, was enacted by the United Kingdom. Since then, these two  
legislations have been served as a model for the national legislations  
of other countries including Australia, Canada, Pakistan, Singapore,  
20 South Africa and Malaysia.

25 The Tribunal finds it rather mind-boggling when some courts can  
consider commercial disputes as a reason for not allowing a State  
to be shielded by the State Immunity principle and yet strenuously  
protect such a State in cases of genocide or other war crimes. Human  
lives cannot be less important than financial gain!

### Other Inroads Into The Concept Of State Sovereignty

30 There have been other inroads into the domain of the State Immunity  
principle including the following:

35 (a) In 1972, the *European Convention on State Immunity* 1972  
was executed. That became the first attempt to establish an  
international legal regime for State immunity on the basis  
of the restrictive doctrine. It is already in force amongst the  
signatory States.

40     <sup>43</sup> [1976] 2 WLR 214.

- (b) In 2004, the *United Nations Convention on Jurisdictional Immunities of States and Their Property* was adopted by the General Assembly but this has yet to come into force.<sup>44</sup> 1
- (c) And not too long ago, both the United States and Canada enacted legislation to permit their respective citizens or permanent residents to institute proceedings against States which harbour terrorists. 5
- (d) In the law of the European Union, member States, can be subjected to hefty fines for violations of EU law. The consent or non-consent of the State is irrelevant. It is the State and not individual State actors who are defendants in EU courts. The subjection of the State to the jurisdiction of the EU courts flows automatically from membership of the EU. 10
- (e) In a jurisprudential, Hohfeldian analysis, the concepts of legal right and legal duty are co-relatives of each other. If a State has legal duties under international law, then someone must have a corresponding legal right against the State. Defence counsel confirmed for us that the State of Israel is a signatory to the Genocide Convention. It has never repudiated the Convention. In fact it has its own law on Genocide that it enacted to conduct genocide trials in Israel like the one in the Eichmann case. We hold that Israel's voluntary subjection to the Genocide Convention imposes on it enforceable duties that it cannot repudiate by simply refusing to give consent to a proceeding against it on a charge of genocide. 20
- (f) Like all other areas of law, international law is not static and is evolving to meet the felt necessities of the times. The Tribunal is conscious that the concept of State sovereignty is in decline. In the human rights era in which we are living, State sovereignty is a shield against foreign aggression. It cannot be used as a 30

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<sup>44</sup> The Convention was open for signatures by all States until 17 January 2007 and would have entered into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. As of 7 May 2013, there are 28 signatories to the Convention and 13 instruments of ratification have been deposited. (According to its Article 30, the Convention requires 30 state parties in order to come into force.) 35 40

sword against one's own nationals or the nationals of another territory. If a sitting head of a sovereign State like the President of Sudan (who personifies the State of Sudan) can be indicted for certain heinous crimes against international law, then it does not make sense to submit that a sovereign State can never be held accountable in international courts without its consent. This will not be in line with modern developments in international law. Witness for example the opinion in the Bosnia case which the Tribunal referred to earlier.

- (g) It was submitted to us that the rationale for excluding the State from prosecution and instead directing the Prosecution at natural persons is that if a State is visited with a verdict of 'guilty' that verdict would be onerous to the entire, innocent population of the State. Touching though this argument is, it is not consistent with a large body of international law e.g. the Charter of the United Nations where measures are prescribed which would amount to collective punishment of the entire population. Under Article 41 the Security Council may authorise complete or partial interruption of economic relations. Embargoes that may devastate innocent lives may be imposed. Under Articles 42 and 44, war measures including the use of force may be employed against a nation. Under Article 5, membership of a nation to the General Assembly can be suspended. Under Article 6, a member can be expelled.

A system of law must have coherence. Its different parts must, in the words of the great jurist Ronald Dworkin, have a "fit". The idea of absolute State immunity from prosecution for grave crimes like genocide appears inconsistent with other wholesome developments in international law. Absolute State immunity is an antiquated doctrine and given the choice between precedents, this Tribunal is inclined to break free of the icy grip of this past dogma.

All these go to show that concerted efforts are taking place on the international scene to move towards a less restrictive State Immunity doctrine. In the words of Lord Denning:

*The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign State should not be impleaded in the Courts of another sovereign State against*

its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilised nations of the world. All nations agree upon it. So it is part of the law of nations.

To my mind [so Denning continued], this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The Courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law upon the subject.

It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the Courts of this country to define the rule as best they can, seeking guidance from the decisions of the Courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it.<sup>45</sup>

### Inequitable Enforcement of International Law

Another reason why the Tribunal wishes to reject the doctrine of Absolute State Immunity from prosecution in matters of genocide, war crimes and crimes against humanity is that the existing international law on war and peace and humanitarianism is being enforced in a grossly inequitable manner. Small, weak nations, mostly in Africa and Asia, are periodically subjected to devastating sanctions, military interventions and regime changes. At the same time, unbearable atrocities and brutalities that are inflicted on the militarily weak nations of Latin America, Africa and Asia by powerful nations in the North Atlantic and their allies go unscrutinised and unpunished.

We take note that the Israeli perpetrators of Sabra and Shatila were never punished and instead rewarded. We took note of the *Jerusalem*

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<sup>45</sup> *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria*, (at p. 888).

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- 1 Post story of Nov. 22, 2013. On January 3, 2009, 100 members of the  
al-Sammouni family huddled inside a house. In the morning mist,  
an Israeli airstrike killed 21 people inside. Yet last week the Military  
Advocate General of the IDF informed *B'Tselem* (human rights group  
5 in Israel) that he had decided to close the investigation into this  
incident without taking any measures.

In the light of this reality that horrendous wrongs go unpunished  
10 and instead the victim is demonised and brutalised, we feel that  
it is time for the legal world to bring some juristic balance to our  
exposition of State immunity and international rights and wrongs  
and to expose the truth. This is what the Charter requires us to do.

### What Amounts To Genocide?

15 Simply put, genocide means any designated acts committed with  
intent to destroy in whole or in part a national, ethnical, racial or  
religious group as such. The definition of genocide as given in  
Article 2 of the Charter is taken verbatim from Articles 2 & 3 of  
20 the Convention on the Prevention and Punishment of the Crime of  
Genocide which states that the following acts may by themselves or  
cumulatively constitute the international crime of genocide:

- (a) Killing members of the group.
  - 25 (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.
  - 30 (d) Imposing measures intended to prevent births within  
the group.
  - (e) Forcibly transferring children of the group to another  
group.
- 35 No significant evidence was introduced by the Prosecution Team  
in relation to acts (d) & (e) above, but we heard 11 witnesses and  
examined thousands of pages of documents relating to acts (a)-(c).  
The Prosecution repeatedly used the words "ethnic cleansing" and  
the Tribunal regards ethnic cleansing as part of acts (a) to (c) above.

*Actus reus*

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The central issue before us was whether genocidal acts took place contrary to Article 2 of the Convention (Part 1, Article 10 of the Charter).

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The Tribunal heard 11 witnesses and examined documentary evidence that clearly indicated a long catalogue of incredible crimes conceived as long ago as 1945 and continuing till the present. What is significant is that these are not isolated acts in the heat of the moment but repeated pattern of atrocities committed against the inhabitants of Palestine.

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- Forcible expulsion of more than 700,000 Palestinians from their homes.
- Massacres of those who refused to abandon the land of their birth.
- Repeated, periodic and massive killings through air and naval strikes using the most sophisticated weaponry over the last 65 years.
- Brutal assaults on many refugee camps as for example in Sabra and Shatila. Israel's military action in Sabra and Shatila was condemned by no other than the 1983 Israeli Kahan Report. The report found Brigadier General Yaron to be complicit in the atrocities and massacres committed by the Lebanese Phalangists. As Brigadier General Yaron was a commanding officer of the IDF, his culpability has to be attributed to the State of Israel. The IDF sealed the camps and prevented any Palestinians from leaving. It allowed the Phalangist militias to enter the camp and to commit mass murders. The Kahan Report notes (Prosecution document volume 3, page 291) that Brigadier General Yaron had no reservations about admitting the Phalangists into the camps; he testified that he was happy with his decision and explained his position in that "*We have been fighting here for four months already, and there is a place where they can take part in the fighting, the fighting serves their purposes as well, so let them participate and not let the IDF do everything*". Credible witnesses testified to us that women and children were shot in their homes; pregnant mothers were killed and their babies extruded from the wombs. Among the witnesses the Tribunal heard was the internationally respected medical

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- 1 doctor, Dr. Ang Swee Chai who testified to the magnitude of  
the atrocities and the fatalities that she witnessed first hand.
- 5 • Periodic seizure of Palestinian lands and farms and conversion  
of them into Israeli settlements.
- 10 • Building of a 190km long wall/fence which has been  
condemned by the ICJ (but whose construction has been  
rationalised by 2 Israeli Supreme Court decisions).
- 15 • Apartheid like conditions of affluence in the illegal settlements  
and extreme depravation in the Palestinian ghettos. Some  
roads are for the Jewish population only.
- 20 • Use of white phosphorus which tears out the insides of human  
bodies on the civilian population.
- Detention without trial and ill treatment of prisoners.
- Torture.
- 25 • Denial of adequate food, stealing of water resources, supply  
of inadequate quantum of water, and building materials.
- Land and sea blockades of Palestinian areas, especially in Gaza.
- Use of excessive force on Palestinian combatants armed with  
crude weapons and in some cases against children throwing  
stones.
- Siege and imprisonment of an entire nation.
- Daily humiliations at hundreds of checkpoints on Palestinian  
territory and impossible conditions of life.
- 25 The Tribunal heard moving testimony from credible witnesses that  
what has happened to them has happened to thousands of their  
brethren.

30 The Tribunal also took note that many of the above atrocities  
committed by Israel over the last 67 years were, now and then,  
condemned by the UN Security Council, the UN General Assembly  
and other international organisations.

35 Chief Counsel for the *Amicus Curiae* Team presented to us an  
ingenious argument that there is no genocide in Palestine because  
the population of the Palestinians is continuing to grow. Unless there  
is a significant decrease in population, there can be no genocide  
he asserted. The Tribunal finds this submission totally insensitive  
40 and inhuman. It is internationally documented that nearly 700,000  
Palestinians were driven from their homes to lead nomadic and  
deprived lives in neighbouring lands where they are not generally

welcomed. The fact that the remaining population of Palestine after the ethnic cleansing in the mid 1940s continues to show modest growth has not disproved the existence of periodic killings, humiliation, and dehumanisation.

In determining whether genocide has been committed, one cannot play a game of numbers. Even if one person is killed on account of his race, ethnicity or religion with intention to kill others for the same reason, that is genocide.

It is impossible for the members of the Tribunal to disregard clear cut evidence of brutalisation, demonisation and dehumanisation of an entire population. It is incredible that in an age of human rights, such atrocities can continue to rage for more than 6 decades and that there are people in nations who trivialise such inhumanity. The Tribunal unanimously holds that the acts committed against the Palestinians amount to genocide over the last 67 years.

The Tribunal must however clarify that it takes note of the violations of international humanitarian law by some members of the Palestinian community. Their prosecution and guilt is a separate matter.

#### ***Was There Mens rea?***

As the Tribunal has stated earlier, the Tribunal heard 11 witnesses and examined documentary evidence that clearly indicated a long catalogue of incredible crimes conceived as long ago as 1945 and continuing till the present. What is significant is that these are not isolated acts in the heat of the moment but repeated pattern of atrocities committed against the dispossessed inhabitants of Palestine.

What is also significant is that the above culpable acts are systematically directed against the same group and by the same offender over the last 67 years. The scale of atrocities committed and their general nature indicate a clear genocidal intention.

Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia stated that the specific intent of the crime of genocide

- 1     “... may be inferred from a number of facts such as the general political  
doctrine which gave rise to the acts possibly covered by the definition in  
Article IV or the repetition of destructive and discriminatory acts”. The  
Tribunal accepts evidence from various internationally respected  
5 social scientists among them Prof Ilan Pappe and John Pilger and  
Prof Noam Chomsky that the ethnic cleansing of Palestine is a  
world historic tragedy that is the result of deliberate State policies  
of succeeding governments of Israel since 1948.
- 10 The Tribunal wishes to state that the test that it employed in  
determining guilt was the test of “beyond reasonable doubt”.

#### Was it a case of Self-Defence?

- 15 The Tribunal heard significant evidence from the *Amicus Curiae*  
Team that Israeli actions of bombing, killing, maiming, other military  
interventions, curfews, checkpoints and “apartheid walls” were in  
response to continuous Palestinian terrorism.
- 20 The Tribunal agrees that there is cogent evidence of Palestinian  
resistance to Israeli presence, incidences of suicide bombing, and  
firing of crude rockets into Israeli territory by Palestinian fighters.  
However it is our finding that much of the Palestinian generated  
violence is not on Israel’s own territory, but from and on Israeli  
25 occupied Palestinian land. Much of the violence perpetrated by  
Palestinians is a reaction to the brutalities of the vicious racism,  
brutalities and genocide that is a tragic feature of Palestinian life.

30 Much as we condemn violence and pray for peace, it must be stated  
that no power on earth can douse the flame of freedom from the  
human spirit. As long as there is suppression, there will always be  
people prepared to die on their feet than to live on their knees.

35 We also hold that the force employed by the IDF is excessive, totally  
disproportionate and a violation of international humanitarian law.  
The methods used are unspeakably inhumane and amount to war  
crimes.

We unanimously find the State of Israel guilty as charged.

**9. Verdict**

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After considering the evidence adduced by the Prosecution and submissions by both the Prosecution and the *Amicus Curiae* Team on behalf of the two Defendants, the Tribunal is satisfied, beyond reasonable doubt, that the first Defendant, Amos Yaron, is guilty of Crimes Against Humanity and Genocide and the second Defendant, the State of Israel is guilty of Genocide.

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**10. Orders**

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10.1 The Tribunal orders that reparations commensurate with the irreparable harm and injury, pain and suffering undergone by the Complainant War Crime Victims be paid to them. While it is constantly mindful of its stature as merely a Tribunal of Conscience with no real power of enforcement, this Tribunal finds that the witnesses in this case are entitled *ex justitia* to the payment of reparations by the two convicted parties. It is the Tribunal's hope that armed with the Findings of this Tribunal, the witnesses (victims in this case) will, in the near future, find a State or an international judicial entity able and willing to exercise jurisdiction and to enforce the verdict of this Tribunal against the two convicted parties. The Tribunal's award of reparations shall be submitted to the War Crimes Commission to facilitate the determination and collection of reparations by the Complainant War Crime Victims.

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10.2 **International Criminal Court and the United Nations, Security Council** - As a Tribunal of Conscience, the Tribunal is fully aware that its verdict is merely declaratory in nature. We have no power of enforcement. What we can do, under Article 34 of Chapter VIII of Part 2 of the Charter is to recommend to the Kuala Lumpur War Crimes Commission, WHICH WE HEREBY DO, to submit this finding of conviction by the Tribunal, together with a record of these proceedings, to the Chief Prosecutor of the International Criminal Court, as well as the United Nations and the Security Council.

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10.3 **Commission's Register of War Criminals** - Further, under Article 35 of the same Chapter, this Tribunal recommends to

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1 the Kuala Lumpur War Crimes Commission that the names  
of the two convicted parties herein be entered and included in  
the Commission's Register of War Criminals and be publicised  
accordingly.

- 5 10.4 The Tribunal recommends to the Kuala Lumpur War Crimes  
Commission to give the widest international publicity to this  
conviction and grant of reparations, as these are universal  
crimes for which there is a responsibility upon nations to  
institute prosecutions.
- 10 10.5 The Tribunal deplores the failure of international institutions  
to punish the State of Israel for its crimes and its total lack  
15 of respect of International Law and the institutions of the  
United Nations. It urges the Commission to use all means to  
publicise this Judgement and in particular with respect to the  
Parliaments and Legislative Assemblies of the major powers  
such as members of the G8 and to urge these countries to  
20 intervene and put an end to the colonialist and racist policies  
of the State of Israel and its supporters.

## 11. Conclusion

- 25 Having delivered its verdict and consequential orders, this  
Tribunal wishes to place on record its deep appreciation to both  
the Prosecution and the *Amicus Curiae* Teams for their efforts in  
ensuring that this resumed Hearing was able to be conducted in the  
best tradition of the Bar.
- 30 The Tribunal commends Co-Prosecutors Prof Gurdial Singh Nijar  
and Tan Sri Abdul Aziz Abdul Rahman and the other members of  
their team for their thorough preparation of their case.
- 35 The Tribunal also commends every single member of the *Amicus  
Curiae* Team for accepting their difficult assignment as friends of the  
court and for giving their all beyond their call of duty in the name  
of justice and fair play for their absent Defendants. Mr Jason Kay,  
Ms. Larissa Jane Cadd and Dr. Matthew Witbrodt, all of whom had  
40 addressed the Tribunal during the Hearing, meticulously presented

the case for the Defendants with extraordinary fidelity even though none of them had met or had been instructed by the Defendants.

Finally, the Tribunal extends its thanks to members of the Malaysian public and other benefactors who had generously contributed to the Kuala Lumpur Foundation to Criminalise War in financing the holding of this adjourned Hearing.

For the Prosecution : Prof. Gurdial Singh Nijar, Tan Sri Abdul Aziz Abdul Rahman, Mr. Avtaran Singh, Ms. Gan Pei Fern, Mr. Nizamuddin Hamid, Dr. Sharizal M Zin, Ms. Rafika Shar'i'ah, Ms. Mazlina Mahali and Ms. Diyana Sulaiman. *Amici Curiae* Team : Mr. Jason Kay Kit Leon (Head), Ms. Larissa Jane Cadd, Dr. Abbas Hardani, Prof. Dr. Rohimi Shapiee, Dr. Rohaida Nordin and Dr. Matthew Witbrodt. Registrars : Mr. Musa Ismail, Ms. Fiffy Armiza Muhammad Sahit (Assistant) and Mr. Razif Mohamed Rosli (Assistant).

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## **APPENDIX A**



1                   **RULING ON PROSECUTION APPLICATION  
FOR PROCEEDING  
TO BE ADJOURNED SINE DIE**

5                   **Kuala Lumpur War Crimes Tribunal - Case No. 3-CHG-2013 and  
Case No. 4-CHG-2013**

10                  Coram : Judge Tan Sri Dato' Haji Lamin Bin Haji Mohd Yunus, Judge  
Alfred Lambremont Webre, Judge Salleh Buang, Judge Eric David,  
Judge Tunku Sofiah Jewa, Judge Shad Saleem Faruqi And Judge  
Michael Hourigan.

15                  22 August 2013

20                  **Judge Prof. Salleh Buang (delivering the Ruling of the Tribunal).**

These proceedings have been scheduled for four days from 21st  
to 24th August 2013 to hear two sets of charges filed by the Chief  
Prosecutor of the Kuala Lumpur War Crimes Commission with  
the Registrar of the Kuala Lumpur War Crimes Tribunal (KLWCT)  
consisting of Case No. 3 CHG 2013 *the KLWCC v Amos Yaron* and Case  
No. No. 4 CHG 2013 *the KLWCC v the State of Israel* ('the charges').

25                  On the first day of the hearing, the Prosecution, without prior notice,  
made a surprise application in Chambers to have Judge Eric David  
recused from being a member of the panel of seven (7) Judges hearing  
this case. In support of its application the Prosecution tendered  
two documents - the first being a photocopy of a legal opinion  
given an earlier time by Judge David (in his private capacity) to  
the People's Mujahedin of Iran ('PMOI') undated and the second  
being a photocopy of a news report from the Daily Mail (UK) dated  
10 February, 2012 ('the supporting documents') ('the Application').

30                  The main thrust of the Prosecution's application was their view that  
because of his relationship with the PMOI, he will not be able to  
discharge his duties in an unbiased manner as befitting an impartial  
Judge of this Tribunal. Further they stressed that unless Judge David  
recused himself in Chambers they would repeat the Application in  
open Court.

35                  The Tribunal considered the Application and supporting materials  
and then unanimously ruled that there was no basis to the  
40                  

The Tribunal considered the Application and supporting materials  
and then unanimously ruled that there was no basis to the

Application requiring Judge David to recuse himself and dismissed the application.

The Court then convened and the Prosecution made a formal Application in open Court for Judge David to be recused. The Court formally dismissed the Application and directed the proceedings commence.

Instead of respectfully abiding by the ruling of the Tribunal and proceeding with the trial as scheduled, Mr. Francis Boyle co-counsel for the Prosecution then addressed the Tribunal in open court and made a series of further unfounded and malicious allegations against Judge David. He offered no credible and cogent supporting evidence (or any at all) for what the Tribunal considered to be scandalous allegations. The Tribunal considered Mr. Boyles' conduct to be improper and an abuse of the court process.

The allegations from Mr. Boyle were very serious accusations made to the Tribunal without due regard for proper decorum and respect owed by a member of the Bar to the Tribunal and constituted contempt towards the Bench. The President patiently reminded Mr. Boyle to cease making these unfounded allegations as the Application had already been heard and a Tribunal order made. Notwithstanding this Mr. Boyle ignored the directions of the President and continued to address the Tribunal repeating the allegations over and over.

The President then ordered that these unsubstantiated allegations by Mr. Boyle, the co-counsel for the Prosecution be expunged from the record of the Tribunal proceedings.

The President once again directed that the proceedings begin.

The Prosecutor Prof. Gurdial Singh Nijar then informed the Tribunal that the Prosecution was not prepared to proceed because its witnesses were not willing to give their testimony in the presence of Judge Eric David. The Tribunal noted that this information had not formed a part of the Prosecution Application and that it should have.

When both the Chief Prosecutor and the *Amicus Curiae* later appeared in Chambers at the request of the President, the Chief Prosecutor was again asked that if his witnesses were not prepared to give oral evidence was he prepared to proceed with the case on the basis of

1 tendering witness evidence in documentary form thus avoiding the necessity for the witnesses to appear in person.

5 Prof. Gurdial Singh Nijar replied that the Prosecution would not proceed in way without Judge David leaving the Bench. Prof. Gurdial Singh Nijar did request for further time to speak with his witnesses which was granted. The *Amicus Curiae* asked for leave to make a statement to the Tribunal in Chambers the following morning.  
10 Permission to do so was granted.

15 On the morning of the second day, the *Amicus Curiae* made his statement in Chambers to the Bench. Having heard both the Prosecution Team as well as the *Amicus Curiae* Team, the proceedings continued.

20 Prof. Gurdial Singh Nijar then sought leave from the Tribunal for a victim representative of the victims group to address the Tribunal. Leave was granted.

25 An adult male victim then addressed the Tribunal and repeated the concerns expressed by his counsel Prof. Gurdial Singh Nijar that the victims were concerned as to their safety from appearing before the Tribunal in its form and, further, that they were distressed at some of the remarks of the Tribunal panel made the previous day to their counsel.

30 The Tribunal noted that no evidence was tendered detailing the safety concerns of the victim.

35 Prof. Gurdial Singh Nijar then made a formal application for these proceedings to be adjourned *sine die* (the new Application).

Before giving its decision on the new Application to suspend these proceedings the Tribunal feels it important to state the following for the record -

40 (1) The Judges observe with deep concern and regret that there has been a serious breach of decorum and improper conduct on the part of Mr. Boyle, co-counsel for the Prosecution in the matters already mentioned above. At this moment there has been no attempt by the said co-counsel to tender his unreserved apologies to the Bench and, in particular, to Judge Eric David;

- (2) Whilst the Tribunal takes note of the Chief Prosecutor's statement to the Bench, both in open proceedings as well as in Chambers, that his witnesses are very concerned for their safety should they give their testimony in the presence of Judge Eric David, the Tribunal finds their conduct in insisting to be present in court even though when all witnesses were ordered from the court, to be in defiance of the clear directions of the full panel of Judges.
- (3) The Judges are unanimous in their Opinion that the witnesses' continuous refusal to give their testimony in these proceedings until and unless Judge Eric David recuses himself, despite the ruling made by the Bench is in contempt of the Tribunal order and amounts to an improper ultimatum being given to the Bench. The witnesses would have the Tribunal believed that if they were to give their testimony in open proceedings in front of the six Judges (with Judge Eric David not on the Bench) they will be safe from harm upon their return to their homeland. In the absence of any evidence to support these alleged concerns the Tribunal is of the view that Judge Eric David 's presence on the Bench will have no impact on their safety.
- (4) It is ironic that whilst the Kuala Lumpur Foundation to Criminalise War (KLFCW) has at great cost and effort given the witnesses their day in court to seek justice for the war crimes committed against them the witnesses (led by the Prosecution team) have instead chosen to refuse to appear before the Tribunal. The witnesses have effectively squandered an invaluable opportunity. The Tribunal is also disappointed that while it made numerous overtures to the Prosecution counsel to find ways to give the witnesses confidence in the Tribunal process each and every offer was dismissed out of hand. The Tribunal could only conclude that the Prosecution team was committed to bringing these proceedings to an end.
- (5) Finally, the Judges also wish to put on record their sorrow and regret that despite all the preparatory work being carried out by so many people under the leadership of the Honourable President of the KLFCW, for which this Tribunal is its organ, as well as substantial expenses which are largely provided by generous donors from amongst the general public, everything

1 has now come to nought. The Tribunal believes the Prosecution  
team, despite asserting that it will abide by the decision of the  
Tribunal, has itself single handedly brought these proceedings  
to a dead lock unless and until their demands are met. That is  
5 an intolerable situation that the Tribunal just cannot condone.

10 (6) The Tribunal wishes to point out that notwithstanding Judge  
Eric David's firm position that there was no merit in the  
Prosecution Application for him to recuse himself he did  
volunteer to withdraw himself from the proceedings. However  
the other Judges unanimously would not support such a  
decision. The Tribunal reaffirms its earlier ruling that Judge  
Eric David will not recuse himself from these proceedings.

15 Consequently, it is with great reluctance and regret that the Tribunal  
now orders that these proceedings stand adjourned *sine die*.

20 For the Prosecution : Prof. Gurdial Singh Nijar, Mr. Francis Boyle,  
Mr. Avtaran Singh and Ms. Gan Pei Fern. *Amici Curiae* Team : Mr.  
Jason Kay Kit Leon, Ms. Larissa Jane Cadd, Dr. Abbas Hardani and  
Ms. Galoh Nursafinas Samsudin. Registrar : Mr. Musa Ismail.

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## **APPENDIX B**



## I RULING ON PRELIMINARY OBJECTIONS RAISED BY THE AMICUS CURIAE TEAM

- 5      **Kuala Lumpur War Crimes Tribunal - Case No. 3-CHG-2013 and**  
**Case No. 4-CHG-2013**  
Coram: Judge Tan Sri Dato' Haji Lamin Bin Haji Mohd Yunus  
(President), Judge Tunku Sofiah Jewa, Judge Shad Saleem Faruqi,  
10     Judge Mohd Saari Yusuf, Judge Salleh Buang, Judge John Philpot  
and Judge Tunku Intan Mainura.

20 November 2013.

- 15     **Judge Tunku Sofiah Jewa (*delivering the Ruling of the Tribunal*).**

### *Preliminary Objections*

- 20     On August 20, 2013 the *Amicus Curiae* Team filed two preliminary  
objections to these proceedings – the first contending that there are  
defects in the Charges preferred against the Defendants, and the  
second contending that the State of Israel cannot be impleaded in  
these proceedings on the grounds of State Immunity.

- 25     The main thrust of the *Amicus Curiae* Team's arguments in its *first*  
*preliminary objection* is that the trend in modern international  
criminal tribunals is either to have jurisdiction for acts that have  
been committed after these tribunals have been constituted, such  
as the International Criminal Court (the ICC), or alternatively its  
30     jurisdiction is for a limited duration of time such as the International  
Criminal Tribunal for Rwanda (ICTR) and the Extraordinary  
Chambers in the Courts of Cambodia (ECCC).

- 35     The *Amicus Curiae* Team submits that this Tribunal came into  
existence on 6 June 2008, whilst the various acts allegedly committed  
by the first Defendant in charge no. 3 occurred in the month of  
September 1982, while the acts allegedly committed by the second  
Defendant in charge no. 4 occurred since 1948 and continue up to  
the present day.

- 40     The *Amicus Curiae* Team openly concedes that if the Tribunal holds  
that its jurisdiction is open-ended (as in the military tribunals at  
Nuremberg, Tokyo and Guantanamo), then its preliminary objection  
must fail.

This morning, the Tribunal allowed the *Amicus Curiae* Team to make its oral submission in respect of the same two preliminary objections.

On behalf of the Prosecution Team, it was argued that the jurisdiction issue must be established by reference to the founding Charter or statute that sets up the Tribunal.

**The Charter of the KL Foundation to Criminalise War** (the Charter) states that the jurisdiction of the Tribunal shall be governed by the provisions of this Charter: Part 1, Article 1. There is no temporal limit. In particular, Article 7 sets no time limit. In this sense the Charter is identical to the 'open ended' temporal jurisdiction of the Military Tribunal at Nuremberg or the International Military Tribunal for the Far East.

The Prosecution Team also submitted that the Tribunal had convicted Bush and Blair of war crimes committed in 2003 – which also predates its setting up: *KL War Crimes Commission v George W. Bush and Anthony L. Blair*, *KLWCT Reports 2011*, p. 1. The verdict by the Kuala Lumpur War Crimes Tribunal (KLWCT) against Bush, Cheney, and Rumsfeld *et al* went back to torture committed from 2001.

The main thrust of the *Amicus Curiae* Team's arguments in its **second preliminary objection** is that there is no authority conferred by the Charter on this Tribunal to hear any action against the government of a country, for example, the government of Israel.

The *Amicus Curiae* Team also argued that international law does not allow the "State of Israel" to be impleaded as an accused. The State of Israel is a nation state, recognized by the United Nations, and as a nation state, it has rights under international law.

The *Amicus Curiae* Team further submits that the State of Israel has not entered appearance in these proceedings and has therefore not submitted to the jurisdiction of this Tribunal. The *Amicus Curiae* Team submits that the State of Israel enjoys immunity for the crimes of genocide and war crimes and therefore Charge 4 should be dismissed.

With regard to the second preliminary objection, the Prosecution Team submits, *inter alia*, that these two Charges are international criminal war crimes being adjudicated by an international tribunal.

1 States have no immunity for such crimes before such tribunals. In support of their contention, the Prosecution Team cited the decision of the ICJ in the Bosnia case, which stated, in part, as follows –

5 *Accordingly having heard the various arguments, the Court affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III.*  
10 *Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred*: para 179 [Prosecution Documents, vol 1: pp. 170-171].

15 ***Two Applications***

On 15th October 2013, the *Amicus Curiae* Team submitted two (2) applications to quash the charge against the two Defendants - the first Defendant, Amos Yaron and the second Defendant, the State 20 of Israel. The grounds of applications as submitted by the *Amicus Curiae* are as follows:

1. The charge is defective for duplicity, and / or latent duplicity.
- 25 2. The charge is defective for uncertainty.
3. The charge is an abuse of process and / or oppressive.

30 On behalf of the two Defendants, the *Amicus Curiae* Team sought for the Tribunal to make the following orders:

1. That the charge against the two Defendants be quashed.
- 35 2. That the prosecution against the two Defendants be permanently stayed.
3. In the alternative, that the Charges be redrafted according to the principles of criminal law.

40 The *Amicus Curiae* Team contends that there were multiple offences within one charge and multiple forms of alleged instances of criminal conduct within one charge. The *Amicus Curiae* Team submits that

the Rules against Duplicity must be strictly adhered to in a criminal proceeding. The rule prescribes that for every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately.

The *Amicus Curiae* Team submits that it is incorrect to say that the principles of duplicity do not apply in international criminal law, and submits further that the right to indict on cumulative charges under international law does not provide a complete freedom to avoid principles of duplicity or abuse of process. Such right to indict on cumulative charges must be subject to the overarching principles of clarity, precision and fairness to the Defendants.

The *Amicus Curiae* Team further submits that the charges against the first Defendant and the second Defendant ought to be amended at the very least, if not altogether quashed. The *Amicus Curiae* Team submits that the defects are so substantial as to warrant censure; they are prejudicial, and fail to use impartial language as expected in the role / office of the Prosecution

In rebuttal, the Prosecution Team submits that this Tribunal is governed by its own Rules and these Rules are silent on the application of the Rule against Duplicity in drafting charges. This rule against duplicity, as it exists in national legal systems, does not, and cannot, apply in the same way in proceedings before international criminal courts. More importantly, the Tribunal should take into account the heinous nature of these crimes and the scale they were alleged to be perpetrated.

On the *Amicus Curiae* Team's submission that the charge is defective due to uncertainty, the Prosecution Team submits that it is premature for anyone to say so without appreciating the particulars contained in the charge. The particulars in the charge are facts that the Prosecution seeks to prove in the course of the proceedings.

The *Amicus Curiae* Team had also submitted that there has been lapse of time from the occurrence of the alleged crimes to the date of these proceedings. This gives rise to probabilities that critical evidence in support of the Defendants' case may not be available, hence significantly prejudicing the Defendants.

1 In response to this, the Prosecution Team refers to the setting up of  
the Extraordinary Chambers in the Courts of Cambodia (ECCC) in  
2005 to hear cases of the Khmer Rouge atrocities from 1975 to 1979.

5 ***Finding***

Having considered the Preliminary Objections raised by the *Amicus Curiae* Team and the Two Applications filed by the *Amicus Curiae* Team and the submissions by both the *Amicus Curiae* Team and the Prosecution Team in the several documents already filed with this Tribunal, and having considered further oral submissions by both parties, it is the unanimous finding of this Tribunal that the Preliminary Objections and Two Applications have little merit and are accordingly dismissed.

Before we terminate these preliminary proceedings and proceed to hear evidence in respect of the two Charges, this Tribunal wishes to state for the record the following:

20 **On the issue of its retrospective jurisdiction**

- (1) This trial is not criminalising what was not criminal before. There is no issue of *autre fois acquit or autre fois convict*. The Charter empowers the KLWCT to take cognisance of, and to adjudicate on, heinous crimes under a plethora of pre-existing international statutes and norms.
- (2) Many other international tribunals have similar retrospective jurisdiction *albeit* within specified time periods that commenced before the tribunals were established. The KLWCT has no such time limits. It is empowered to take cognizance of international crimes committed in unlimited time periods prior to its establishment.
- (3) It is also noteworthy that many of the international crimes mentioned in the charge sheet are continuing.
- (4) We were invited by the learned counsel for the Prosecution to follow the model of the Nuremberg Tribunal whose retrospective jurisdiction had no express time limits as opposed to some other international tribunals whose powers

were confined to time periods. We are inclined to accept this suggestion because our Charter permits us to adjudicate on crimes against peace which many *ad hoc* tribunals do not have the power to adjudicate on.

On the issue of the immunity of sovereign States from criminal process in foreign courts

(1) Can foreign States be impleaded before the KLWCT? Our Charter in Chapter III, Article 6(b) is explicit that "if the Charge involves a Sovereign State, a current head of state/government, service of a copy thereof to any relevant Embassy or High Commission shall suffice and the accused is deemed to have been served".

(2) The jurisdiction that international law doctrine against impleading a foreign State must be read subject to a more peremptory norm of international law (*jus cogens*) that prohibits the crime of genocide, as can be seen in the following two ICJ judgments, namely:

(i) *Democratic Republic of the Congo v. Rwanda* (2006) at para 64;

(ii) *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 26 Feb. 2007 (ICJ Judgment) at para. 161.

(3) We are in agreement with the Prosecution's citation in the ICJ Case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia & Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at p. 113 that "The Court observes that duality of responsibilities continues to be a constant feature of international law" which is "reflected in Article 25, para 4 of the Rome Statute for the International Criminal Court"...."Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred."

- 1 For the Prosecution : Prof. Gurdial Singh Nijar, Tan Sri Abdul Aziz  
Abdul Rahman, Mr.Avtaran Singh, Ms. Gan Pei Fern, Mr. Nizamuddin  
Hamid, Dr. Sharizal M Zin, Ms. Rafika Shari'ah, Ms. Mazlina Mahali  
and Ms. Diyana Sulaiman. *Amici Curiae* Team : Mr. Jason Kay Kit  
Leon (Head), Ms. Larissa Jane Cadd, Dr. Abbas Hardani, Prof. Dr.  
Rohimi Shapiee, Dr. Rohaida Nordin and Dr. Matthew Witbrodt.  
Registrars : Mr. Musa Ismail, Ms. Fiffy Armiza Muhammad Sahit  
(Assistant) and Mr. Razif Mohamed Rosli (Assistant).

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## **APPENDIX C**



1           **AMICUS CURIAE INTERLOCUTORY APPEAL OF**  
RULING ON PRELIMINARY OBJECTIONS RAISED  
BY THE AMICUS TEAM  
ISSUED BY  
5           **THE KUALA LUMPUR WAR CRIMES TRIBUNAL,**  
DATED 20 NOVEMBER 2013<sup>46</sup>

10           **Kuala Lumpur War Crimes Tribunal - Case No. 3-CHG-2013 and**

Case No. 4-CHG-2013

15           Coram: Judge Tan Sri Dato' Haji Lamin Bin Haji Mohd Yunus (President), Judge Tunku Sofiah Jewa, Judge Shad Saleem Faruqi, Judge Mohd Saari Yusuf, Judge Salleh Buang, Judge John Philpot and Judge Tunku Intan Mainura.

20           22 November 2013

I. INTRODUCTION

- 20           1. By Ruling dated 20 November 2013, the *Coram* of the Kuala Lumpur War Crimes Tribunal ruled that the two (2) preliminary objections submitted by the *Amicus Curiae* for Amos Yaron and the State of Israel regarding the temporal jurisdiction of the Tribunal and the sovereign immunity of the State of Israel under the current circumstances.
- 25           2. The Ruling also includes decisions concerning two (2) applications regarding international standards concerning the formulation of charges and alleged uncertainty resulting from the formulation of the charges.
- 30           3. The present appeal, which is being submitted concurrently with a second interlocutory appeal of distinct subject matter and seeks a separate remedy, is warranted on the basis that a correction of an error of law within the Ruling concerning the issue of the jurisdiction of the Tribunal over the alleged conduct of Israel is required.

40           <sup>46</sup> See Ruling on Application to Appeal at p.297, line 10-13.

## II. SUBMISSION

- 1           4. The appeal should be allowed to correct a grievous error of law leading to the decision reached by the *Coram* in the Ruling concerning the international legality of the Tribunal extending jurisdiction over the allegations made in relation to the State of Israel. The *Amicus Curiae* Team humbly requests the *Coram* to articulate the correct legal standard and review the findings of the Ruling.
- 5           5. The Kuala Lumpur War Crimes Tribunal was established with international legal personality and the legal capacity required "for the exercise of their functions ad fulfilment of their purposes."<sup>47</sup> The purpose of the Tribunal is to bring war criminals to justice to "guarantee lasting respect for and the enforcement of international justice."<sup>48</sup> Furthermore, the Charter clearly indicates that in the event of a lacuna in the rules, "the Tribunal shall adopt rules which comply with international standards of fairness and justice."<sup>49</sup> Consonant with contemporary and established international legal framework and practice, an international criminal tribunal cannot endeavour to uphold and enforce rules of international law while simultaneously abrogating the rules of international law in the dispensation of its duties.<sup>50</sup>
- 10           6. The decision rendered in regards to the issue of the jurisdiction of the Tribunal over the offences is contrary to customary international law and the decisions of international adjudicatory bodies. In the ruling, the *Coram* apparently only considered the nature of the offence committed and the status of the offence under international law.<sup>51</sup> Furthermore, the *Coram* insisted that the assertion of jurisdiction rested also in the provisions of the Charter itself.<sup>52</sup>
- 15           20           25           30

<sup>47</sup> Article 4 of the Charter of the Kuala Lumpur Foundation to Criminalise War (hereinafter "the Charter").

<sup>48</sup> Preamble of the Charter.

<sup>49</sup> Part II, Article 2(k) of the Charter.

<sup>50</sup> *Prosecutor v. Simic et al., Ex Parte Confidential: Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness*, 27 July 1999, paras. 9-22.

<sup>51</sup> The Ruling, pp. 3, 6-7.

<sup>52</sup> The Ruling, p. 7.

- 1      7. In an attempt to support its decision, the *Coram* referred to  
the Application of the Convention on the Prevention and  
Punishment of the Crime of Genocide<sup>53</sup> at paras. 161,<sup>54</sup> 173<sup>55</sup>  
and 179,<sup>56</sup> and *Armed Activities on the Territory of the Congo* (New  
5      Application: 2002)<sup>57</sup> at para. 64.<sup>58</sup> However, the information  
cited does not support the contention of the *Coram* that  
jurisdiction exists over the offence under international law.
- 10     8. In particular, in referring to the Armed Activities on the  
Territory of the Congo (New Application: 2002) decision, the  
*Coram* cites para. 64. The relevant portion of paragraph 64  
reads as follows:

15     *The Court observes, however, as it has already had occasion  
to emphasize, that the erga omnes character of a norm and the  
rule of consent to jurisdiction are two different things ... and  
that the mere fact that rights and obligations erga omnes may  
be at issue in a dispute does not give the Court jurisdiction to  
entertain that dispute.*

- 20     The International Court of Justice (ICJ), by a vote of 15 to two, held that  
despite the fact that genocide constituted an obligation that was *erga  
omnes* or *jus cogens* in nature, the fact that a reservation to Article IX of  
25     the Genocide Convention had been entered by Rwanda precluded the  
automatic assertion of jurisdiction of the ICJ over the proceedings and  
the failure to obtain consent from Rwanda regarding the jurisdiction  
of the ICJ precluded the assertion of jurisdiction of the ICJ over the  
dispute.<sup>59</sup>

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<sup>53</sup> *Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, I.C.J. Reports 2007*, p. 3.

<sup>54</sup> The Ruling, p. 7.

35     <sup>55</sup> The Ruling, p. 7. It must be noted, however, that the original transcript for the  
quotation in the Ruling is erroneous, as the quotation appears on p. 77 at para.  
173 in the judgment, not on p. 43 at para. 113 as the Ruling suggests.

<sup>56</sup> The Ruling, p. 4.

<sup>57</sup> *Democratic Republic of the Congo v. Rwanda, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6.

<sup>58</sup> The Ruling, p. 7.

40     <sup>59</sup> *Democratic Republic of the Congo v. Rwanda, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at paras. 125-128.

9. Furthermore, the references to the decision in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* do not support the findings of the Coram. Para. 161 refers to a portion of the judgment which establishes the customary international legal and *jus cogens* nature of the prohibition against genocide. Meanwhile, para. 173 of the case refers to the "duality of responsibility" in relation to obligations *erga omnes*; and State responsibility and the individual criminal responsibility / liability of an individual. Meanwhile, at para. 179, the ICJ holds that it does have jurisdiction over the dispute concerning State obligations regarding genocide on the basis of Article IX of the Genocide Convention.
10. While the ICJ asserted jurisdiction, it was not due to the basis of state responsibility or the nature of the wrongful act but arose from expressed consent.<sup>60</sup> The decision rested upon the explicit wording of Article IX of the Genocide Convention, which confers jurisdiction over disputes between two parties to the Genocide Convention following the request of any party to the dispute.
11. The rules regarding explicit consent to jurisdiction are part of the corpus of customary international law. The requirement of an international adjudicatory body to obtain consent from a State before that body may lawfully exercise jurisdiction over a dispute has been consistently upheld.<sup>61</sup> International courts and tribunals cannot exercise jurisdiction over States without explicit consent due to the nature and limitations of the contemporary international legal system.<sup>62</sup> Furthermore, no peremptory norm requires States to consent to jurisdiction where questions concerning the compliance with a peremptory

<sup>60</sup> *Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, I.C.J. Reports 2007*, p. 3, at paras. 147-148, 450 and 471.

<sup>61</sup> For example, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), *Judgment, I.C.J. Reports 2007*, p. 3, at para. 148; *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 90, at para. 29; and *Armed Activities on the Territory of the Congo (New Application: 2002) (Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at paras.

<sup>62</sup> *Democratic Republic of the Congo v. Rwanda, Jurisdiction and Admissibility, Declaration of Judge Elaraby, I.C.J. Reports 2006*, p. 82, paras. 2 and 7.

1 norm are presented,<sup>63</sup> nor does the status of a rule of jus cogens  
5 provide a basis to overthrow the principle of consent.<sup>64</sup>

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12. The bases for the present interlocutory appeal arise from  
5 the purpose of the Tribunal to adjudicate over international  
criminal allegations; the obligation for the Tribunal, as an  
international adjudicatory body, to render decisions and  
judgments in a manner consistent with general principles of  
international law and customary international law; and the  
need to remedy the error of law inherent in the Ruling of 20  
November 2013. Respect for the rule of law and the sound  
administration of justice would not be served by the prospect  
of the Tribunal issuing a decision or judgment which is neither  
consonant with, nor supportable by, international law.

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### III. CONCLUSION

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13. For the aforementioned reasons, the interlocutory appeal of the  
*Amicus Curiae* Team should be allowed and the *Coram* should  
grant remedy either in the form of a summary second ruling  
consistent with general principles of international law and  
customary international law with the option of oral arguments  
to be heard on the matter if the honourable Tribunal requires  
25 additional clarification; and issue an advisory opinion instead  
of a judgment with respect to charge no 4 against the State of  
Israel.
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14. Additionally, due to the motion, the *Amicus Curiae* Team  
humbly requests a stay on the proceedings pending a decision  
on the interlocutory appeal.

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<sup>63</sup> Democratic Republic of the Congo v. Rwanda, *Jurisdiction and Admissibility, Separate Opinion of Judge ad Hoc Dugard*, I.C.J. Reports 2006, p. 86, para. 3.

<sup>64</sup> Ibid., para. 14.

Dated 22nd day of November 2013.

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**المدعي العام للجنة جرائم الحرب في كوالالمبور**

**ضد**

**عاموس يارون ودولة إسرائيل**

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**محكمة جرائم الحرب كوالالمبور - قضية رقم 3 – CHC 2013 قضية رقم 4 – 2013**

**أعضاء المحكمة:** القاضي تان سري داتو حاجي لامن بن حاجي محمد يونس (رئيس)، القاضي توكو صفيه جيو، القاضي شاد سليم فاروقى، القاضي محمد ساري يوسف، القاضي صالح بوأنغ، القاضي جون فيلفوت و القاضي توكو إتان مينورا.

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**25 تشرين الثاني / نوفمبر 2013.**

**القانون الدولي العام - جريمة الحرب - جريمة ضد الإنسانية - الإبادة الجماعية - محاكمة الدولة ذات السيادة - حصانة الدولة - مسؤولية الدولة تجاه أجهزتها - القواعد الأممية - مدى اختصاص**

**المحكمة - مسؤولية القيادة.**

**إجراءات - الاتهامات الموجهة ضد المدعي عليهم، غياب المدعي من المحكمة - عدم تسليم المدعي عليهم لاختصاص المحكمة - مثلول فريق الدفاع (مجموعة أصلقاء المحكمة) أمام المحكمة نيابة عن المدعي عليهم.**

**الإثباتات - عباء الإثباتات - إثبات نية الإبادة الجماعية - العلم - القصد الجنائي - نتائج**

**تحقيقاتلجنة كاهان وتقاريرها - أثر قرارات الجمعية العامة للأمم المتحدة لإثبات الإبادة الجماعية.**

**عقدت جلسة محكمة جرائم الحرب كوالالمبور (tribunals/المحكمة) لسماع تحفظين ضد عاموس**

**yaron (المتهم الأول) و دولة إسرائيل (المتهم الثاني).**

**بينما وجهت إلى المتهم الأول تهمة ارتكاب جرائم الحرب وجرائم ضد الإنسانية وجريمة الإبادة**

**25**

**بينما وجهت إلى المتهم الأول تهمة ارتكاب جرائم الحرب وجرائم ضد الإنسانية وجريمة الإبادة**

**28**

الجماعية، وُجّهت إلى المتهم الثاني جريمة الإبادة الجماعية وجرائم الحرب، وهذه التهم (تفاصيلها) تم إخطار المتهمين بما حسب النظام، وفُرِّت علينا في المحكمة من قبل المسجل عندما بدأت هذه الإجراءات. لا أحد من المتهمين حضر هذه الإجراءات، غير أن فريق الدفاع المعروف بمجموعة أصدقاء المحكمة مثلت بالنيابة عنهم.

في مستهل الإجراءات، قدمت مجموعة أصدقاء المحكمة اعتراضين أوليين، فال الأول يجادل أن ثمة خللاً في الشكاوى المرفوعة ضد المتهم الأول، والثاني يجادل أن دولة إسرائيل لا يمكن اتّهامها في هذه الإجراءات بموجب حصانة الدولة.

وأفادت مجموعة أصدقاء المحكمة (فريق الدفاع) بأن الاتّجاه السائد في المحاكم الجنائية الدولية الحديثة هو إما أن تتمتع المحكمة بالاختصاص على الأفعال التي ارتكبت بعد أن يتم تشكيلها، كما هو الحال في المحكمة الجنائية الدولية (ICC)، أو أن يكون اختصاصها لفترة زمنية محددة كما هو الحال في المحكمة الجنائية لرواندا (CTR) والدّوائر الاستثنائية في محاكم كمبوديا (ECCC).

كما أضافت مجموعة أصدقاء المحكمة بأن هذه المحكمة تم إنشائها في 6 حزيران/يونيو 2008 بيد أن الأفعال المزعوم ارتكابها من قبل المتهم الأول في التهمة رقم 3 وقعت في أيلول 1982، والأفعال المزعوم ارتكابها من قبل المتهم الثاني في تهمة رقم 4 بدأت منذ 1948 واستمرت إلى يومنا الحاضر.

وقدّمت مجموعة أصدقاء المحكمة (فريق الدفاع) كذلك أن دولة إسرائيل لم تُحضر هذه الإجراءات، وبالتالي لم تكن عاشرة لاختصاص هذه المحكمة، كما تم التقدّم من قبل مجموعة أصدقاء المحكمة بأن دولة إسرائيل تتمتع بالحصانة ضد جرائم الإبادة الجماعية وجرائم الحرب؛ وبناء على ما سبق من المفروض رفض تهمة رقم 4.

قدم فريق النيابة في ردّه أن قضية الاختصاص يجب البت فيها بالرجوع إلى الميثاق التأسيسي للمحكمة، وليس هناك حد زمني في الميثاق، بل الميثاق يطابق الاختصاص المؤقت غير محدد الزمن للمحكمة العسكرية في نورميرغ أو المحكمة العسكرية الدولية للشرق الأقصى

1 أما بالنسبة للاعتراض التمهيدي الثاني فقد دافع فريق الادعاء بأن هاتين التهمتين ضمن جرائم حرب الدولية والتي تم إصدار القرار من قبل محكمة دولية بأنه ليست للدول حصانة ضد الجرائم أمام هذه المحاكم.

5 وقبل البدء بالإجراءات قدمت مجموعة أصدقاء المحكمة طلين (2) لإبطال الدعوى ضد المتهمين، والمبررات للطلبات على ما يلي:

- (1) أن في هذه التهمة خللا بالإزدواجية أو الإزدواجية الكامنة أو هما معا  
 (2) أن في هذه التهمة خللا لعدم اليقين  
 10 (3) أن في هذه التهمة تعسفا في الإجراء، أو أن فيه قمعا أو هما معا

وتدعي مجموعة أصدقاء المحكمة أن هناك جرائم متعددة ضمن تهمة واحدة، كما أن هناك أشكال متعددة للحالات الإجرامية ضمن تهمة واحدة. وتؤكد مجموعة أصدقاء المحكمة أنه يجب الالتزام بصرامة القوانين ضد الإزدواجية في الإجراءات الجنائية.

15 للطعن في هذه الدعوى، أكد فريق الإدعاء أن هذه المحكمة تحكمها قواعدها الخاصة، وهذه القواعد سكتت عمّا يتعلق بتطبيق القانون ضد الإزدواجية في صياغة التهم، كما أن القانون ضد الإزدواجية لا يطبق بل لا يمكن تطبيقه في الإجراءات أمام المحكمة الجنائية الدولية كما هو الحال في النظم القانونية الوطنية والأهم من ذلك أنه ينبغي للمحكمة أن تأخذ في الاعتبار طبيعة هذه الجرائم البشعة والنطاق الذي قيل ارتكبت فيه هذه الجرائم.

وبعد إمعان النظر في الاعتراضات المقدمة من قبل الفريقين، قررت المحكمة بالإجماع بأن الاعتراضين الأوليين، وكذلك الطلبين لا تتحمل وزنا، وعليه تم رفضها.

25 القضية التي ادعيت ضد المتهم الأول تمحور في أن المتهم ارتكب جرائم الحرب، وجرائم ضد الإنسانية وجريمة الإبادة الجماعية بوصفه القائد الإسرائيلي العام في السيطرة العسكرية على مخيم صبرا وشاتيلا للاجئين في إسرائيل - لبنان المحتلة في أيلول 1982 حيث إن هذا الأخير سهل

وسمح عن قصد بمذمة سكان هذين المхجمين. وهذه الجرائم تعد انتهاكاً لمجموعة من الأمور وهي:  
اتفاقية جنيف الرابعة لعام 1949، اتفاقية منع الإبادة الجماعية لعام 1948، القواعد الأممية،  
القانون الدولي الإنساني وكذلك المادة 9 و 10 و 11 من الفصل.

قضية الادعاء ضد المتهم الثاني تتمثل في أن الدولة الإسرائيلية ارتكبت منذ عام 1948 إلى هنا  
الوقت وبشكل منتظم سلسلة من الأفعال وهي، القتل، التسبب بالحرق ضرر بدني خطير، وفرض  
ظروف معيشية من شأنها أن تؤدي إلى تدمير مادي - بني إهلاك الشعب الفلسطيني بشكل كلي  
أو جزئي.

هذه القوانين تنص على جريمة الإبادة الجماعية في القانون الدولي متضمناً اتفاقية منع جريمة  
الإبادة الجماعية والمعاقبة عليها 1948 (اتفاقية الإبادة الجماعية) وبخاصة في المادة 2، والتي  
تعاقب عليها بموجب المادة 3 في الاتفاقية المذكورة. كما تتضمن جريمة الإبادة الجماعية بموجب  
المادة 10 من الميثاق.

واستدعت النيابة 11 شهوداً بعضهم أدلو بشهادتهم أمام المحكمة شفويًا وبعضهم أدلو  
بشهادتهم عن طريق سكالبي.

## قضايا

### ضد المتهم الأول:

- 1 عباء الإثبات
- 2 الإثبات على نية الإبادة الجماعية
- 3 مسؤولية الدولة تجاه تصرفات أحدهما أو رعايتها.
- 4 العلاقة بين الميليشيات اللبنانية والمتهم الأول.
- 5 مدى علم للمتهم الأول بالأفعال المرتكبة من قبل الميليشيات

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- 1 6 تأثير تقرير ودراسات لجنة كاهان.
- 7 الفشل في توجيه الاتهام ضد أريل شارون
- 8 أثر قرارات الجمعية العامة للأمم المتحدة على إثبات جريمة الإبادة الجماعية
- 9 مسؤولية القيادة
- 5 10 ما هي الجرائم التي ارتكبها المتهم الأول.

#### ضد المتهم الثاني:

- 10 1- ما إذا كان اختصاص المحكمة مفتوحاً فيما يخص التحديد الزمني.
- 2- ما إذا كانت التهمة يمكن توجيهها إلى الأشخاص الطبيعيين فقط.
- 3- المساندة السيادية للدولة إسرائيل وأثر القواعد الأممية
- 4- ما هي الأفعال التي تعد من الإبادة الجماعية
- 5- هل هناك قصد جنائي

#### قررت اللجنة

#### ضد المتهم الأول:

- 15 1- أن عبء الإثبات يتجاوز أعلى شك. وعليه يجب إثبات جميع عناصر المحالة فوق أدنى شك. وهذا يطبق على جرائم الحرب، وجرائم ضد الإنسانية وجرائم الإبادة الجماعية.
- 2- أنه يمكن إثبات قصد الإبادة الجماعية عن طريق الاستنتاج على ضوء كل الحقائق، ولا يتطلب أي عهدة محددة. وفي حالة وجود تفسير بديل لحالة المتهم الذئبة فإن النيابة تعتبر عاجزة؛ وعليه فالاستنتاج يجب أن يكون هو الاستنتاج المعقول الوحيد المتاح في تلك البيئة.
- 25 3- أن الدولة تكون مسؤولة إذا ارتكبت أحجزها أو أحد رعاياها أو مجموعة منها والتي يمكن عزو تصرفاً لها قانوناً إلى الدولة ارتكب أي فعل من الأفعال التي نصت عليه المادة الثالثة من اتفاقية منع الإبادة الجماعية.
- 28 4- أن النيمة أمام المحكمة تدل بوضوح وبدون أدنى ريب أن المتهم الأول وقوات الدفاع

الإسرائيلية (أي دي أيف) تعاونا مع مليشيات الكتائب واستخدمنا المليشيات لتنفيذ السياسة الإسرائيلية في تدمير الشعب الفلسطيني. وقد اشترك المتهم الأول في عمل ذلك مع المليشيات شخصيا.

5- (أ) أنه ليس هناك مجال للشك بأن المتهم الأول على علم بالأفعال المرتكبة من قبل المليشيات حيث إن المتهم الأول أرسل هذه المليشيات إلى خيم صبرا وشاتيلا مع علمه بما ستقوم به المليشيات من المهام، وبما أن التقارير أوضحت أن ثمة عمليات القتل فإن المتهم أخفق في إدارته بوصفه قائد قوات الاحتلال في حماية السكان المدنيين.

(ب) وتدل البينة على أن المتهم الأول رفض أن يحمي السكان الفلسطينيين في كلا المخيمين عن وعي، وليس هذا فحسب بل تجاوزت مسؤوليته ذلك حيث إنه والقوات الإسرائيلية استخدمنا المليشيات لتدمير الشعب الفلسطيني في المخيمين، حيث تم بإبلاغه عن سير عملية المجزرة طوال الوقت، وأن الاستباط المعقول الوحيد هو أن المتهم الأول يقصد القتل الجماعي وأنه يجب تدمير السكان الفلسطينيين.

6- المحكمة ليست ملزمة بالأخذ بتقرير لجنة كاهان ولكن ملاحظاتها الواقعية مفيدة في البحث عن الحقيقة.

7- وفيما يتعلق بفشل المحكمة في توجيه الاتهام ضد أريل شارون، فهذا الأمر راجع إلى المدعي العام، قوله أن يقرر إلى من توجه التهمة وليس للمحكمة التدخل في سلطة النيابة العامة.

8- أما ما يتعلق باستخدام قرارات الجمعية العامة للأمم المتحدة لإثبات الإبادة الجماعية فنرى المحكمة أن قرار الجمعية العامة عن قصد ارتكاب الإبادة الجماعية غير ملزم، ولكن يمكن الاستفادة منه لتقدير نوايا كل من المتهمين.

9- وما دام أن المحكمة قد تأكدت أن المتهم الأول مسؤول عن الجرائم المرتكبة شخصيا، فإنها (المحكمة) قد أهلت اعتبار المتهم الأول مدانًا بسبب مسؤوليته القيادية

10- أما بخصوص الإثبات، فإن المحكمة أفادت أن المتهم الأول مدين بجرائم ضد الإنسانية وجريمة الإبادة الجماعية، وامتنعت المحكمة عن توجيه تهمة جرائم الحرب ضده حيث إن ذلك يكون إدانة متراكمه.

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## ضد المتهم الثاني

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1- جرائم الإبادة الجماعية وجرائم الحرب التي وجهت إلى المتهم الثاني لم يوجد بسبب الميثاق، بل كانت موجودة منذ منتصف القرن الماضي. ولكن الميثاق وضع آلية للتمكن من تحقيق هذه التهم والتقييم باللاحقة القضائية فيها، ولإنشاء محكمة جرائم الحرب للفصل في هذه التهم. ولم يحدد الميثاق أي تاريخ أو إطار زمني كما هو الحال في المحكمة الجنائية الدولية ليوغوسلافيا السابقة (أي سي تي واي) والمحكمة الجنائية الدولية لرواندا (أي سي تى أر) والدوائر الاستثنائية في محاكم كمبوديا (أي سي سي سي)، وترى المحكمة أنها لم تُمنع من الفصل في قضايا وقعت في العقود الماضية، كما أكدت أن اختصاصها مفتوح وغير مقيد بأي فترة زمنية.

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2- ناقشت مجموعة أصدقاء المحكمة أنه لا يمكن توجيه التهمة ضد المتهم الثاني وذلك أن الميثاق قدر الاختصاص على الأشخاص الطبيعيين فقط وليس على أمة أو دولة؛ وعلى هذا الأساس قبل مجموعة أصدقاء المحكمة أن يكون للمحكمة اختصاص على "الحكومة". وفي جانبه أفادت المحكمة أن كونها محكمة ضمير والتي أنشئت للفصل في الجرائم الخطيرة ترفض هذا التفريق التقني الخفي بين "الحكومة" و "الدولة"؛ بالتعليل أن الدول تباشر أعمالها بواسطة (أجهزتها) الحكومية. إضافة إلى ما سبق، فإن الفصل الثالث من المادة 6 (ب) من الميثاق دليل قاطع على أن المحكمة مخولة لحاكمية الدول والأفراد على حد سواء.

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3-(أ)- وقدمت مجموعة أصدقاء المحكمة الاحتجاج بأن القانون الدولي لم يسمح بمحاكمة دولة إسرائيل كمتهم، يدل هذا المفهوم على أن الدولة لها حصانة ضد محاكمتها في محكمة أحنجية إلا إذا هي وافقت على ذلك، وفي بعض الدول، الدولة تدافع غيرة عن مفهوم حصانة الدولة "المطلقة"، ولكن بعض الدول تفضل التفسير "المقييد" كما هو الحال في الولايات المتحدة الأمريكية. (ب) ويدل فقه محكمة العدل الدولية (أي سي جي) والمحاكم الوطنية أن تحريم الإبادة الجماعية كمعيار للقاعدة الآمرة للقانون الدولي أمر معترف به، ومن ناحية أخرى، لا يوجد أي سلطة قانونية تدل على أن مبدأ الحصانة الدولية تتطلب القواعد الآمرة. (ج) من للتعرف عليه قانونيا أنه عند وقوع تعارض بين مبدئين من المبادي القانونية، أن يرجح الأعلى منها رتبة في الأهمية. وعليه فإن المحكمة ترى بأن المبدأ ضد احتمام دولة أحنجية أقل رتبة في الأهمية من ذلك الذي يحزم الإبادة

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الجماعية، الأمر الذي أدى إلى أن التهمة الموجهة ضد المتهم الثاني يجب أن تزيد للمحاكمة. (د) مبدأ حصانة الدولة المطلقة من التحقيقات عن الجرائم مثل جرائم الإبادة الجماعية يبدو أنه غير مناسب مع بعض التطورات الأخلاقية التي لحقت بالقانون الدولي، الحصانة المطلقة للدولة مبدأ مهجور وبناء على عيوب من السوابق فإن هذه 5 الحكمة تمبل إلى التحرر من سيطرة هذا المبدأ القديم، (ه) ومن الأسباب المعتمدة لرفض الحكمة مبدأ حصانة الدولة المطلقة ضد الملاحقة القضائية لجرائم الإبادة الجماعية وجرائم الحرب والجرائم ضد الإنسانية أن القانون الدولي المتعلق بالحرب والسلام والإنسانية كان يطبق بشكل فيه ظلم فاضح؛ فالدول الصغيرة والضعيفة معرضة بشكل دوري لعقوبات 10 والتدخل العسكري وتغيير الحكومة. لكن الأعمال الوحشية والفظيعة التي تعرضت لها الأمريكية اللاتينية وأفريقيا وأسيا من قبل الأمم القوية في الأمريكية الشمالية وخلفائها تذهب بدون أي تحقيق ولا عقاب. (و) ولاحظت المحكمة أن مرتكبي مجرزة صبرا وشاتيلا لم يتعرضوا لأي عقاب ولكنهم بالعكس أعطوا مكافأة. وقد أبلغ المدعي العام العسكري 15 (أي دي ييف) فريق حقوق الإنسان في إسرائيل بأنه تم إيقاف التحقيقات عن الغارة الجوية الإسرائيلية التي قتلت 21 فرداً من أسرة الساموني.

4- (أ) وتعني الإبادة الجماعية بشكل مبسط أي فعل ارتكب يقصد الإهلاك الكلي أو 20 الجرئي بجماعة قومية أو عرقية أو عنصرية أو دينية وهكذا. وتعريف الإبادة الجماعية موجود في الباب الأول في المادة العاشرة من الميثاق، وأخذ هذا التعريف حرفياً من المادة الثانية والثالثة من اتفاقية منع الإبادة الجماعية. (ب) وقد استمعت المحكمة إلى شهود، وحققت من الأدلة التي تشير بوضوح إلى سلسلة من الجرائم المدعاة منذ عام 1945 إلى وقتنا الحاضر. وهذه الأفعال البشعة المتكررة ما زالت ترتكب ضد سكان فلسطين. وليس هذه الأعمال منعزلة في حرج الأوضاع الحالية؛ ولكنها صور للأعمال 25 الشديدة المرتكبة ضد سكان فلسطين، وتم في السابق وإلى الآن إنكار كبير من هذه الأعمال الشديدة من قبل مجلس الأمن التابع للأمم المتحدة، والجمعية العامة للأمم المتحدة وغيرها من المنظمات الدولية. (ج) وتقدم مجموعة أصدقاء المحكمة بحجة ساذحة مفادها أنه لا توجد الإبادة الجماعية في فلسطين بدليل أن عدد سكان فلسطين لم يزداد. وأنه لا يمكن أن تكون ثمة الإبادة الجماعية إلا في حالة أن هناك انتهاكاً ملحوظاً في عدد سكان فلسطين، وترى المحكمة أن هذا الاحتجاج غير معقول وغير إنساني. وفي 28 التتحقق ما إذا كانت هناك إبادة جماعية مرتكبة فإن المعتبر ليس هو العدد، بل إذا قتل

- 1 شخص واحد على حساب عرقه، أو إثنية، أو دينه وبنيه قتل الآخرين بالسبب نفسه  
فإن ذلك يعتبر إبادة جماعية.
- 5- ومن الأهمية بمكان أن هذه الأفعال لم تُقْتَل توجه ويشكل متهجي إلى هذه الجماعة نفسها ومن قبل هؤلاء المجرمين أنفسهم منذ أكثر من 67 سنة. ويدل حجم هذه الجرائم  
5 البشعة التي ارتكبت وطبيعتها العامة على قصد الإبادة الجماعية. وقبلت المحكمة  
الإثباتات التي أدلى بها الشهود الخبراء لجهة الادعاء والتي مفادها أن التطهير العرقي  
للشعب الفلسطيني يعتبر مأساة تاريخية عالمية والتي هي التسليحة للمتعبد من سياسة  
الدولة للحكومات الإسرائيلية المتعاقبة منذ 1948.

- 10 وقررت المحكمة بالإجماع أن المتهم الأول بدون أدنى شك ثبتت إدانته بالجرائم ضد الإنسانية  
وجرائم الحرب والإبادة الجماعية، والمتهم الثاني مدان بجريمة الإبادة الجماعية.

#### **السوابق التي أحالت إليها المحكمة:**

- 15 الأعمال المسلحة في أراضي الكونغو(تطبيق جديد: 2002)  
(جمهورية الكونغو الديمقراطية ضد رواندا)، اختصاص و مقبولية، قضاء، تقاريرأي سي جي  
2006، ص 6.  
تطبيق اتفاقية منع الإبادة الجماعية والمعاقبة عليها (اليونسة والفرنك ضد سريليا وموتنينغرو)،  
قضاء، تقاريرأي سي جي 2007، ص 43.
- 20 مكتب المدعي العام جرائم الحرب كوالالبور ضد جورج W بوش و أنتوني إيل بليار تقارير  
المحكمة الجنائية الدولية كوالالبور 2011، ص 1.  
KLWCT  
كريستيشن المحكمة الجنائية الدولية ليوغوسلافيا السابقة (ICTY) 19 نيسان /أبريل 2004.  
المدعي العام ضد دواغوجوب كوناراك، رادومير كوفاك و زوران فوكوفيتش، 12 حزيران / يونيو  
2002.  
بلوكبورغار ضد الولايات المتحدة 284 يو أي 304، 299 (1812).  
باغوسورا وانسينغيوميا المحكمة الجنائية الدولية لرواندا (ICTR)

- 1 سكونار للصرافة ضد ماكفاددون 11 يو ايس 136 (1812)
- 5 ميخائيل ضد سلطان جومر 149 Q1 (1894)
- قضية بورتو أليساندرا (1920) 797AC
- قضية شركة دوف للتطوير ضد حكومة كلاتنان (1924) 485 AC
- قضية كريستينا (1938) كومولث أستراليا ضد ميدفود (مالزيا) أنس دي إين برهاد ضد أنور (1990) 475 MLJ 1
- 10 أدميرال الفلبينية (1976) 214 WLR 2
- شركة ترنديس للتجارة المحدودة ضد البنك المركزي النيجيري
- القضايا والاتفاقيات التي أحالت إليها المحكمة
- 15 -اتفاقية هاغيو (Hague) عن الحروب الأرضية 1907
- اتفاقية جنيف الرابعة 1949
- اتفاقية منع الإبادة الجماعية 1948
- ميثاق نورمبرج 1945
- الوثائق التي أحالت إليها المحكمة
- 20 تقرير لجنة كاهان 1983
- تقرير شون ماكريابد 1983.

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1 تان سري داتو حاجي لامن بن حاجي محمد يونس، رئيس محكمة جرائم الحرب  
كوالالمبور ( يقدم القرار الصادر عن المحكمة)

5 جلسات محكمة جرائم الحرب كوالالمبور<sup>1</sup> (المحكمة) لاستماع إلى تحنتين وجهتا إلى عاموس يارون (المتهم الأول) ودولة إسرائيل (المتهم الثاني). وجهت إلى المتهم الأول تحنة ارتكاب جرائم الحرب والجرائم ضد الإنسانية وجرائم الإبادة الجماعية بيد أن المتهم الثاني اتهم بارتكاب الإبادة الجماعية وجرائم الحرب.

الدعوى الموجهة ضد المتهم الأول كالتالي:

10 "ارتكب المتهم عamos يارون جرائم الحرب والجرائم ضد الإنسانية وجريمة الإبادة الجماعية بوصفه القائد الإسرائيلي العام للسيطرة العسكرية في مخيم صبرا وشاتيلا لللاجئين في إسرائيل - لبنان المحتلة في أيولو 1982 عندما سهلت وسمحت بمذبحة سكان هذين المخيمين قصد، وهو بذلك قد انتهك اتفاقية هاغ (Hague) لرعاية مصالح الأرض لسنة 1907، واتفاقية جنيف الرابعة لسنة 1949، واتفاقية منع الإبادة الجماعية لسنة 1948، وقانون نورميرج (1945) قرار نورميرج 15 (1946) ومبادئ نورميرج (1946)، وعرف القانون الدولي، القواعد الأممية، وقوانين الحرب، وقانون الدولي الإنساني.

الدعوى الموجهة ضد المتهم الثاني كالتالي:

20 " ارتكبت دولة إسرائيل منذ 1948 وإلى يومنا هذا (التي تسمى فيما بعد "المتهم الثاني") ضد الشعب الفلسطيني سلسلة من الجرائم وهي كالتالية: القتل، والتسبب بإلحاق ضرر بدني خطير، وفرض ظروف معيشية من شأنها أن تؤدي إلى هلاك مادي متعمدا.

25 على أن التصرف الذي قام به المتهم الثاني يقصد به الإبادة الكلية أو الجزئية للشعب الفلسطيني وهذه الأفعال التي قام بها تعتبر ضمن سلسلة الأفعال الإجرامية ضد الشعب الفلسطيني.

28 <sup>1</sup> انظر ملحق (A) للدعوى الموجلة بتاريخ 22 أغسطس / آب 2013

تم تفيد هذه التصرفات من قبل المتهم الثاني بواسطه مئليه ووكلاه بما في ذلك المذكورين في الملحقين 1 و 2.

مثل هذا النوع من التصرفات يشكل جريمة الإبادة الجماعية بموجب القانون الدولي بما في ذلك اتفاقية منع جريمة الإبادة الجماعية ولها عايم على عام 1984، ولا سيما المادة 2 منها، ويحظر عليها بموجب المادة 3 من جريمة الإبادة الجماعية في الاتفاقية المذكورة. فإنه يشكل أيضاً جريمة الإبادة الجماعية كما هو منصوص عليه في المادة 10 من الميثاق.

مثل تصرف المتهم الثاني بوصفه قوة مختلة أياً كان لعرف القانون الدولي كما جاء في اتفاقية هاغ (Hague) في العام 1907، وهي تتعلق بقانون وأعراف الحرب على الأرض واتفاقية جنيف (Geneva) الرابعة للعام 1949.

يشكل مثل هذا التصرف كذلك جرائم الحرب وجرائم ضد الإنسانية بموجب القانون الدولي.

وهذه الأحكام (مع تفاصيلها) قد وجهت إلى المتهمنين كما ينبغي، كما تلقت في المحكمة المفتوحة من قبل مسجلها في بداية المحاكمة.

لم يكن المتهم حاضراً في المحاكمة، ولكن لكل منهما ممثل من مجموعة أصدقاء المحكمة

#### 1- الاعتراضات الأولية وتطبيقاتها من قبل مجموعة أصدقاء المحكمة

قدمت مجموعة أصدقاء المحكمة الاعتراضين الأوليين في المحاكمة، يشمل أولهما أن هناك عيوب في التهم الموجهة ضد المتهمن الأول والآخر أن دولة إسرائيل لا يمكن أن توجه إليها التهمة في سير هذه الدعوى على أساس أنها دولة تتمتع باللحصنة.

وفيما يتعلق بالاعتراض التمهيدي الأول فإن مجموعة أصدقاء المحكمة يدعون أن الاتجاه الحديث في المحاكم الجنائية الدولية هو إما أن تكون للمحكمة اختصاص على الأفعال التي ارتكبت بعد

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أن يتم تشكيلها، كما هو الحال في المحكمة الجنائية الدولية (ICC)، أو أن يكون اختصاصها لفترة زمنية محددة كما هو الحال في المحكمة الجنائية لرواندا (CTR) والدوائر الاستثنائية في محاكم كمبوديا (ECCC).

وقدّمت مجموعة أصدقاء المحكمة أن هذه المحكمة لاحت إلى الوجود في 6 يونيو عام 2008، في حين أن الجرائم التي أُدعيت أن المتهم الأول ارتكبها المتهم في محكمة رقم 3، وقعت في شهر سبتمبر 1982، بينما الجرائم التي ارتكبها المتهم الثاني برقم 4 وقعت منذ 1948، وتستمر حتى يومنا هذا.

وبحخصوص الاعتراض التمهيدي الثاني قدّمت مجموعة أصدقاء المحكمة أنه ليس هناك سلطة فرض إليها حسب الميثاق الاستئماني إلى أي فعل ضدّ حكومة بلٍد معين، على سبيل المثال، حكومة إسرائيل. وتحتجّ مجموعة أصدقاء المحكمة كذلك بأن القانون الدولي لا يسمح أن توجه ضدّ "دولة إسرائيل" أي محكمة، لأنّها دولة معترف بها من قبل الأمم المتحدة، على أنها دولة مستقلة، ولها حقوقها بموجب القانون الدولي.

وقدّمت مجموعة أصدقاء المحكمة كذلك أن دولة إسرائيل لا تدخل في هذه المحاكمة ومن ثم لا تخضع لاختصاص هذه المحكمة. وقد قدّموا كذلك أن دولة إسرائيل تتمتع بالخصائص ضدّ جرائم الإبادة الجماعية، وجرائم الحرب، ولذلك ينبغي رفض احتمامات رقم 4.

واحتاج نوابه عن فريق الادعاء العام، - فيما يتعلق بالاعتراض الأولي - أن قضية الاختصاص يجب أن يبيّن، وذلك بالرجوع إلى الميثاق الذي ينظم المحكمة. وبينص هذا الميثاق بأنه على أن اختصاص المحكمة وحدودها، يجب أن يتولاه محتوى الميثاق: الجزء الأول، المادة 1. ليس هناك حدّ معين، ولا سيما لم تحدد المادة 7 مهلة زمنية معين. بل إن الميثاق بذلك يدل على ينص الفصل على اللاعدودية في اختصاص المحكمة العسكرية في نورمبرغ (Nuremberg) أو المحكمة العسكرية الدولية للشرق الأقصى.

قدمت مجموعة الادعاء العام أيضاً بأنه قد أدانت المحكمة بوش وبادر من جرائم الحرب المرتكبة في العام 2003 - والذي ينبيء بحسب تشكيلها: وكالة كوالالمبور جرائم الحرب ضدّ جورج بوش

وأندوني بلور، تقارير (KLWCT) للعام 2011، ص 1، والقرار ضد بوش وتشيني ورامسفيلد وغيره يرجع إلى جريمة التعذيب المرتكبة عام 2001.

وفيما يتعلق بالاعتراض الثاني قدمت مجموعة الاعتراض العام بأن هاتين التهمتين من جرائم الحرب الجنائية الدولية تفصل فيها محكمة دولية وأنه لا تملك الدولة الحصانة عن هذه الجرائم أمام هذه المحاكم.

وبعد استئناف المحاكمة قدمت مجموعة أصدقاء المحكمة كذلك الطلبين لرفع التهمة الموجهة إلى المتهمين، وأسس هذين الطلبين كما يلي:

- 1 تحمة معيبة عن الإزدواجية و/أو عن الإزدواجية الكامنة
- 2 أن هذه التهمة معيبة لعدم اليقين
- 3 أن هذه التهمة تعسف في الإجراء، و/أو فيه قمع.

ونيابة عن المتهمين، طلبت مجموعة أصدقاء المحكمة من المحكمة إصدار الأوامر الآتية:

- 1 رفض التهمة الموجهة إلى المتهمين.
- 2 ثبوت الادعاء ضد المتهمين.
- 3 إعادة صياغة التهم وفقاً لمبادئ القانون الجنائي، وتكون بدليلاً للأول.

تدعى مجموعة أصدقاء المحكمة أن هناك جرائم متعددة مدمجة في تحمة واحدة، وعدة أشكال تحمة الإجرام في تحمة واحدة. وقدمت المجموعة أنه لا بد من التقييد بالحكم ضد الإزدواجية في الإجراءات الجنائية.

وفي ردده، قدم فريق الادعاء العام بأن هذه المحكمة تحكمها قواعدها الذاتية وهذه المادة صامدة في صياغة التهم لتطبيق الحكم ضد الإزدواجية، والقانون ضد الإزدواجية كما هي موجود في النظم القانونية الوطنية، لا يمكن أن يطبق بالطريقة نفسها في الدعاوى المعروضة أمام المحاكم الجنائية الدولية.

والأهم من ذلك أنه ينبغي للمحكمة أن تأخذ في عين الاعتبار حجم بشاعة هذه الجرائم المرتكبة.

وفيما قدمته مجموعة أصدقاء المحكمة للمحكمة، أن التهمة معيبة بسبب عدم اليقين، قدّمت 5 مجموعة الادعاء العام أن من السابق لأوانه أن يقول أحداً مثل ذلك دون تقدير تفاصيل الواردة في الاتهام . وتفاصيل هذه التهمة هي الحقائق التي تسعى مجموعة الادعاء إلى إثباتها أثناء المحاكمة .

وباعتبار الاعتراضات التمهيدية التي رفعتها مجموعة أصدقاء المحكمة والطلاب المقدمين من قبلهم، 10 وما قدمته مجموعة الادعاء العام في عدة الوثائق المقدمة إلى هذه المحكمة وكذلك بعد اعتبار التقديم الشفوي من كلا الطرفين، ترى المحكمة بالاجماع أنه لا قيمة ثابتة للاعتراضات التمهيدية والطلابين، فعليه ترى المحكمة رفضها.

قرأت القاضية صفية جوا حكم المحكمة المكتوب أمام الجميع في 20 نوفمبر العام 2013.<sup>2</sup>

## 15 2. دعوى الادعاء العام

فإن الدعوى ضد المتهم الأول هو أن المتهم الأول قد ارتكب جرائم حرب، وجرائم ضد الإنسانية والإبادة الجماعية بصفته قائد إسرائيل في السيطرة العسكرية على مخيمات اللاجئين في 20 صبرا وشاتيلا الخلطة الإسرائيلية في لبنان في سبتمبر عام 1982، عندما هُن متعمداً وسمح على نطاق واسع بمجزرة سكان هذين المخيمين. وهذه الجرائم في انتهاك جملة أمور من اتفاقيات جنيف الرابعة، في العام 1949، واتفاقية منع جريمة الإبادة الجماعية، في العام 1948، والقانون الإنساني الدولي، والمادة 9 و10، و11 في الميثاق.

إن الدعوى ضد المتهم الثاني هو أنه من 1948 إلى يومنا هذا، إن دولة إسرائيل قد قام بأنواع التصرفات - بطريقة وأخرى - ضد الشعب الفلسطيني تذكر منها: القتل والحقّ ضرر جسدي

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<sup>2</sup> انظر ملحق "ب" للحكم على الاعتراض التمهيدي الذي أثاره مجموعة الدفاع أصدقاء المحكمة

1 حسيم والضغط على الأحوال المعيشية، يقصد وراءها التسبب عمداً في إهلاك فعلي، بقصد التدمير كلياً أو جزئياً على الشعب الفلسطيني.

5 هذه التصرفات تشكل جرعة الإبادة الجماعية بموجب القانون الدولي بما في ذلك اتفاقية الإبادة الجماعية ولا سيما المادة 2 ويعاقب عليها بموجب المادة 3 من الاتفاقية. كما يشكل جريمة الإبادة الجماعية المنصوص عليها في المادة 10 من الميثاق.

10 في بيانه الافتتاحي، قال رئيس الادعاء العام الأستاذ الدكتور جورج السينغ أن الادعاء س يقدم دليلاً على إثبات التهم الموجهة إليه خلال شهادات شفوية ومكتوبة من الضحايا والشهود، والوثائق التاريخية السردية في الكتب الموثوقة بها، والتعليقات، وقرارات الأمم المتحدة، وتقارير الهيئات الدولية.

### 3. شهادة الشهود

15 استدعي فريق الادعاء العام 11 شاهداً للإدلاء بشهادتهم نيابة عنه.

كانت شهيرة أبو أردي أولى الشهود (PW1)، وهي في سن 45 من عمرها، وكانت من سكان مخيم صبرا وشاتيلا، بيروت، لبنان.

20 وأدلت بشهادتها بأنه عند احتلال إسرائيل للبنان في مايو 1982، اقتحموا أماكن قرية من مخيم شاتيلا، الذي كان مركز السكان الفلسطينيين. وشهدت كذلك بأنه تم إطلاق الرصاص على والدها وأختها على أيدي ميليشيا الكتاب اللبناني.

25 وقالت أيضاً أن هناك كثيراً من الجثث متشردة في كل مكان، وهبّت تكون من جنث الرجال والنساء والأطفال وحتى الحيوانات. وقد بدأت الميليشيات المسلحة عملية القتل من منزل قرب المجمع الرياضي حيث كانت قاعدة القوات الإسرائيلية. ودخلوا البيوت وقتلوا سكانها، وقتل أي شخص ثُرِكَ من مكانه.

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1 وشهدت الشاهدة الأولى كذلك (PW1) أنه في موقع معين على الطريق إلى الملعب شهدت جثة ابنة عمها، بقرت القاتل بطنها وأنحرج حينتها، ثم وضعه على جثتها. وشهدت الشاهدة الأولى (PW1) أن الضحية كانت صنمًا وبكماء، تعيش في دار رعاية ذوي الاحتياجات الخاصة.

5 وشهدت الشاهدة الأولى (PW1) بأن هناك جثث مكدسة في كل مكان لأن رجال الميليشيا قد أجعوا الناس معاً ثم أطلقوا النار عليهم جميعاً في وقت واحد. ونتيجة لذلك كان من الصعب التعرف على الضحايا، وأسرهم كانت بالحاجة إلى النبش بين الجثث للعثور على ذويهم.

10 قالت الشاهدة الأولى (PW1) أنه في 36 ساعة من المجموع، قتل 3,500 فرداً من سكان صيرًا وشاتيلا. وقالت إن الميليشيا، حزب الكتاب والذين ارتكبوا هذه الفظائع تعمل معاً مع الإسرائيليين. وكانوا دمى وأعوية لقوى الإسرائيلية.

15 عندما قدم فريق الادعاء العام الشاهدة الأولى (PW1) بمجموعة أصدقاء المحكمة للاستجواب رفضت المجموعة استجوابها.

دعى فريق الادعاء العام الشاهدة الثانية (PW2) وهي بيان نويمان العوت. أدلت بشهادتها بوصفها الشاهدة الخبيرة عبر سكايب (Skype) ولم تكن ممثلة أمام المحكمة شخصياً.

20 قدم فريق الادعاء العام مقتطفات من كتاب يعنوان "صبرا وشاتيلا سبتمبر 1982" الذي كتبه الشاهدة الثانية (PW2) حيث قالت: "خلال 40 ساعة متواصلة بين غروب الشمس من يوم الخميس في سبتمبر 16، وظهر يوم السبت من سبتمبر 18، وقعت مذبحة صيرًا وشاتيلا، إحدى أكثر الأحداث الوحشية في القرن العشرين."

25 عندما طلب المدعي العام إليها أن تقدم تعليقاً لها على الرقم 3,500 على أساس أنه عدد القتلى المنشور، وقالت الشاهدة الثانية (PW2) أنه حسب بحثها تقدر عدد القتلى نحو 1,350، وقالت إنما اتصلت بمختلف المنظمات الدولية لجمع قائمة عدد الضحايا، ولكنها لم تتفق في الحصول عليها.

- 1 وعندما قدمت الشاهدة الثانية (PW2) لمجموعة أصدقاء المحكمة لاستجوابها، قالوا أيضاً إنه ليس لديهم الرغبة في استجواب الشهود.
- 5 الشاهد الثالث للادعاء العام كان محمود إي إيج السموني، البالغ 15 سنة من عمره، وكان مقيم شارع السموني في قطاع الريتون بمدينة غزة. قدم شهادته عبر سكايب Skype.
- 10 شهد الشاهد الثالث (PW3) بأن القوات الإسرائيلية هاجمت مكانه في يناير 3، عام 2009، بالقناابل والصواريخ. وقال إنه رأى نزول الظلة الواقية في أعلى المباني.
- 15 وشهد بأنه جاء أكثر من 50 جندياً إلى منزله يحمل كل واحد منهم الأسلحة. وأطلقوا النار على الجنود الداخليين من المنزل وفي جميع أنحاء منزله. وقد طلب من صاحب المنزل الخروج وعندما خرج والد الشاهد الثالث أطلق الجنود عليه النار ومات في الحال، واستمر الجنود في إطلاق الرصاص داخل البيت حوالي 15 دقيقة، حرج أحدهم و5 آخرون من أفراد أسرته، بما فيهم شقيقته أمال التي تعرضت للإصابات الخطيرة، بما فيها بشطية في رأسها. وتوفي شقيقه أحمد بعد ذلك.
- 20 لم تستجب الشاهد الثالث (PW3) لمجموعة أصدقاء المحكمة.
- 25 الشاهد الرابع للادعاء العام (PW4) كان صلاح السموني، البالغ 34 سنة من عمره، وكان من سكان حي الريتون في مدينة غزة. قدم شهادته عبر Skype.
- 30 وقال في يناير 3 من عام 2009، إنه تلقى معلومات من ابن عمّه أن دبابات حرية للجيش الإسرائيلي قد دخلت مدينة غزة وأحاطت بحي الريتون والمناطق المحيطة به.
- 35 وأضاف أنه تم قتل 21 من أفراد أسرته على أيدي الإسرائيليين في يناير 5 عام 2009، وقد قدم قائمة أسماء هؤلاء القتلى من أفراد أسرته بوصفها معرضاً.
- 40 وعندما قدم هذا الشاهد لمجموعة أصدقاء المحكمة للاستجواب، رفضت المجموعة استجوابه.

الشاهد الخامس للادعاء العام (PW5) هي باولا مندكا، وهي تقيم حاليا في جينوفا، بإيطاليا.  
أدلت بشهادتها بوصفها شاهدة خبيرة عبر سكايب .

وأفادت الشاهدة المحكمة بأنها أجرت وأشرفت على مشروعين بخبيثين في العام 2011، يتعلقان  
بتأثير الأسلحة على الصحة الإنجابية الناشئة من المهمات الإسرائيلية على غزة، ونتائج بحوثها  
تفيد بتدور الصحة الإنجابية، والزيادة في الهيكلية، والتشوهات الخلقية.

وشهدت كذلك بأن نسبة 66% من الولادات في قطاع غزة مع الطفل للعيوب خلقياً، لبعضهن  
للفحص أو القسصور الأبيض أثناء عملية القصف في العام 2008/2009.

أدت دراستها بما إلى الاستنتاج بأن هناك تأثيراً طويناً لدى على الصحة الإنجابية مع العقلية  
المترتبة بالملوثات نتيجة التعرض للأسلحة خلال الحرب ولبقاء المروء.

وعندما قدمت الشاهدة الخامسة (PW5) إلى مجموعة أصدقاء المحكمة للاستجواب رفضت  
المجموعة استجوابها.

الشاهد السادس للادعاء العام (PW6) كانت الدكتور أنج سُوي تشاي، وهي خبيرة استشارية  
جراح العظام والصلومات، تقيم حالياً في لندن، إنجلترا . كانت حاضرة خلال إجراء المحاكمة  
شخصية، واستجوبها المدعى العام شفهياً، وكما استجوبها عليها بعد ذلك مجموعة أصدقاء  
المحكمة.

وأدلت بشهادتها أنها وصلت إلى بيروت في أغسطس 1982، بوصفها إحدى أعضاء المجموعة  
الطبية البريطانية، وكانت تقدم خدماتها تطوعاً بصفة جراحة العظام. وبدأت عمل جراح العظام

في مستشفى غزة في أغسطس 22. كانت المستشفى ذات 11 طابق في مخيم صبرا وشاتيلا  
للأجيئين الفلسطينيين والذي افتح رسمياً في أغسطس 23، 1982. قدّمت الشاهد السادس (PW6)  
التفاصيل للأحداث الواقعة في سبتمبر 1982، 22.

في سبتمبر 15، حلت الطائرات الإسرائيلية من البحر متوجهة نحو المخيمين، ثم بدأ القصف في جميع الاتجاهات، تشاهد بوضوح من مستشفى غزة. وفي سبتمبر 16، تسبّب القصف الصحايا إلى المستشفى، بينما يستمر القصف وإطلاق النار في الخارج. واستمر إطلاق النار حتى الليل.

وفي سبتمبر 17، قالت الشاهدة إنها تعمل على ولد في أحد عشر من عمره، أطلق عليه النار 5 هم 27 من أفراد عائلته. ومات جميعهم إلا الولد.

وفي سبتمبر 19، قالت الشاهدة السادسة (PW6) استطاع أعضاء المستشفى من العودة إلى مخيّمي صبرا وشاتيلا وهناك شاهدوا الجثث في كل مكان، ومن الواضح إطلاق النار على أفراد الأسر معاً. وقال تبلغ مجموع عدد القتلى -حسب اللجنة الدولية للصليب الأحمر- 1,500 شخصاً.

وأفادت الشاهدة أنّها يمكن مشاهدة جلّ موقع المذبح في المخيمين بالوضوح من مقرّ الإسرائيل الرئيس في سفارة الكويت. وقالت آخرها الناجون من الفلسطينيين بأنه لا يمكن الهرب أثناء المجزرة لأنّ الإسرائيل قد سدّ المخيّمات. عندما جاء السفير الترويجي في محاولة لإنقاذ الأطباء الترويجيين، قال للشاهد أنّه كان عليها الاتصال بالسلطات الإسرائيليّة للموافقة.

قالت الشاهدة كذلك أنّها اكتشفت من أحد الموارد السرية من أرشيف البريطان الوطية، بأنّ عدد القتلى في المخيمين كان 3,500 شخصاً. وعندما أحاط الإسرائيّيون واحتلّوا مستشفى عكا في سبتمبر 15، قتلوا المرضى والممرضات والأطباء .

استحوذت مجموعة أصدقاء المحكمة الشاهدة السادسة (PW6)، ولكن شهادتها بقيت سليمة وثابتة.

كان نبيل اللساوي الشاهد السابع للادعاء العام (PW7) وكان يسكن في شارع كركفنا بيت 25 لحم.

وقال الشاهد بينما كان طالباً في الجامعة الأهلية في العام 2008، شارك في المظاهرات السلمية

1      قرب مخيم اللاجئين في هرزا، وفندق بارادايس، وفي حوالي 12:30 ظهراً، وحين اشغال المتظاهرين، أطلق عليه قناص النار. أغمي عليه إثره وتم نقله إلى المستشفى.

5      وقد أكتشف أخيراً أن دمدم الرصاصية قد اخترق بطنه ثم انشقت إلى ثلاثة أجزاء، واقتحمت مختلف الاتجاهات، خرج الإثنان من جسده، ويفي الثالث عالقاً في مثانته. وكان على سيرير المرض لمدة شهرين ونصف شهر، وهناك أجريت له ثلاثة عمليات جراحية. وكان يتلقى العلاج لمدة شهرين ونصف شهر آخر، حيث خضع لأكثر العمليات الجراحية لاصلاح معاهده.

10     ونتيجة إصابته، قد تغيرت حياته تماماً. يحمل أثر الجرح القدم في بطنه، وكان لا يستطيع الجلوس منتسباً، فضلاً عن السباحة المنافسة. وكان محظوظاً من دخول إسرائيل، وكان دائماً في حالة الخوف والقلق. وهو الضحية بلا حرية في بلده.

15     الشاهد الثامن للادعاء العام (PW8) هو إلان باي، وهو مؤرخ إسرائيلي، الناشط في المجال الاجتماعي. وقد قدم شهادة شفوية عبر إسكايب Skype. وهو مؤلف 15 كتاباً، بما فيها كتاب: "التطهير العرقي لفلسطين (2006)- غزة في أزمة" (شارك مع نعوم تشومسكي بتأليفه 2010)، كان أحد المؤرخين الإسرائيليين الجدد الذين يسجلون تاريخ تأسيس إسرائيل في العام 1948، وطرد 700,000 الفلسطينيين في العام نفسه. وقد كتب أن الطرد لم يكن على أساس قرار مخصوص كما ذهب إليه بعض المؤرخين، ولكن بشكل تطهيراً عرقياً للشعب الفلسطينيين وفقاً لمخطط داليت Plan Dalet) الذي وضع في العام 1947، على أيدي قادات 20     المستقبل للإسرائل .

25     وشهد الشاهد أن الناس الذين وراء خطة داليت، ليسوا إلا فئة قليلة من الناس، يقدر عددهم نحو 30 نمراً، مكون من الجنرالات في الجيش اليهودي، والخوارء عن الشؤون العربية، مع الرئيس الذي سيكون أول رئيس وزراء إسرائيل. وقد تحولت هذه الخطة إلى خطة رئيسية مع خطة منهاجية في طرد الفلسطينيين من بلادهم .

28     وعندما سُأله المدعى العام عن أخبار هؤلاء الفلسطينيين الذين رفضوا الانتقال، قال الشاهد إنه في بعض الأماكن تم إعدام الكبار في القرى لتهذيب الباقيين، وفي بعض الأماكن، تم مجزرة جميع

الذكور. وفي فلسطين حوالي 800 قرية، وتم طرد سكان القرى يبلغ عددهم 530 شخصا.

شهد الشاهد أيضاً أنه تم تدمير القرى المحتلة، وبنيت عليها المستوطنات أو الأماكن الترفية. وفي المدن ازداد جيران الفلسطينيين بالهارجين اليهوديين الوافدين من أوروبا وبيلدان أخرى.

وعندما سُئل عن غزة، قال الشاهد: كانت غزة سجناً كبيراً، يحتوي مليونين شخصاً.

استجوبت مجموعة أصدقاء المحكمة الشاهد إذا كان سيوافق على أن شكل عمله ورؤيته، لإدانة الوجود بسبب الصهيونية، وأحاب الشاهد أنه لا يشعر بهذه الطريقة. وقال إنه نظراً إلى أن والديه من ضحايا سياسة الإبادة النازية، إنه لا يريد أن يكون جزءاً من عملية الإبادة الجماعية الجديدة.

إجابة لسؤال آخر من مجموعة أصدقاء المحكمة قال الشاهد إن اليهود الذين فروا من ألمانيا وأوروبا من خلال سنة 1930 في الواقع، كانوا لا يحترمون عن ملاذ آمن، ولكن اليهود الذين جاءوا في سنة 1982م وفي السنوات اللاحقة جاءوا كالمستعمرين.

وكانت الشاهدة التاسعة للادعاء (PW9) إيمها تغريب خليل نعمت، إحدى سكان مدينة نابلس في الضفة الغربية. تعيش مع والديها وتسعة أشقاء.

أدلت الشاهدة أن في سنة 1979م أو أوائل سنة 1980م، اعتقل والدها من قبل القوات الإسرائيلية وحبست في السجن لـ 18 يوماً لسبب شكواه عن الحرية الفلسطينية. وبعد سنة، اعتقل مرة أخرى وحبست في السجن لـ 21 يوماً للمخافاة نفسها.

في سنة 1987 طلبت الشاهدة للعمل في مكتب حكومي ولكن رفض طلبها. وكان من المفهوم الشائع أنه إذا كان أي فرد من العائلة له تاريخ الاعتقال من قبل الحكومة الإسرائيلية، فإنه سيكون من الصعوبة طلب العمل في مكتب حكومي.

وأضافت الشاهدة أنها في 15 أبريل 2004، أثناء السفر من نابلس إلى بيتلحم (مسافة 80 كم) أوقفت بسيارة عسكرية إسرائيلية واحتجزت لمدة 29 ساعة دون طعام أو ماء. وفي أثناء

الاحتجاز، وُضعت الشاهدة تحت الاستجواب والإهانات لفظياً. وبعد الحادثة، وُضمت الشاهدة من قبل مجتمعها، بما لها من الأصدقاء والزملاء.

وكان الشاهد العاشر للادعاء ( PW10 ) هو الدكتور وليد الخطيب، أحد سكان مدينة بيت جalla، محافظة بيتحم في الضفة الغربية. وهو طبيب مؤهل، متخصص في مجال الصحة العامة.

شهد الشاهد أنه كعمارس عام، كان يعمل في عيادة الطوارئ خلال الانتفاضة الأولى، حيث رأى عدة مرضى بأنواع مختلفة من الإصابات نتيجة من العنف الإسرائيلي — جروح من الرصاص، وتعرض باصابات غازية المسيل للدموع واعتداء جسدياً من قبل الجنود الإسرائيليين. أضاف أنه على مدى سبعة عشرة من السنوات الماضية كان مسؤولاً عن صحة وحماية الطفل، 10 والصحة الاجتماعية وقانون الطفل الفلسطيني والحقوق.

كما شهد بأن غزو المدن الفلسطينية من قبل القوات الإسرائيلية ( بما في ذلك القصف والتفحير، واستخدام الغاز المسيل للدموع، وبناء جدران للفصل بين القدس والضفة الغربية، والتحقق من النقاط التي تقييد حركة الشعب الفلسطيني ) أثر في صحة الفلسطينيين وتعليمهم، وخاصة الأطفال 15 منهم.

وقال الشاهد إن الانتفاضة الأولى ( 1987 - 1993 ) لم تكن عسكرية في طبيعتها. بل إنما مجرد المظاهرات ضد الاحتلال الإسرائيلي. ثم لم تكن ثمة أي حواجز، ولا جدار، ولا القصف، ولا تفجيرات الطائرة.

بدأت الانتفاضة الثانية ( 2000-2009 ) عندما ذهب Ariel Sharon إلى المسجد الأقصى. واحتج الفلسطينيون ضد هذه الزيارة. وفي ذلك اليوم، قتل الجنود الإسرائيليون 20 شخصاً خارج المسجد.

وفي أثناء الانتفاضة الثانية، قال الشاهد إن 77.8 % من الأسر الفلسطينية عانت من مشاكل عقلية. ومن 2001 إلى 2011م، كانت هناك 2,282 قضية من قضايا الإعاقة — يرجع معظمها إلى الإصابات التي لحقت المترورطين في الانتفاضة، سببها الذخيرة الحية، والشظايا.

والرصاص المطاطي والانفجارات. وتعني الإعاقات في هذا الصدد تلك التي تقلل فرصهم للعمل مما يرجع مئاهم إلى الفقر.

وذكر الشاهد أن الفقر متشر في الضفة الغربية وقطاع غزة، والذي زاد على نسبة 20 % (قبل الانفاضة) إلى 50 % (حال الانفاضة). وأصبح مرض فقر الدم منتشرًا بين الأطفال وصل إلى نسبة (42%) نتيجة لنظام غذائي غير متوازن، و(21%) بين الحوامل.

وبخصوص موضوع نقطة التفتيش، أدى الشاهد أن هناك نحو 730 نقطة للتلفتيش بين المدن والبلدات والقرى في الضفة الغربية. وكان هناك العديد من قضايا الحوامل (اضطررت للتوقف والانتظار في هذه الأماكن) تضعن حملهن في هذه نقاط التفتيش. كان هناك أيضًا العديد من الناس في حالة الطوارئ أحيروا على الوقوف عند نقاط التفتيش، ومنعوا من النزهات إلى المستشفيات. ونتيجة لذلك لقوا حتفهم في هذه نقاط التفتيش.

وأضاف الشاهد أيضًا أنه يعتقد قبل الانفاضة الثانية أن الإسرائيليين يبحثون عن السلام مع الفلسطينيين. وبعد الانفاضة الثانية، لم يعد له هذا الاعتقاد.

وكان الشاهد الحادي عشر للادعاء (PW11) هو جواد مصلح، أحد سكان الخزان ساحور، محافظة بيت لحم. وهو منشق برنامج في وكالة السفر.

شهد شاهد مسيحي، أنه معتقل في أغسطس 1985 من قبل السلطات الإسرائيلية وأطلق سراحه بعد 20 شهراً، في مارس 1987. كان محبوساً في سجن بالقدس الغربية للمرة الأولى، وبعد ذلك نقل إلى سجن آخر في حيفا، وأخيراً إلى سجن آخر في الضفة الغربية. وكان عمره آنذاك 15 سنة، وهو طالب في مدرسة كاثوليكية في حزام ساحور.

وأضاف الشاهد أنه تعرض للتعذيب في السجن الأول في القدس الغربية أثناء الاستجواب. استخدم الإسرائيليون التعذيب العقلي والنفسي لإجباره على الاعتراف بهaram لم يرتكبها - أنه كان عضواً في جبهة فلسطين من أجل تحرير فلسطين. وكلما يرفض الاعتراف بذلك، يضرب، وإذا لم يضرب، يوضع في الحبس ويداه مكبّلتان خلف ظهره وعلى رأسه غطاء.

اعترف بذلك أخيراً، وبعد ذلك اعتقل لمدة 20 شهراً. وما زال يتعرّض للتعذيب عندما كان في السجن. وقال إن هناك الآن أكثر من 5,000 سجينًا في السجون الإسرائيليّة.

وأكّد الشاهد أيضًا أن أكثر المستعمرات الإسرائيليّة التي يجري بناؤها على أراضي في الضفة الغربيّة والقدس. وهناك الآن 700,000 مستوطنٍ يهوديٍّ يعيشون في الضفة الغربيّة والقدس.

يتم تقسيم الضفة الغربيّة الآن إلى 3 مناطق –(أ، ب، ج). المنطقة (أ) هي الأراضي الخاضعة للسلطة الفلسطينيّة وتغطي المدن الرئيسيّة والمدن مثل بيتلحم والخليل ونابلس ورام الله وجنين وغيرها. المنطقة (ب) هي القرى الصغيرة المحيطة بالمدن الرئيسيّة، حيث تقيم الإسرائيليّون في السيطرة على الأمان في حين أن الخدمات المدنية مثل الصحة والتعليم هي من مسؤوليّة السلطة الفلسطينيّة. والمنطقة (ج)، هي ما تبقى من الضفة الغربيّة، تحت سيطرة كاملة من قبل السلطات الإسرائيليّة. يتم تعين نقاط التفتيش وحواجز الطرق في أنحاء المنطقة (أ، ب، ج)، وأغلقت هذه الحواجز اعتباطيًّا في الأغلب دون إخطار مسبق، لساعات طويلة.

وعلاوة على ذلك، شهد الشاهد أن المنطقة (ج) هي أعنى مصدرًا لإمدادات المياه. وكانت إمدادات المياه تحت السيطرة الكاملة من قبل السلطات الإسرائيليّة. ويتم توفير المياه للمستوطنيّين الإسرائيليّين بسعر أرخص، وخمس مرات أكثر في الحجم، مقارنة بالمياه المزودة للفلسطينيّين – التي غالباً ما تكون غير كافية لاستعمالهم اليومي، مما تسبّب في معنة كبيرة ومعاناة.

#### 4 - اختتام تقديم الادعاء

وفي ختام تقديمه، قال رئيس المدعي العام إنه دعا أحد عشرة شاهداً (بعض منهم قد أدلّ شهادته عبر مكاييف)، طرح خمسة عشر معرضاً وقدّم عدة الوثائق والتقارير إلى المحكمة أثناء سير الإجراءات.

وحتّى المحكمة أن تضع في اعتبارها أن هذه المحكمة محكمة الضمير Conscience وتكون القضية أمامها قضية استثنائية، والتي سماها ونسنون تشرشل بأنها "جريدة بلا اسم".

قال إن الادعاء العام قد قدم أدلة على الحقائق التي لو درست بكمالها، يتبيّن أن الجنة ارتكبوا هذه الأفعال ضد الفلسطينيين، مع قصد القتل، وتسبّب ضرر بدني خطير أو أضرار نفسية وتعمد إلحاق ظروف معيشية يراد من ورائه الإهلاك المادي للشعب الفلسطيني كلياً أو جزئياً.

من شهادة بروفيسور بابيه ( PW8 ) وقد أظهر الادعاء أن قبل عام 1948م، وذلك قبل فرار الأمم المتحدة قرار 47، أن هناك خطة للسيطرة على أراضي فلسطين، ويتم تفعيل هذه الخطة ريثما تخلى البريطانية عن ولايتها على الأرضي.

كانت نسبة الفلسطينيين آنذاك 94% في الأرضي، وعدد السكان اليهود مجرد 6% من الأرضي. وفي إطار خطة الأمم المتحدة للتقسيم، كان أكثر من 50% من الأرضي تعطى لليهود.

قد لا تكون خطة دالت Plan Dalet قانونياً في شكل الإبادة الجماعية في بدايتها، ولكنها أخذت شكل التطهير العرقي حين تحول إلى مقتل ومذابح وتهيئة الظروف من المستحيل الحياة للفلسطينيين - إما أن يغادروا أو يقاتلوا. ويؤكد الادعاء أن هذا الصنيع يعتبر إبادة جماعية كما تدل عليه المادة 2 من اتفاقية منع الإبادة الجماعية.

وفيما يتعلق بقضية صبرا وشاتيلا، يؤكّد شاهدا الادعاء ( PW1 و PW6 ) بأن تم قتل اللاجئين الفلسطينيين في كلي للمخيمين على أيدي الكتائب، بمساعدة وتحريض من قبل الإسرائييلين الذين كانوا في سيطرة كاملة على المخيمين.

وفقاً لتقرير كاهان، كان كل بيروت تحت السيطرة الإسرائيلية، وكان هناك علاقة تكافلية واضحة بين الإسرائيل والقوات المسيحية ( الميليشيا النصرانية المارونية اللبنانيّة أو الكتائب ) .

وفي إدلاء عملية الرصاص في عام 2008م، قال رئيس الادعاء إن النازحين قد استخدمو جميع أنواع الأسلحة، بما فيها الفوسفور الأبيض الذي هو سلاح حارق. واستخدام الأسلحة الحارقة محظورة بموجب البروتوكول الثالث بشأن حظر أو تقييد استعمال الأسلحة الحارقة.

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نتيجة للاحتلال الإسرائيلي للقطاع غزة، لا يوجد أي مكان في غزة يعد آمناً للمدنيين. وكان 1.5 مليون فلسطيني الآن محاصرين في اليأس، ودمر اقتصادهم المدمر. ووفقاً لعقيدة الضاحية (أكتوبر 2008)، التدمير الكامل لغزة هو الهدف النهائي، ولا بد أن يكون كل مكان مدمرًا.

يُقدم الادعاء أنَّ الأثر التراكمي للإجراءات المتعددة من قبل الحكومة الإسرائيلية – كما هو مبين من قبل شهود الادعاء، ومن خلال الوثائق المقدمة إلى المحكمة، قد أظهر بما لا يضع مجالاً للشك أنَّ إسرائيل مذنبة في جريمة الإبادة الجماعية وفقاً لاتفاقية منع الإبادة الجماعية والميثاق.

ويضيف المدعى العام المشارك تان سري عبد العزيز على التهمة الأولى ضدَّ عاموس يارون قائل إنَّ عاموس يارون كان قائداً المسؤول عن الجيش الإسرائيلي وعن منطقة بيروت، وخيمني صبرا وشاتيلا. وقال إنَّ هناك قضيتين يحدِّر الاشتلاف بينهما. الأولى: ما إذا كان ثمة مذبحة واسعة النطاق على سكان المخيمين. والثانية: ما إذا كان عاموس يارون سهلَ هذه المذبحة وسمح لها، والتي تشكَّل انتهاءً للقانون الدولي وللمواد 9 و 10 و 11 من ميثاق الأمم المتحدة؟

وفيما يتعلق بالقضية الأولى، قدم أنَّ هناك مذبحة واسعة النطاق، كما أدلى به شاهد الادعاء العام الأول PW1. حيث كانت موجودة أثناء الواقع، وشاهدت المذبحة بعينها. ومثله ذكر شاهد الادعاء العام السادس PW6، وأقرَ ذلك في تقرير كاهان.

وأضاف بخصوص القضية الثانية، أنَّ عاموس يارون كان مسؤولاً عن ضمان سلام، وانضباط ونظام. وخلص تقرير كاهان نفسه إلى أنَّ أي شخص يعرف عن لبنان سيدرك أنَّ بإطلاق الكتاب في بيروت، تكون هناك مذبحة.

بالتأكيد، يعرف عاموس يارون، الجنرال المسؤول أنَّ سماح الكتاب للنهاية إلى المخيمين، أنه سوف تحدث المذبحة. ولكن مع ذلك قرر ألا يفعل شيئاً.

وتلقي تقارير توضح أنَّ ثمة قتل النساء والأطفال، لكنه لم يقرأ التقرير. ولم يقدمه إلى رؤسائه. ويقدم المدعى العام أنه من خلال التجاهل الذي صدر من المدعى عليه مع أنه على علم بهذه الظروف، يمكن القول إنَّ المدعى عليه يقصد تسبب وفاة الناس في المخيمين.

— ما إذا كان الادعاء العام قد أسس قضية شرعية مقبولة.

بعدما قدم فريق الادعاء تقرير ختامته، قدمت مجموعة أصدقاء المحكمة أنه ليس هناك قضية يمكن الرد عليها على النحو المنصوص عليه في المادة 28 من الفصل السابع (وضع الإجراءات) من الجزء 2 من ميثاق الأمم المتحدة.

أخذت المحكمة استراحة قصيرة بغية تمكين القضاة من المعاورة والنظر في تحمل الأدلة المقدمة من قبل الادعاء.

انعقدت المحكمة جلسة أخرى بعد الاستراحة القصيرة، وحكم رئيس المحكمة أن المحكمة قد وافقت بالإجماع على أن القضية التي أنشئت شرعية ومحبولة في كلي التهمتين، وعليه تُدعى مجموعة أصدقاء المحكمة لتقديم مرافعة الدفاع.

— مرافعة الدفاع

السيد جايسون كاي كيت ليون من مجموعة أصدقاء المحكمة قدم بخصوص التهم الموجه ضد المدعى عليهم، وقد ذكر الادعاء جرائم الحرب والجرائم ضد الإنسانية والجرائم ضد السلام. يبيو أن الادعاء غلى عن هذه التهم، ورثّر فقط على جريمة الإبادة الجماعية.

قال إن جريمة الإبادة الجماعية تم تعريفها في المادة 2 من اتفاقية معن الإبادة الجماعية عام 1948م، في حين عرفها قاموس اكسفورد الإنكليزي بأنها "القتل المتعمد بمجموعة كبيرة من الناس، خصوصاً أولئك من دولة معينة أو مجموعة عرقية".

وقدم أن جريمة الإبادة الجماعية فريدة من نوعها، حيث إنها تعني أنك لا تُحب جماعة، قتلتهم بكثرة. وتعني الإبادة الجماعية أن عدد الضحايا في نهاية الإبادة الجماعية أقل من عدد الضحايا قبل بدء الإبادة الجماعية.

قدم كذلك أن المرة عندما يتحدث عن "القتل الجماعي"، فإنه يعني أنه يبدأ من مئات الآلاف

إلى الملايين من الناس. وأشار إلى أن اعتبار القتل المؤسف لعدد 3,000 شخصا ( مгинيم صبرا وشاتيلا ) يعادل القتل الضخم الواسع النطاق أمر يختلف من حدة الرعب الحقيقي للقتل الجماعي ( كما في رواندا، حيث قتل 800,000 شخصا خلال 100 يوم).

فيما يتعلق تقرير كاهان، قالت مجموعة أصدقاء المحكمة إنه حدد أيضاً أشخاص آخرين بأنهم مسؤولون، مع اثنين الآخرين ما عدا يارون الذي لا يزال على قيد الحياة. والسؤال هو لماذا التركيز على يارون فقط؟ لماذا ترك وزير الدفاع أرييل شارون.

وأضافت أيضاً أن منظمة التحرير الفلسطينية قد انتهكت مرارا وتكرارا اتفاق وقف إطلاق النار في يوليو عام 1982. وفي يونيو عام 1982، عندما ذهب الجيش الإسرائيلي إلى لبنان، وقد جعلت منظمة التحرير الفلسطينية الحياة التي لا تطاق في شمال إسرائيل من خلال قصصها المتكرر لبلدات إسرائيلية.

وبحخصوص عملية الرصاص المصوب، قدمت أصدقاء المحكمة أن الجيش الإسرائيلي قد خرج بتقريرين. والأمر أنك إذا كنت تريد قتل الناس طوعاً أو كرها، لا تبلغ عنه.

وفيما يتعلق بقضية الجدار، قدمت مجموعة أصدقاء المحكمة أن الاعتبار الأساسي هو أمن المستوطنين الإسرائيليين. ولدولة إسرائيل الدفاع عن حياهم وسلمتهم ورفاههم.

أضافت مجموعة أصدقاء المحكمة بخصوص قضية نقاط التفتيش، إن للدول الحق في قوانين المجرة.

فيما يتعلق بخطبة دالت Plan Dalet، قالت مجموعة أصدقاء المحكمة أنه يخضع لآراء متباعدة، فبعض المؤرخين يؤكدون أنه كانت دفاعية تماماً، في حين كان بعض المؤرخين الآخرين يرون أن الخطبة يقصد من ورائها التطهير العربي.

7 - تقرير المحكمة عن التهمة الموجهة ضد عاموس يارون

### مذابح صبرا وشاتيلا

في تهمة رقم 3، اتهم المدعى عليه عاموس يارون بارتكاب جرائم حرب، وجرائم ضد الإنسانية، والإبادة الجماعية. وبوصفه الجنرال الإسرائيلي القائد في السيطرة العسكرية على مخيمات اللاجئين صبرا وشاتيلا في الإسرائل المحتلة في لبنان في شهر سبتمبر من عام 1982م، قام بتسهيل ومحاج 5  
يمذبحة ضخمة لسكان المخيمين بعلم، متهاهاً لواحة هاغ (Hague) بشأن الحرب البرية لعام 1907  
1948م، واتفاقية جنيف الرابعة لعام 1949م، واتفاقية منع الإبادة الجماعية عام 1945  
وميثاق نورمبرغ (1946م)، وحكم نورمبرغ (1950م)، ومبادئ نورمبرغ (1950م)، وعرف  
القانون الدولي، القواعد الأممية، وقوانين الحرب، والقانون الدولي الإنساني، والأحكام ذات الصلة  
المنصوص عليها في المواد 9 و 10 و 11 من ميثاق الأمم المتحدة.

غزرت الإسرائل لبنان في 6 يونيو 1982م. واستمر الحصار الإسرائيلي وقصف بيروت الغربية في 15  
الصيف عام 1982م. على الرغم من الدمار الذي لحق لبنان والسكان المدنيين، لكن إسرائيل لم  
تنجح في تحقيق هدفها المتمثل في هزيمة أو طرد القوات السورية ومنظمة التحرير الفلسطينية.

وتم التوصل إلى اتفاق في 19 أغسطس 1982م بين لبنان والولايات المتحدة وفرنسا وإيطاليا  
 وإسرائيل، ومنظمة التحرير الفلسطينية لإخلاء منظمة التحرير الفلسطينية والقوات السورية تحت  
رعاية وحماية قوة متعددة الجنسيات. وينص الاتفاق كذلك على أن الجيش الإسرائيلي لن يحاول  
الدخول أو احتلال بيروت الغربية بعد إخلاء منظمة التحرير الفلسطينية والقوات السورية.

عملاً بذلك الاتفاق، أشرف القوات المتعددة الجنسيات بما فيها الأمريكية والفرنسية والإيطالية  
على إجلاء منظمة التحرير الفلسطينية والقوات السورية حتى انتهت في 1 سبتمبر 1982م.  
 تركت القوات متعددة الجنسيات لبنان من 10-12 سبتمبر 1982م، بعد انتهاء عملية  
الإجلاء.

وفي 14 سبتمبر 1982م، اغتيل الرئيس اللبناني بشير الجميل، أحد الكتاب، في بيروت.

1 قرر رئيس الوزراء الإسرائيلي، ورئيس وزراء الدفاع شارون، ورئيس الموظفين إثبات أن الجيش الإسرائيلي سيدخل فوراً وبختال بيروت الغربية.

وفقاً للقرار، ففي 15 سبتمبر 1982، دخل الجيش الإسرائيلي بيروت الغربية تحت قيادة جينرال المدعي عليه عاموس يaron، المدعي عليه في هذه القضية. أنشأ الجيش الإسرائيلي منصب 5 القيادة الأمامي على سطح مبني سبعة طوابق جنوب غرب خيم شاتيلا، وأمر جينرال المدعي عليه يaron الجيش الإسرائيلي من ذلك المنصب. كانت المنطقة المحيطة بالمخيمين، صبرا وشاتيلا، بعد ذلك تحت قيادة وسيطرة الجيش الإسرائيلي، واعتبرت كل القوى في المنطقة، بما في ذلك حزب الكتائب، على أن تعمل تحت سلطة جيش الدفاع الإسرائيلي وبتصرف وفقاً لتعليماتها.

10 استمعت المحكمة شهادة مفصلة عن الحوادث التي وقعت بين 16 سبتمبر و 18 سبتمبر 1982. بحسب رهيبة للاجئين الفلسطينيين العزل، شهدت مقتل ما يصل إلى 3,500 ومعظمهم النساء والأطفال الصغار في المخيمين.

15 كان الجنرال العام عاموس يaron قائد العملية في بيروت. مثل بواسطة الجنرال دروري لتنسيق دخول قوة الكتائب في منصب القيادة الأمامي.<sup>3</sup>

بعد هذه المذابح، وكانت الحكومة الإسرائيلية تحت ضغط هائل لإنشاء لجنة الاستفسار تحت رئاسة يتسوك كاهان (لجنة كاهان)، لتحقيق في المذبحة. عقدت هذه اللجنة 60 جلسة تسمع إلى 20 48 شاهداً.<sup>4</sup>

قدمت لجنة كاهان الملاحظات التالية:

(أ) أعلن وزير الدفاع أرييل شارون ورئيس الموظفين إثبات في 16 سبتمبر 1982 قبل بدء

25 <sup>3</sup> تقرير كاهان، أرييل شارون ومذبحة صبرا وشاتيلا في لبنان: مسؤولية وفق القانون الجنائي الدولي للمذبحة مسكن مدني، لندن، أ. مالون، دورية القانون من 373، يشار إلى مالون فيما بعد.

<sup>4</sup> تقرير لجنة التحقيق عن حوادث مخيمات اللاجئين في بيروت، يشار إليه بـ تقرير كاهان في ما بعد، فبراير 8، 1983، ص. 28 .2

- اللذابع بأن بيروت كافة تحت السيطرة الإسرائيلية، وأنه تم إغلاق المخيمات وإحصارها.<sup>5</sup>
- (ب) كانت هناك علاقة تكافلية واضحة بين الإسرائيلي والقوات النصرانية (ميليشيا النصرانية اللبنانيين المارونية) المعروفة باسم الكتائب بمساعدة من الموساد الإسرائيلي. حتى إن زعيـم جيش لبنان الجنوبي (SLA) والكتائب مثل زعيـم جيش الدفاع الإسرائيلي، والذي قدم من قبل الإسرائيليـن.<sup>6</sup>
- (ج) أن الإسرائيليـن ثـمارـس قـدرـاً مـنـ الـسيـطـرـة على جـيشـ لـبنـانـ الجنـوـبـيـ.<sup>7</sup>
- (د) ونقشت خطة الكتائب Phalangists لاستخدام القوة لإزالة الفلسطينيين في عدة اجتماعات مع الإسرائيليـن.<sup>8</sup>
- (هـ) فـرـ قـرـ ثلاثةـ كـبارـ مـسـؤـولـيـنـ فـيـ الحـكـومـةـ الإـسـرـائـيلـيـةـ أـنـ الجـيشـ الإـسـرـائـيلـيـ سـيـدـخـلـ بـيـرـوـتـ الغـرـيـبةـ تـحـتـ قـيـادـةـ الـجيـنـيـرـالـ العـامـ عـامـوسـ يـارـونـ:ـ رـئـيسـ الـوزـراءـ بـيـغـنـ،ـ وـوزـيرـ الدـفـاعـ شـارـونـ وـرـئـيسـ الـموظـفـيـنـ يـاتـيـانـ.ـ وـعـلـيـهـ فـيـنـ الجـيشـ الإـسـرـائـيلـيـ لـاـ يـدـخـلـ المـخـيمـاتـ بـلـ سـيـفـوـضـ دـخـولـ المـخـيمـاتـ إـلـىـ الـكـتـائبـ.ـ وـقـالـ إـيـتـانـ إـنـهـ وـشـارـونـ وـافـقـ عـلـىـ دـخـولـ الـكـتـائبـ إـلـىـ مـخـيمـاتـ صـبـراـ وـشـاتـيلاـ:ـ وـيـنـصـ النـظـامـ التـشـغـيلـيـ عـلـىـ أـنـهـ:ـ "ـسـيـتـمـ ذـلـكـالـبـحـثـ وـالـتـطـهـيرـ مـنـ الـمـخـيمـاتـ مـنـ قـبـلـ الـجـيشـ الـكـتـائبـ الـلـبـانـيـةـ"<sup>9</sup>.ـ وـكـذـلـكـ مـلـخـصـ تـعـلـيمـاتـ وزـيرـ الدـفـاعـ.ـ إـنـهـ عـنـصـرـ وـاحـدـ فـقـطـ،ـ وـهـذـاـ هوـ جـيشـ الدـفـاعـ الإـسـرـائـيلـيـ،ـ هـوـ الـذـيـ يـتـولـيـ قـيـادـةـ الـقـوـاتـ فـيـ الـمـنـطـقـةـ.ـ وـفـيـماـ يـتـعلـقـ بـالـعـلـمـيـةـ فـيـ الـمـخـيمـاتـ يـجـبـ إـرـسـالـ الـكـتـائبـ إـلـيـهاـ".<sup>10</sup>
- (و) استخدام مصطلحات مثل:
- "تنقية وتطهير" (نيويورك تايمز، 20 سبتمبر 1982 في A6، العمود 5؛<sup>11</sup>  
واشنطن بوست في 21 سبتمبر في A14، col6)؛<sup>12</sup>  
"التطهير" (نيويورك تايمز، 23 سبتمبر 1982 في A8، العمود 4)؛<sup>13</sup>  
"تنظيف" (نيويورك تايمز، 23 سبتمبر 1982 في A8، العمود 6؛ سبتمبر 26، 1982، العمود 2) المخيمات.
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- <sup>5</sup> تقرير كاهان ص. 16، مالون ، ص. 402.
- <sup>6</sup> تقرير مالون ص 381، تقرير كاهان ص 7
- <sup>7</sup> تقرير مالون ص 372، تقرير كاهان ص 7
- <sup>8</sup> تقرير مالون ص 383 - 382 ، تقرير كاهان ص 8
- <sup>9</sup> تقرير مالون ص 383 ، تقرير كاهان ص 12
- <sup>10</sup> تقرير مالون ص 386

- وهذه المصطلحات تظهر القصد الفعلي من المسؤولين الإسرائيليين وقادتها.<sup>11</sup>  
كانت المخيمات تحت سيطرة كاملة من الإسرائيليين قبل القتل.<sup>12</sup>

(ج) بعد إقرار رئيس الموظفين إيتان يأن الكتاب "قد ذهبا بعيدا جدا" أعطى علامة خضراء لمواصلة "التطهير".

تم تشكيل لجنة دولية للتحقيق في انتهاكات القانون الدولي التي تم إبلاغها من قبل الإسرائيلى حلال غزوهـا للبنان.

- أصدرت تقريرا في عام 1983. الإسرائيلي في لبنان: تقرير اللجنة الدولية للتحقيق في انتهاكات القانون الدولي من قبل الإسرائيلي خلال غزوها للبنان 196 1983).<sup>13</sup>

(ج) وترأس لجنة التحقيق شون ماك برايد، وزير الخارجية الإيرلندي السابق، ومفوض الأمم المتحدة السابق لناميبيا الفائز بجائزة نوبل للسلام في عام 1974م.

(ب) اتفق أربعة من ستة أعضاء اللجنة على أن الإسرائيلي شرعت في "التمهير المتعمد للحقوق الوطنية والثقافية، وهوية الشعب الفلسطيني التي تصل إلى الإبادة الجماعية".

15 قرر بأنه:

(ج) يمكن وصف المذابح التي وقعت في صبرا وشاتيلا في سبتمبر 1982 بأنها مذابح الإبادة الجماعية، ومصطلح "التواطؤ في الإبادة الجماعية" واسعة بما يكفي لإثبات مسؤولية الإسرائيلي عن هذه الأفعال.

(د) وضع التقرير في سياق المذبحة:

كانت محازر(صبرا وشاتيلا) عواقب التكنولوجيا الأقل إلى وقت سابق التكنولوجيا العالمية  
التشريع من قبل الإسرائيل من البر والبحر والجو من كل خيم فلسطيني الكبرى التي تقع  
في أي مكان بالقرب من منطقة القتال في جميع أنحاء جنوب لبنان. يبدو أن الهدف  
الإسرائيلي الأساسي موجه بوضوح إلى جعل المخيمات الفلسطينية غير صالحة للسكن  
في بالمعنى المادي، فضلا عن تزويق السكان، كسر إرادة الحركة الوطنية الفلسطينية،

٤٣٢ تقرير مالون ص ١١

تقریر مالوں ص 387 - 388

<sup>13</sup> مذكرة صيريا وشاتله: تقرير شهود أعيان، ليل، شاهد، دورية دراسة فلسطين، مجلة 32، عدد 1، ص. 36.

1      وليس فقط في منطقة الحرب من لبنان، ولكن ربما أكثر مركزياً، في الضفة الغربية المحتلة والغزة<sup>14</sup> ص. 121.

(ه) إن هذا يمثل سياسة شاملة لتدمير جماعة عرقية بأكملها ويوضح مرة أخرى عن طريق أمثلة كيلوك وصبرا وشاتيلا.(ص 45-6)

5      "منذ بداية الحرب في يونيو 1982م، يستخدم الإسرائيليون مراها وتكراها لجرافات لتدمير المنازل وإجبار السكان على الفرار. وكانت مخيمات اللاجئين في جنوب لبنان مقصوفة ثم دمرت بالتفجيرات والجرافات. تعرف هذه العملية في الإسرائيل كـ"تمهير البنية التحتية للإرهاب". كان الهدف هو منع الفلسطينيين من تشكيل الجماعة الوطنية في لبنان. ولذلك، ليس الضروري تدمير المنازل فحسب، ولكن أيضاً المؤسسات الفلسطينية مثل المدارس والمستشفيات، ومرافق الخدمة الاجتماعية. بالإضافة إلى ذلك، سعى الإسرائيليون إلى حرمان السكان الفلسطينيين من جميع الذكور من خلال اعتقال الآلاف من الرجال وإجبار الآلاف الآخرين على الفرار.<sup>15</sup>

### المتهم عاموس يارون

15      وافق قائد الجنرال العام يارون والكتائب أن ضابط الكتائب الاتصالى مع معدات الاتصالات من شأنه أن يكون حاضراً في جميع الأوقات مع منصب حيش الدفاع الإسرائيلي مع موساد ضابط اتصال في مقر الكتائب.<sup>16</sup>

20      كان يارون على علم بأخلاق الكتائب القتالية. كان فرحاً بقراره وكان يرى انضمام الكتائب للمشاركة دون أن تترك العملية لجيش الدفاع الإسرائيلي فقط.

لم يستطع يارون أن يفسر عدم حصوله على عمل أو تدخل من قبل الجيش الإسرائيلي لحماية المدنيين عندما علم في الليلة الأولى، 16 سبتمبر، لما وقعت المذابح بدخول الكتائب.<sup>17</sup>

14 ذكر في مقالة شاهد في ص 43.

15 شاهد ص. 44.

16 388 مليون ص.

17 بلدة كاهان من 81 28

حتى عندما علمت السلطات العسكرية الإسرائيلية بالاتزاز من قبل الكاتب يوم الجمعة 17 سبتمبر، لم تتدخل لحماية المدنيين الفلسطينيين، بل سمح لهم بجلب الجرارات ليفعلوا ما 18 يشاؤون.

5 تؤكد الشهادة التالية أن مراكز القيادة، والإسرائيليين، بما في ذلك الجنرال القائد عاموس يaron، يمكنها رؤية المخيمات ومراقبة المذايحة:

(أ) وبدء منصب الجنرال، كان من الممكن رؤية المخيمات، وحتى في الأزقة الضيقة. يمكن للمرء أن يرى مقبرة جماعية 300 متر بعيداً عن الكاتب والجرافة تستخدم لدفن مئات 10 الضحايا.<sup>19</sup>

(ب) وكذلك شهادة الدكتور أنج سوي تضيي  
20 تقارير كبار الصحفيين.

واشنطن بوست، مراسل أجنبي كبير، جوناثان راندال: لاحظ ذلك بأنه "خطأ واقعي عنيد".

15 الصحفي الإسرائيلي أمنون كيبلوك.

صحيفة إسرائيلية يادعة أحرونوت تقرير ساخر؛

جريدة نيويورك الجديدة المادة، 26 سبتمبر 1982 في A9، العمود 2.

لورين جنكينز، مراسل صحيفة واشنطن بوست بيروت، في 20 سبتمبر، 1982، مساعد الإسرائيلي وحرض.

20 شهد الأطباء والممرضات أنهم سمعوا إطلاق النار والقصف المستمر من شاتيلا، وعرفوا فيما بعد أن مذبح قد وقعت: جريدة نيويورك الجديدة، 20، سبتمبر، 1982 في A6، من الأعمدة 4-3.<sup>21</sup>

(د) أوردت ليلى شهيد قول ضابط إسرائيلي قائلًا بأن النظر من أسطح أحد المباني المختلة من قبل الإسرائيليين مثل مشاهدة من الصنف الأمامي من المسرح".<sup>22</sup>

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<sup>18</sup> مالون ص .392.

<sup>19</sup> مالون ص 385 - .384.

<sup>20</sup> مالون ص 385 - .384.

<sup>21</sup> مالون فقرة 385، هامش .52.

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<sup>22</sup> شاعد ص .44.

(و) منع الجنود الإسرائيليون اللاجئين الفلسطينيين من الفرار وإعادتهم إلى المخيمات. أحير الجنود رؤسائهم بوقوع المذابح.<sup>23</sup>

أدانت الأمم المتحدة مقتل شاتيلا صبرا ... قرار مجلس الأمن: (S/RES/521) 19 سبتمبر 1982 أدان المذبحة الإجرامية. وذهب المجلس العام بعد ما ذهب إليه مجلس الأمن، في قرار المجلس العام 123/37 الذي عقد في 16 ديسمبر 1982،<sup>5</sup>:

D.1: أدان بأشد العبارات مذبحة المدنيين الفلسطينيين على نطاق واسع في مخييمي صبرا وشاتيلا للاجئين (صوت: 123-0؛ امتناع 23).

D.2: قرر أن المذبحة تعتبر إبادة جماعية (صوت: 98-19؛ امتناع 23).

#### القضايا القانونية

#### 25 عباء الإثبات

عباء الإثبات في هذه المحكمة هو وراء كل شك معقول. يجب إثبات جميع عناصر خالفة بحيث لا يضع مجالاً لشك معقول.<sup>24</sup> وهذا ينطبق على جرائم الحرب والجرائم ضد الإنسانية وجريمة الإبادة الجماعية.

يكون الشخص مرتكباً جريمة الإبادة الجماعية إذا كان قد تصرف مع وجود نية كما هو موضع في الإبادة الجماعية في المادة 2.<sup>25</sup>

في الاتفاقية الراهنة، تعني الإبادة الجماعية أيًا من الأفعال التالية إذا ارتكبت بقصد التدمير الكلي أو الجزئي لجموعة إثنية أو عرقية أو دينية أوطنية، على هذا النحو:

<sup>23</sup> شاهد ص 40-41

<sup>24</sup> اللاحقة : المادة 2، فرع المادة (2)

<sup>25</sup> كما طبع في المادة 10 اللاحقة

- ١ (أ) قتل أعضاء الجماعة؛  
٢ (ب) إلحاق ضرر جسدي أو عقلي جسيم لأعضاء الجماعة؛  
٣ (ج) إخضاع مجموعة عمداء، لظروف معيشية يراد بها التعمير المادي كلياً أو جزئياً؛  
٤ (د) فرض تدابير من شأنها منع إنجاب الأطفال داخل الجماعة؛  
٥ (هـ) نقل أطفال الجماعة إلى جماعة أخرى.

ويعرف هذا القصد بالقصد الجنائي في القانون الجنائي خلافاً لمفهوم النية العامة. وقد اعتمدت المحاكم الخاصة كلمة *DOLUS SPECIALIS* للتعبير عن هذا الشرط فيما يتعلق الحالة الجنائية للذهب، حتى يدان أي شخص يجب التأكيد أن المتهم له قصد التدمير الكلي أو المجزئ لجماعة كما نصت عليه في الاتفاقية.

<sup>10</sup> نصت عليه في الاتفاقية.

ويمكن أن يتم إثبات نية الإبادة الجماعية عن طريق الاستنتاج في ضوء كل الحقائق، ولا يتطلب  
خطوة محددة.<sup>26</sup> يجب إثبات هذا القصد بما لا يدع مجالاً لشك معقول. إذا كان هناك أي تفسير  
بدليل حالة الذهنانية للمدعى عليه، يعتبر المدعى العام فاشلاً. يجب أن يكون ذلك الاستدلال هو  
الاستنتاج الوارد المعقول الوحيد.<sup>27</sup>

<sup>27</sup> الاستئثار الوحدي المعقول الوحدي.

تكون الدولة مسؤولة إذا ارتكب جهاز من أجهزتها أو شخص أو مجموعة يمكن عزو أفعالها قانونا إلى الدولة أي فعل من الأفعال المبينة في المادة الثالثة من الاتفاقية.<sup>28</sup>

الاستنتاجات الاستدلالية

الاستنتاجات الاستدلالية

هذه النتائج أدناه مصنوعة إلا إذا اقتنعت المحكمة فوق أي شك معقول بالنتائج.

٢٦، عاكرة أكاسو الاول (٥) ص 560

<sup>27</sup> كرسك أستي حكم استئنافي 19 ابريل 2004 فقرة .41.

<sup>28</sup> قضية تتعلق بتعليق الاتفاقية لحماية وعقوبة جريمة الابادة . تقرير أ . م . ج . 26 فبراير 2007 فقرة 179

## وضع الجيش الإسرائيلي في لبنان من 15 سبتمبر 1982

الأدلة المذكورة أعلاه تدل على أنّ الإسرائيل قد غزت لبنان بطريقة غير شرعية وأصبحت قوة محظوظة جزء من لبنان. وكان المتهم يارون المسؤول عن الاحتلال، كما هو مبين أدناه، وهذا يرقى إلى جريمة ضد السلام والمسؤولية الجنائية تكون لدولة الإسرائيل وللمدعى عليه يارون.

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### العلاقة بين الميليشيات اللبنانيّة والمتهم الأول

تبين الأدلة المذكورة أعلاه دون أدنى شك في أنّ المتهم الأول والجيش الإسرائيلي تعاونت مع ميليشيات الكتائب واستخدم الميليشيات لتنفيذ السياسة الإسرائيلي لتدمر الشعب الفلسطيني. عملاً لاتهاماً الأول يارون مع الميليشيات شخصياً.

10

### ضحايا

تبين الأدلة أن عدداً كبيراً من الرجال والنساء والأطفال قتلوا، معظمهم فلسطينيون. كانت هناك مقاومة ضئيلة أو معدومة للغارة. هذا هو جزء من الشعب الفلسطيني وعلى هذا التحول استوفت متطلبات اتفاقية الإبادة الجماعية.

15

### علم المتهم الأول وأفعاله وتركه

20

ليس هناك مجال للشك أنّ المتهم الأول يارون كان على معرفة دقيقة لعمليات الابتزاز التي ترتكبها الميليشيات المرتبطة بها. حيث أرسل المتهم الأول هذه الميليشيات إلى مخيّم صبرا وشاتيلا، وكان على بيته ما ستقوم به هذه الميليشيات. كما أوضحت تقارير عن عمليات قتل المدنيين العزل: يعني رجال ونساء وأطفال، إلا أنه فشل في واجبه كقائد لقوة الاحتلال وغزو لحماية السكان المدنيين.

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I

## نية دولة الإسرائل، نية المتهم الأول عاموس يارون

تظهر هذه الأدلة وراء كل شك معقول أن المتهم الأول يارون رفض بوعي لحماية السكان الفلسطينيين في مخييمي صبرا وشاتيلا. بل إن مسؤوليته تذهب أبعد من ذلك بكثير. حيث إنه 5 والجيش الإسرائيلي استخدما الميليشيات لتدمير الشعب الفلسطيني في المخيمين. كانت هناك مقاومة تقريباً. وقد الجيش الإسرائيلي يراقب سير المذابح بالكامل من رصيده النظري. لا يمكنني شخص من الهروب من المنطقة طوقة من قبل الجيش الإسرائيلي. كان على علم طيلة عملية المذابح. الاستدلال الوحيد المعقول هو أن عاموس يارون يقصد القتل الجماعي وأن يتم تدمير الشعب الفلسطيني.

قال الدفاع أن يارون لم يفعل شيئاً لارتكاب الجرائم في صبرا وشاتيلا، مستشهاداً لتقارير لجنة كاهان في محاولة تبرئة يارون عن هذه الاتهامات.

ليست هذه المحكمة خاضعة للجنة كاهان ولكن ملاحظاتها الواقعية مفيدة في البحث عن 15 الحقيقة. وكانت نتائج لجنة كاهان قدمت إلى الإسرائيل في حين أن هذه المحكمة محكمة دولية لها آرائها المستقلة عن الإسرائيل والقوى الكبرى. لا تقبل المحكمة حجج الدفاع بشأن أفعال وتقدير المتهم الأول يارون.

قال الدفاع إن الادعاء العام أخطأ في عدم اتهام أرييل شارون. أما بالنسبة لعدم اتهام أرييل شارون، والأمر متربوك للمدعي العام أن يقرر ما هم الأشخاص الذين يزيد أن يوجه ضدهم الاتهام، أو منع إساءة المعاملة أو الدافع المنحرف من قبل المدعي العام ولا تستطيع المحكمة التدخل 20 في السلطة التقديرية للنيابة العامة.

واعتراض الدفاع على استخدام قرارات المجلس العام لإثبات جريمة الإبادة الجماعية. والبحث عن القصد (على ارتكاب الإبادة الجماعية) من قبل المجلس العام يعد قانوناً غير ملزم ولكنه مفيد في 25 تقييم نية الإسرائيل وعاموس يارون.

وترى المحكمة أن تصرفات عاموس يارون تدل على مسؤوليته الجنائية الشخصية.

## مسؤولية القيادة

1

بالنظر إلى النتيجة التي مفادها أن المتهم الأول عamos يارون هو المسؤول الشخصي عن الجرائم التي ارتكب، فإنه يرفض النظر في مسؤوليته عن مسؤولية القيادة.

5

### العواقب القانونية.

فإن المحكمة تفحص الحقائق ثبتت في ضوء الجرائم المنصوص عليها في ميثاق الأمم المتحدة، وهي جرائم ضد السلام وجرائم ضد الإنسانية والإبادة الجماعية وجرائم الحرب المنصوص عليها في المواد 8 و 9 و 10 و 11 من ميثاق الأمم المتحدة .

10

### الإدانات التراكمية:

تذكر المحكمة القانون فيما يتعلق قناعات تراكمية. عقدت غرفة الاستئناف في المحكمة الدولية ليوغوسلافيا السابقة في فقرة 168<sup>29</sup>

15

تقبل غرفة الاستئناف النهج المفصلي في حكم الاستئناف سيليبيشي، وهو نهج المثلثة بالديون لقرار كتلة برغر من المحكمة العليا للولايات المتحدة<sup>30</sup>. ونص غرفة الاستئناف كالتالي.

"الإنصاف إلى المذعّى عليه والاعتبار أن الجرائم المتميزة فقط تبرر قناعات متعددة، تؤدي إلى استنتاج مفاده أن إدانات جنائية متعددة دخلت تحت أحكام قانونية مختلفة ولكن على أساس نفس السلوك الذي تباح فقط إذا كان كل حكم قانوني ينطوي على عنصر متميز"

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<sup>29</sup> قضية المدعي العام ضد هاغيلوب كوفاراك وادومر كوفاراك وزوران فوكوفيتش، القضية رقم A-1-96-23 و Af-96-A، الحكم، بتاريخ 12 يناير 2002.

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<sup>30</sup> بلوغبارغار ضد الولايات المتحدة، 284 الولايات المتحدة، 299، 304 (1931) ("إذا كان فعل واحد أو معاملة واحدة تشكل انتهاكاً لحكمن من الأحكام القانونية فإن المعول به لمعرفة ما إذا كان المعتبر وجود جريمة واحدة هو ما إذا كان هناك حكم معين يتطلب إثبات محققة إضافية في حين كان الآخر لا يتطلب ذلك")

<sup>31</sup> استئناف الحكم سيليبيشي، الفقرات 412-13. والذي يشار إليه فيما بعد اعتبار سيليبيشي (Čelebić test)

28

1 مادياً لا يرد في الآخر. يختلف عنصر جوهرياً عن آخر إذا كان يتطلب إثبات حقيقة ليست مطلوبة من قبل الطرف الآخر.

5 حيث لم يتحقق هذا الاختبار، يجب على الغرفة أن تقرر على أساس القاعدة أن الإدانة بمحب أحکام أكثر تحديداً ينفي التمسك.

فإن المحكمة تتبع هذه القاعدة.

#### جرائم ضد السلام

10 تعدّ لبنان دولة ذات سيادة التي تعرضت للغزو من قبل الإسرائيليين في 15 سبتمبر 1982م. شارك المتهم الأول عاموس يaron في هذا العدوان من لبنان، وهو الجنرال هذه القوة الاحتلالية. وتشير المحكمة إلى قواعد نورمیرغ الأولى والستة.

15 ونصت القاعدة الأولى أن "أي شخص يرتكب فعلاً يشكل جريمة بمحب القانون الدولي يكون مسؤولاً عنها ويكون عرضة للعقاب"

#### ونصت القاعدة السادسة

20 "الجرائم المبينة أدناه تعاقب على أنها جرائم بمحب القانون الدولي:

##### (أ) الجرائم ضد السلام:

25 (أ) أي خطط أو تجهيز، أو مشروع أو شن حرب عدوانية أو حرب تنتهك المعاهدات الدولية، أو اتفاقيات أو ضمانات؛

(ب) المشاركة في حركة مشتركة أو مؤامرة لنجاز أي من الأفعال المذكورة في فقرة (أ).

28 نذكر شروط حكم نورمیرج تحت قلم السيد القاضي يركيت الدولي:

<sup>1</sup> "التهم في لائحة الاتهام أن المتهمن خططوا و شنوا الحروب العدوانية تعد التهم ذات بالغ الخطورة، الحرب شر. أساس، ولا تقتصر آثاره على الدول المتحاربة وحدها، ولكن تؤثر على العالم كله.

<sup>5</sup> وبالتالي، لينه الحرب العدوانية ليس فقط جريمة دولية، بل هي الجريمة الدولية العظمى التي لا تختلف عن جرائم الحرب الأخرى في أنها تحتوي في داخلها الشر المترافق للمجلس بكامل هيئته".

فإن دولة الإسرائيل قد ارتكبت أم كل الجرائم الدولية من خلال غزو لبنان، وهذا قد أدى المتهم الأول بارون إلى ارتكاب جرائم ضد الإنسانية والإبادة الجماعية.

10

#### جرائم ضد الإنسانية

نكرر المحكمة الأجزاء ذات الصلة من المادة 9 من الميثاق.

#### جرائم ضد الإنسانية

15

لفرض هذا الميثاق، يعني "جريمة ضد الإنسانية" أي فعل من الأفعال التالية عندما ترتكب كجزء من هجوم واسع النطاق، أو هجوم منهجي ضد أية مجموعة السكان من المدنيين، مع العلم بالهجوم

(أ) القتل

(ب) الإبادة الجماعية

20

جريمة الإبادة الجماعية هي عمل من أعمال قتل على نطاق واسع<sup>32</sup> مع ذلك فالتعبير "على نطاق واسع" لا تشير إلى أدنى الحد العددي<sup>33</sup> بالإضافة إلى أساس متطلبات القصد الجنائي (أو

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<sup>32</sup> باغوسورا وسلفيومينا، محكمة استئاف الحكم، الفقرة، 394، روكوندو استئاف الحكم، الفقرة، 185، نقلًا عن انذاكيروتيسانا استئاف الحكم، الفقرة، 516.

<sup>33</sup> باغوسورا وسلفيومينا محكمة، استئاف الحكم، الفقرة، 394، روكوندو استئاف الحكم، الفقرة، 185، نقلًا عن انذاكيروتيسانا استئاف الحكم، الفقرة، 516.

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النية الجنائية) بالنسبة لجميع الجرائم ضد الإنسانية، القصد الجنائي يتطلب أن المدعى عليه يقصد قتل الأشخاص على نطاق واسع أو إخضاع عدد كبير من الناس لظروف المعيشة التي من شأنها أن تؤدي إلىوفاقهم بطريقة واسعة النطاق أو منهجية.<sup>34</sup>

وقد وجدت المحكمة فوق ذلك أن المدعى عليه الأول عاموس يaron (Amos Yaron) وللمدعى عليه الثاني، دولة إسرائيل شاركاً مباشرةً مع الميليشيات اللبنانية في القتل الجماعي وتدمير الفلسطينيين في مخيّمي صبرا وشاتيلا؛ لهذا السبب حكمت المحكمة أن المدعى عليه الأول عاموس يaron (Amos Yaron) مرتكب جريمة ضد الإنسانية كما أُثبت.

#### تهمة الإبادة الجماعية

كما وجدت أعلاه، فإن المدعى عليه الأول يaron قصد القتل الجماعي والتدمير للسكان الفلسطينيين في صبرا وشاتيلا، تشكل هذه الفئة من السكان مجموعة وطنية على النحو المتونجي في اتفاقية الإبادة الجماعية. ليس فقط أن المتهم الأول عاموس يaron ينوي القتل الجماعي لهؤلاء اللاجئين الفلسطينيين وتدميرهم كمجموعة، بل إنه ينجح في قتل ما يصل إلى 3,500 منهم.

إن المتهم الأول عاموس يaron قصد تدمير هذه الفئة من الشعب الفلسطيني، وبالتالي كان لديه القصد المحدد حسبما تقتضيه المادة 10 من الميثاق.

تلاحظ المحكمة أنه باعتباره العميد للقوة الاحتلال الجيش الإسرائيلي، كان المتهم الأول عاموس يaron אחمل في المسؤولية الجنائية على الدولة الإسرائيلية مما يعني ارتكابها (الدولة الإسرائيلية) الجنائية كما وجد في التهمة (4) من فصل هذ القضاء

خلصت المحكمة إلى أن المتهم الأول عاموس يaron مذنب في التهمة الموجهة إليه من الإبادة الجماعية.

<sup>34</sup> أوردن، استئناف الحكم، الفقرة الحكم، 476؛ ستاكبيتش، استئناف الحكم، الفقرة، 259-260؛ غاكومبيتسى، استئناف الحكم، الفقرة، 86؛ انتاكيروتيمان، استئناف الحكم، الفقرة 522.

## جرائم الحرب

1

وسوف ترفض هذه المحكمة النظر في جرائم الحرب؛ بناء على أن الجرائم ضد الإنسانية هي أكثر تحديدا، ومن شأن إدانة جرائم الحرب أنها تكون إدانة تراكمية.

5

### 8 نتائج نظر المحكمة في التهمة ضد دولة إسرائيل

فيما يتعلق بالتهم الموجهة إلى دولة إسرائيل من جرائم الإبادة الجماعية وجرائم الحرب، فإن المحكمة واعية لأصلية القضايا التي أثيرت، وهي ترغب في مواجهة هذه القضايا وجهها لوجه؛ فاصلة تعزيز أهداف القانون الدولي وتفسير السوابق الموجودة بطريقة تجعلها ملائمة أحسن ما تكون مراعاة للعدالة والقيم الأخلاقية.

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نلاحظ أن جهة الادعاء ألغت المطالبة بتهمة ارتكاب جرائم الحرب وتركزت بقوة على المطالبة بتهمة الإبادة الجماعية، وبالتالي ستكتفي المحكمة بالنظر في قضية الإبادة الجماعية فقط، والنقاط القانونية التي أثيرت أمامنا هي ما يلي:

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#### الاعتراض الأولي عن الأثر الرجعي للقوانين

جادل الخبير بالقوانين الحامي لمجموعة أصدقاء المحكمة أن القاعدة الأخلاقية العامة ضد القوانين بأثر رجعية من المحكمة من النظر في القضايا التي وقعت قبل إنشائها في 6 يونيو 2008، والتهم ضد إسرائيل تتعلق بالواقع الذي حدث تماما قبل عام 2008.

20

وأثيرت هذه القضية من قبل مجموعة أصدقاء المحكمة باعتبارها الاعتراض الأول، الاعتراض الذي رفض بالإجماع من قبل المحكمة بسبب أن جرائم الإبادة الجماعية وجرائم الحرب التي أثبتت بما دولة إسرائيل لم تخلق من قبل الميثاق؛ وذلك أن أن هذه الجرائم قد وجدت منذ منتصف القرن الماضي.

25

وضع الميثاق آلية للتحقيق ومحاكمة هذه الاتهامات وإنشاء محكمة جرائم الحرب للقضاء

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فيها، لم يحدد الميثاق أي موعد أو أطر زمنية كما كانت الحال بالنسبة للمحكمة الجنائية الدولية ليوغوسلافيا السابقة (ICTY)، والمحكمة الجنائية الدولية لرواندا، (ICTR) والمحكمة الاستثنائية في محاكم كمبوديا (ECCC) والمحكمة الخاصة لسيراليون (SCSL).

وكان محامي الدفاع رحب الصدر لتسليميه بأن هذا الاختصاص (حق النظر في الدعوى) في الوقت المفتوح (محدد الزمن) كان يوجد بالفعل لمحكمة نورمبرغ، (Nuremberg) ومحكمة طوكيو (Tokyo) ويمقتضي قانون اللجان العسكرية الأمريكية لعام 2006 لمعتقلين غواتامانامو (Guantanamo).

قررت المحكمة بناء على أن ميثاقنا لم يقيد المحكمة بإطار زمني، فلم تكن المحكمة ممنوعة من الفصل في الأحداث التي وقعت منذ عشرات من السنين؛ لما لاحظت المحكمة أنه تقريراً كل محكمة دولية تعامل مع الإبادة الجماعية تم إنشاؤها لممارسة الولاية القضائية على الجرائم التي تم ارتكابها قبل إنشائها، كما قررت المحكمة أن حقها في النظر في الدعوى كان مفتوحاً وغير مقيد بأي فترة زمنية، وبالتالي فالمحكمة تتمتع بالاختصاص الكامل للنظر وإنذاد الاجراءات القضائية في هذه القضية.

### **الاعتراض الأولي بأنه لا يمكن توجيه الاتهام إلا إلى الأشخاص الطبيعيين فقط**

جادل الخبير بالقوارين محامي الدفاع لا يمكن توجيه التهمة ضد دولة إسرائيل؛ لأنه موجب المادة 2 (ج) من ميثاق الأمم المتحدة والقواعد الإجرائية وقواعد الإثبات في المواد 2، 3، 4، 5، 11، و 12 فإن الميثاق يتوجى اختصاص النظر في الدعوى على الأشخاص الطبيعيين فقط وليس ضد الدول القومية، ومع ذلك فقد اعترف محامي الدفاع بأن الميثاق في المادة 2 (ج) يسمح للولاية القضائية على "حكومة".

وترى المحكمة موجباً كونها محكمة الضمير، وأنها أنشئت للتحقيق في الجرائم الخطيرة، فإنه يجب رفض هذا الفرق التقني والباطني كمثل الفرق بين "الدولة" و "الحكومة"؛ إذ الدول تعمل من خلال حكوماتها؛ وبالتالي فالمحكمة لنترفض حقها في النظر بمجرد الاعتماد على هذا الدافع التقني.

إضافة، فإن المحكمة ترى أن المادة 6 (ب) من الفصل الثالث من ميثاقها تنص صراحة على أنه<sup>1</sup> إذا كانت التهمة تتعلق بدولة ذات سيادة، أو الرئيس الحالي للدولة/الحكومة أو رئيس الدولة/الحكومة، فإنه يكفي (وسيلة لإبلاغ الداعي إلى المتهم) تقديم نسخة الوثيقة القانونية إلى أي سفارة أو المفوضية العليا ذات الصلة "وهذا دليل حاسم على أن المحكمة بموجب ميثاقها<sup>5</sup> مخولة لمحاكمة الدول وكذلك الأفراد.

### الاعتراض الأولي أن إسرائيل لديها حصانة السيادية

قدم محامي الدفاع أن القانون الدولي لا يسمح لدولة إسرائيل أن تُضم باعتبارها متهمة إلى طرف ثالث في دعوى قضائية، وتم التقديم على أنه بغض النظر عن ما يمكن أن تكون الحقائق ومدى ما تكون خطورة الجريمة المزعومة، فدولة إسرائيل تتمتع بمحصنة مطلقة في القانون الدولي ضد ضمها (دولة إسرائيل) باعتبارها متهمة إلى طرف ثالث في محكمة محلية أو هيئة قضائية ما لم تخضع نفسها اختياراً مثل هذه الولاية القضائية.<sup>10</sup>

في رأينا، الاعتراض الأولي المطعون فيه من قبل مجموعة أصدقاء المحكمة يشير الحاجة إلى تقسيم التفريع الثنائي بين مفهوم حصانة الدولة من جهة ومبدأ القواعد الأممية من جهة أخرى.<sup>15</sup>

إن مفهوم حصانة الدولة ينص على أن الدولة في مأمن من الولاية القضائية في محكمة أجنبية إلا أن توافق عليها.<sup>20</sup>

ومن ناحية أخرى، فإن مبدأ القواعد الأممية يشير إلى أن مجموعة من المبادئ أو القواعد القطعية المعترف بها من قبل المجتمع الدولي ككل على أنها أساسية لصيانة نظام القانوني الدولي والتي لا يجوز خالفتها.

لدراسة هذين المبدأين يلزم التأمل في الأسئلة الثلاثة التالية، وهي:<sup>25</sup>

- (أ) ما مبادئ القانون، ذات صلة بالقضية المطروحة، تشكل القواعد الأممية؟
- (ب) هل يمكن أن يعتبر مبدأ حصانة الدول أحداً منزلة القواعد الأممية؟<sup>28</sup>

- (ج) إذا كان هناك تعارض بين مبادئ من مبادئ القانون، إحداهم تعد من القواعد الامنة والأخرى لا تعد منها فما التي ينبغي أن تكون الغالبة؟.

من غير شك أنه إلى منتصف القرن العشرين، كانت الدول تقبل المبدأ القائل بأن الدولة ذات سيادة لا يمكن مقاضاتها أمام محاكمها المحلية، وبعد زوال هذا المبدأ على سبيل المثال في المملكة المتحدة مع إصدار قانون الإجراءات للملك عام 1947 (قانون صدر عن برلمان المملكة المتحدة الذي سمحت للمرة الأولى بالدعوى المدنية ضد الملك، تم استبداله بمبدأ آخر غير محدد على حد سواء وهو أن كل دولة ذات سيادة تُعفي من أن تتول ضدها محكمة محلية أجنبية الولاية القضائية ضدها، وكانت القاعدة الفقهية اللاتينية :“لا يملك مساو سلطة على مساو ” هي التي يقوم عليها المبدأ هذه الممارسة التي وفرت حصانة الـ.

حرية الكاملة أو صلاحية التصرف المطلق للدول الأجنبية، أصبحت تعرف باسم "مبدأ الحصانة المطلقة للدولة".

ويتمكن الاطلاع على مبدأ الحصانة المطلقة للدولة في معظم، إن لم يكن في جميع الحالات والتي تظهر في رزمه من المستندات التي قدمتها مجموعة أصدقاء المحكمة الخيرة في دعم طلبهم المقدم للاعتراض الأولي. وتشمل هذه الحالات: <sup>35</sup> The Schooner Exchange ضد سلطان Mighell، <sup>36</sup> جوهر، وقضية Parto ضد الاسكندر، <sup>37</sup> وشركة داف للتنمية ضد حكومة كيلاتنان، <sup>38</sup> وقضية كريستينا، <sup>39</sup> (The Cristina Case)؛ كومونولث أستراليا ضد شركة ميدفورد (ماليزيا) المحدودة وأوانو (Anor) <sup>40</sup>، وحصانات الولاية القضائية للدولة (ألمانيا ضد إيطاليا). <sup>41</sup>

<sup>35</sup> 11 الولايات المتحدة، 116، 136 (1812) (1894)، 1Q149. <sup>36</sup>

٣٦ تقاریر قاتئنة تاونز ٦٦

.66 تقارير قانونية تايمز، 36<sup>37</sup>

.797A.C (1924) <sup>38</sup>

.485 A.C (1938) <sup>39</sup>

.475MLJ 1 (1990) 40

1 حصانات الولاية القضائية للدولة (ألمانيا ضد إيطاليا مع تدخل اليونان) كانت قضية عام  
 2012 بمحكمة العدل الدولية في قضية العدل حيث توصلت المحكمة في جملة أمور من قبل  
 الأغلبية 14:1 إلى أن الجمهورية الإيطالية قد انتهكت التزامها باحترام الحصانات من الولاية  
 القضائية تتمتع جمهورية ألمانيا الاتحادية بموجب القانون الدولي عن طريق السماح بالطلبات  
 5 المدنية التي رفعت ضدها على أساس انتهاكات القانون الإنساني الدولي التي ارتكبها الرايخ الألماني  
 بين عامي 1943 و 1945.

10 في الصفحة 10 الفقرة 31 من ملاحظاتهم على الاعتراض الأولي، نقل محامي الدفاع من  
 الطبعة الثانية من كتاب القاضي تونوكو صفيه: "القانون الدولي العام من منظور ماليزي"، على  
 النحو التالي:

"قضية ..... محكمة العدل الدولية تعتبر دائماً من التصريحات التي تعتبرها أوثق الهيئات  
 القضائية الدولية قوانين دولية في نقطة معينة، من حيث مراعاة مجموعة معينة من الظروف.

15 ومع ذلك، فإن القاضي الخبير تونوكو صفيه، اتفقت معنا على أن مفهوم الحصانة المطلقة للدولة  
 التي عفا عليها الزمن يجب أن تقرأ جنباً إلى جنب مع اعتبارات أخرى مقتنة ذات الصلة لعصرنا  
 وخاصة مع الوضع الذي نحن بصدده.

20 فالقوانين ما لم تتعلق والتي من الله العلي القدير، لا تكون إلا وهي قابلة للتغيير غير مسفرة على  
 حال، وبالتالي عندما تكون العدالة مطلوبة، فمن خلال مرور الزمن تقع التحولات والتغييرات في  
 القوانين التي هي غير عادلة دائماً.

25 مناقشة، ففي بعض البلدان مثل الصين، فإن الدولة تخرس بحرص شديد مفهوم "الحصانة المطلقة"  
 للدول وتنتفي أي محاولة من قبل أي شخص نحو ضم الدولة إلى طرف ثالث باعتبارها متهمة ما  
 لم توافق الدولة.

28 الدول الأخرى تفضل تأويل المفهوم تأويلاً مقيداً، فسمحت الحصانة للدول فيما يتعلق بأفعالها  
 "العامة" بخلاف تلك (الأفعال) التي هي "عاصبة".

كدليل على ممارسة الدولة، يمكن لواحد أن يشير إلى مثال الولايات المتحدة، فمما يُعْرَف به لحكومة الولايات المتحدة أنه بناء على الاقتراح الذي تم تقديمها في رسالة من قبل القائم بأعمال المستشار القانوني بقسم "شئون الدولة" للولايات المتحدة، جاك ب. تيت (Jack B. Tate)، إلى القائم بأعمال وزير العدل بتاريخ 19 مايو 1952، كان هناك تحول في سياسة حكومة الولايات المتحدة من الدعم لنظرية الحصانة المطلقة للدولة إلى الدعم لنظرية الحصانة المقيدة.

دعونا الآن ننتقل بإيجاز إلى موضوع القواعد الأممية. ما مبادئ القانون، ذات صلة بالقضية المطروحة، تُشكّل القواعد الأممية؟

إذا كان للمرء أن ينظر إلى فقه محكمة العدل الدولية (ICJ) وكذلك المحاكم الوطنية، هناك العديد من الحالات التي فيها الاعتراف بمعظم الإبادة الجماعية قاعدة ملزمة من قواعد القانون الدولي، انظر على سبيل المثال:

- (أ) قضاء محكمة العدل الدولية في الأنشطة المسلحة في أراضي الكونغو (طلب جديد: 2002) (جمهورية الكونغو الديمقراطية ضد رواندا)، حق النظر في الدعوى و المقبولية، قضاء محكمة العدل الدولية، تقارير 2006، ص 6 في الفقرة 64.
- (ب) تطبيق اتفاقية منع و معاقبة جريمة الإبادة الجماعية (اليونسنه وافرسك ضد يوغوسلافيا) 26 فبراير 2007 (قضاء محكمة العدل الدولية) في الفقرات 161، 162، 163 و 173 و 174، وتقرير تاريخي للاتفاقية أسرف عن العديد من الاتجاهات والاتجاهات العابرة ولكن الواضح أن الالتزامات المتعلقة بمنع و معاقبة الإبادة الجماعية تشكل جزءاً من القانون الدولي العربي (الفقرة 161) التعهد غير مقيد (الفقرة 162)، هناك مسؤولية من جانب الأفراد وكذلك الدولة، "الإبادة الجماعية هي جريمة دولية ترتب عليها مسؤولية وطنية ودولية من جانب الأفراد والدول" (II) 180 / RES / A (الفقرات: 161 و 163). "الأطراف المتعاقدة ملتزمون بموجب الاتفاقية الالتزام بعدم الارتكاب عن طريق الأجهزة أو الأشخاص أو الجماعات الذين تكون تصرفاتهم منسوبة إليهم- الإبادة الجماعية و الأفعال الأخرى المذكورة في المادة الثالثة، وبالتالي إذا ارتكب جهاز من أجهزة الدولة، أو شخص أو مجموعة أي فعل من الأفعال المحظورة بموجب المادة الثالثة من الاتفاقية، تكون القضية عرضة لمسؤولية الدولة الدولية" ( الفقرة 179 ).

- (ج) لم تزل ازدواجية المسؤولية سمة متواصلة من سمات القانون الدولي وتعكس هذه السمة في المادة 25، الفقرة 4، من نظام روما الأساسي للمحكمة الجنائية الدولية، التي تعرف بما الآن 104 دول: "لا توجد فقرة شرطية في هذا النظام الأساسي يتعلّق بالمسؤولية الجنائية الفردية أثنا تؤثّر على مسؤولية الدول بموجب القانون الدولي".
- (د) بينما ارتكبت الجرائم ضد القانون الدولي من قبل المسؤولين في الدولة، فإنه غالباً ما يكون الحال أن الدولة نفسها هي المسئولة عن الأعمال المذكورة أو لعدم منع أو معاقبتهما في بعض الحالات وفي العدوان على وجه الخصوص، تكون الدولة بالتعريف مشاركة حتى وإن كانت مسألة المسؤولية الفردية من حيث المبدأ متميزة من مسألة مسؤولية الدولة. لم يتم إفقاء الدولة من مسؤوليتها عن التصرف غير المشروع دولياً بمجرد محاكمة ومعاقبة موظفي الدولة الذين تقذوه" (تعليق جنة القانون الدولي بشأن مشروع المواد المتعلقة بمسؤولية الدول عن الأفعال غير المشروعة دولياً، تقرير مؤتمر القانون الدولي 10 / 56 A التعليق على المادة 58، الفقرة 3).
- (ه) طلبات التدابير المؤقتة، 13 سبتمبر 1993 (تقرير محكمة العدل الدولية 325) الرأي المستقل للقاضي لاوترياخت (Lauterpacht) في الفقرة 100.
- أيضاً، قد أكد العلماء البارزون في القانون الدولي، مثل م. بسيون (M. Bassiouni)،<sup>42</sup> على تحرّم الإبادة الجماعية بوصفه قاعدة ملزمة من قواعد القانون الدولي.
- كما نص التصريح الثاني المؤثر فيما يتعلق بالعلاقات الدولية للولايات المتحدة على أنه يمكن ألا يحد أي سلطة قانونية التي تنص على أن مبدأ حصانة الدولة قد نُزِّلت منزلة قاعدة من القواعد الآمرة، وأن العالمة اللاتينية التي في اللغة الإنجليزية تعني ببساطة "القانون الملزم".
- من ناحية أخرى فإن السلطات القانونية تتعجب مما يدل على أن القواعد الآمرة باعتبارها مصدراً من مصادر القانون هي أعلى بشكل هرمي.

<sup>42</sup> م. بسيون، "الجرائم الدولية: القواعد الآمرة والالتزام إيرغا أوبيس (1996) وقانون مشكلات معاصرة 58 (4)، ص.

ويعتبر أيضاً قانوناً مبتدلاً، أنه إذا وجد التعارض بين مبادئ القانون فإن الأعلى هرمياً في الأهمية يُغلب على الآخر.

في رأينا أن مذهب القانون الدولي ضد ضم دولة أجنبية إلى طرف ثالث في توجيه التهم، لكونه أقل هرمياً في الأهمية من تحريم الإبادة الجماعية هذه، يؤدي إلى أن تحمة ضد دولة إسرائيل ينبغي أن تؤكّد للمحاكمة الكاملة.

#### تراجيع سيادة الدولة: التمييز بين أفعال السيادة والأنشطة التجارية

بناء على رسالة "تيت" (Tate) المرعومة، فإن الولايات المتحدة تضفي الحصانة على الدول الأجنبية فقط عن الأفعال العامة والحكومية، ولكن لا الأنشطة التجارية. يجدر باللحظة أن ارتكاب جريمة حرب أو إبادة جماعية أو جرائم ضد الإنسانية لا يمكن أبداً أن يكون فعل السيادية أو الحكومية.

هذا التفضيل لحصانة الدول المقيدة أُعطي أثراً قانونياً في الولايات المتحدة بموجب قانون حصانات السيادة الأجنبية لعام 1976.

وقع للململكة المتحدة في وقت لاحق في عام 1976 أنها اعتمدت نهج الحصانة المقيدة، وقع هذا في قضية الأدميرال الفلبيني<sup>43</sup> حيث قرر مجلس الملكة الخاص أنه في الحالات التي كان سفينة تجارية مملوكة للدولة المشاركة في التجارة العادلة هي موضوع الأمر القضائي، فإنه لا تستحق الحصانة السيادية، فسوف يستمر التقاضي.

صدر في عام 1978 قانون حصانة الدولة عام 1978 الذي اعتمد النهج التقييدي، من المملكة المتحدة، منذ ذلك الحين، يعتمد التشريعان كنموذج للتشريعات الوطنية في البلدان الأخرى بما في ذلك أستراليا وكندا وباكستان وسنغافورة وجنوب أفريقيا ومالزيا.

خلصت المحكمة إلى أنه يقيناً تُحيّر عندما يمكن لبعض المحاكم النظر في المنازعات التجارية كسبب لعدم السماح للدولة لتكون محمية بواسطة مبدأ حصانة الدولة، ومع ذلك تخفي بقوة هذه الدولة في حالات الإبادة الجماعية أو جرائم الحرب الأخرى؛ فلا يمكن أن تكون حياة الإنسان أقل أهمية من تحقيق مكافحة مالية!

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### نحو انتهاك آخر في مفهوم سيادة الدولة

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كانت هناك نجاحات أخرى في مجال مبدأ حصانة الدول، ومن ذلك ما يلي:

- (أ) في عام 1972، تم تنفيذ الاتفاقية الأوروبية بشأن حصانة الدول عام 1972. وهي التي أصبحت أول محاولة لإنشاء نظام قانوني دولي لحماية الدولة على أساس المبدأ التقييدي، هي بالفعل معمول بها بين الدول الموقعة.
- (ب) في عام 2004، تم اعتماد اتفاقية الأمم المتحدة لحقوق الإنسان الدول ومتلكاتها من الولاية القضائية من قبل الجمعية العامة، ولكنها لم تدخل حيز التنفيذ.<sup>44</sup>
- (ج) ومنذ وقت ليس ببعيد، سنت كل من الولايات المتحدة وكندا تشريعاً للسماح للمواطنين في كل منها أو إجراءات المقيمين الدائمين ضد الدول التي تووي الإرهابيين.
- (د) في قانون الاتحاد الأوروبي، يمكن أن تتعرض الدول الأعضاء، لغرامات باهظة جراء انتهاكـاتـ قـانـونـ الـاتـحادـ الأـورـوـيـ،ـ لـمـوـافـقـةـ أوـ عـدـمـ المـوـافـقـةـ منـ الـدـوـلـ غـيرـ مـؤـثـرـ فيـ ذـلـكـ،ـ إـنـماـ الـمـتـهمـ فيـ حـاـكـمـ الـاتـحادـ الأـورـوـيـ الـدـوـلـةـ وـلـيـسـ أـفـرـادـ مـسـتـوـيـ الـدـوـلـةـ،ـ إـخـضـاعـ الـدـوـلـةـ لـلـوـلـاـيـةـ الـقـضـائـيـةـ فـيـ مـاـ حـاـكـمـ الـاتـحادـ الأـورـوـيـ يـبـعـثـ تـلـقـائـاـ مـنـ عـضـوـيـةـ الـاتـحادـ الأـورـوـيـ.
- (هـ) في تحليقات حوفيلديان (Hohfeldian) الفقهية، أن مفهومي الحق القانوني والواجب القانوني هما متقاريان أحدهما للأخر، إذا كانت للدولة واجبات قانونية بموجب القانون الدولي، فيجب أن يكون هناك شخص له حق قانوني مقابل ضد الدولة، وأكـدـ لـناـ محـاميـ الدـفاعـ أـنـ دـوـلـ إـسـرـاـيـلـ هـيـ مـنـ الـدـوـلـ المـوـقـعـةـ عـلـىـ اـتـفـاقـيـةـ مـنـ الإـبـادـةـ الـجـمـاعـيـةـ،ـ

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<sup>44</sup> كانت الاتفاقية مفتوحة للتوقيع من جانب جميع الدول حتى 17 يناير 2007، وكان قد دخل حيز التنفيذ في اليوم الثلاثين الذي يلي تاريخ إيداع الصك الثلاثين من سكوك التصديق أو القبول أو الموافقة أو الانضمام. اعتباراً من 7 مايو 2013 هناك 28 دولة موقعة على الاتفاقية و13 دولة من سكوك التصديق تم المودعة. (وفقاً مادعاً 30، تتطلب الاتفاقية 30 دولة من الأعضاء من أجل أن يدخل حيز التنفيذ).

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- وأنما لم تذكر قط الاتفاقية، في واقع الأمر أنها (دولة إسرائيل) لديها قانوناً الخاص بالإبادة الجماعية التي سنت لإجراء محاكمات الإبادة الجماعية في إسرائيل مثل ما في قضية إيختمان. (Eichmann) نرى أن إخضاع إسرائيل نفسها طوعاً لاتفاقية الإبادة الجماعية يفرض عليه واجبات واجبة النفاذ، التي لا يمكن أن ترفضها عن طريق رفض إعطاء المواجهة على إجراء تحمة الإبادة الجماعية ضدّها.
- (و) مثل كل الجوانب الأخرى للقانون، فإن القانون الدولي ليست منوعة من التغير والتتطور لتلبية ضرورات العصر المعايش، فالمحكمة تدرك أن مفهوم سيادة الدولة في الانفصال في عصر حقوق الإنسان الذي نعيش فيه، سيادة الدولة هو وقاية ضد العذاب والخارج؛ فإنه لا يمكن أن يستخدمه المزعزع كالسيف ضد الملاطنين أمثاله أو مواطني إقليم آخر. إذا كان الرئيس الحالي لدولة ذات سيادة مثل الرئيس السوداني (الذي يمثل دولة السودان) يمكن توجيه الأحكام إليه لبعض الجرائم البشعة ضد القانون الدولي، فإنه لا معنى للتقرير بأن دولة ذات سيادة لا يمكن مساعتها في المحكمة الدولية من غير موافقتها، فإن هذا لا يكون منسجماً مع التطورات الحديثة في القانون الدولي. يشهد لذلك على سبيل المثال رأي المحكمة في قضية البوسنة التي أشارت إليها المحكمة في وقت سابق.
- (ز) وقد تم التقدم إلينا أن الأساس المطلقي لاستبعاد الدولة من الملاحقة القضائية، وتوجيهها بدلاً من ذلك إلى الأشخاص الطبيعيين، أنه إذا تم الحكم على دولة بارتكاب ذنب يكون من شأن الحكم أن يكون مرهقاً للأبرياء من سكان الدولة، ورغم أن البرهان وجيه، فإنه لا يتفق مع مجموعة كبيرة من القانون الدولي مثل ميثاق الأمم المتحدة حيث تم الأمر بالتدابير التي من شأنها أن ترقى إلى العقاب الجماعي للسكان. بموجب المادة 41 يجوز مجلس الأمن أن يأخذ بمقاطعة كاملة أو جزئية للعلاقات الاقتصادية، قد يفرض الحظر التجاري الذي قد يدمر حياة الأبرياء، بموجب المادتين 42 و 44، يجوز استخدام تدابير الحرب بما في ذلك استخدام القوة ضد أمة، بموجب المادة 5، يمكن أن تُوقف مؤقتاً عضوية دولة في الجمعية العامة للأمم المتحدة، بموجب المادة 6، يمكن أن يفصل أحد الأعضاء.

25 يجب أن يكون نظام القانون متصفاً بالتماسك، على حد تعبير الفقيه الكبير رونالد دوركين (Ronald Dworkin)، يجب أن تكون أجزاءها المختلفة متاللامة، يدو أن فكرة المساندة المطلقة للدولة من الملاحقة القضائية للجرائم الخطيرة مثل الإبادة الجماعية يتعارض مع التطورات

المحسوسة الأخرى في القانون الدولي. حصانة الدولة المطلقة هي مذهب قديم وبالنظر إلى الاختيار بين السوابق، تميل هذه المحكمة إلى التحرر من قبضة هذا المذهب القديم الجليدي.

كل هذه تؤدي إلى إظهار أن تضافر الجهود تجري على الساحة الدولية على التحرك نحو شيء من الحصانة الدولية، وفي كلام لورد دينينغ (Lord Denning):

إن مبدأ الحصانة السيادية يستند إلى القانون الدولي، ومن قواعد القانون الدولي أن الدولة ذات السيادية لا ينبغي أن تضم في الولاية القضائية إلى طرف ثالث ضد إرادتها في محاكم دولة أخرى ذات سيادة. مثل كل قواعد القانون الدولي، يقال إن هذا الحكم نشأ من إجماع دول العالم المتحضرة، إلا أن كل الدول تتفق عليه؛ ولذلك هو جزء من قانون الأمم

في رأيي [هكذا استمر دينينغ (Denning)], إن فكرة الإجماع هذه خيال؛ ذلك أن الدول لم تتفق إطلاقاً على مبدأ الحصانة السيادية، فمحاكم كل دولة تختلف في تطبيقها؛ بعضها توافق على الحصانة المطلقة، ووافق البعض الآخر على حصانة محدودة، مع اختلاف كل في تحديد المد الأقصى، فلا يوجد إجماع أبداً كان، ولكن هذا لا يعني أنه لا يوجد قانون قاعدة في القانون الدولي على هذا الموضوع.

هذا يعني فقط أننا نختلف على ما هو ذلك القانون، تحدد كل دولة لنفسها حدود الحصانة السيادية، كما تحدد لنفسها الاستثناءات من ذلك، كما أعتقد أن محاكم هذه الدولة تعريف سيادة بأفضل ما يمكن لها مع طلب الإرشادات من قرارات محاكم الدول الأخرى، ومن الفقهاء الذين درسوا البرنامج، ومن المعاهدات والاتفاقيات، قبل كل شيء تحديد الحكم بعبارات تتفق مع العدالة بدلاً مما يناؤها.<sup>45</sup>

<sup>45</sup> ترندتكس (Trendtex) شركة تجارة المحدودة ضد البنك المركزي البحريني، (ص 888)

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## الإنفاذ غير العادل للقانون الدولي

سبب آخر الذي من أجله تود الحكمة أن ترفض مبدأ الحصانة المطلقة للدولة من الملاحقة القضائية في مسائل الإبادة الجماعية وجرائم الحرب والجرائم ضد الإنسانية هو أن القانون الدولي القائم المتعلق بالحرب والسلام والإنسانية كان يفرض بفظاظة بطريقة غير عادلة؛ فالدول الصغرى والضعيفة، التي في أفريقيا وأسيا في الأغلب، وتعرض دورياً لعقوبات مدنرة، التدخلات العسكرية وتحريف النظام، وفي نفس الوقت، فيما لا يطاق من الفظائع والأعمال الوحشية التي تتعرض لها الدول الضعيفة عسكرياً من أمريكا اللاتينية وأفريقيا وأسيا من قبل الدول القوية في شمال المحيط الأطلسي وحلفائهم تذهب تحقيق فيها ومن غير معاقبة.

لاحظنا أنه لم يتم معاقبة المرتكبين للجريمة في صبرا وشاتيلا من الإسرائيليين أبداً، وبدلاً من معاقبتهم تمت مكافأتهم، تم الانتباه هنا إلى قصة حيروزاليم بوست (Post Jerusalem) من 22 نوفمبر 2013.

في 3 يناير، 2009، احتشد 100 من أفراد عائلة السمواني داخل منزل في ضباب الصباح، قتلت غارة جوية إسرائيلية 21 شخصاً في الداخل، ومع ذلك، ففي الأسبوع الماضي أخبر المحامي العام العسكري للجيش الإسرائيلي ب. بتسليم (B.Tselem) "مجموعة حقوق الإنسان في إسرائيل" أنه قرر إغلاق التحقيق في هذا الحادث دون اتخاذ أي تدابير.

في ضوء هذا الواقع أن الأخطاء البشعة تم دون عقاب، وبدلاً من ذلك يتم تحرير الضحية بأنه شرير وحشي وشيطاني، ونحن نشعر بأنه قد حان الوقت للعالم الذي تسود فيه العدالة أن يتحقق بعض التوازن الفقهي نحو مفهومنا لـ الحصانة الدولية، ومفهوم الحق والباطل على المستوى الدولي؛ للكشف عن الحقيقة، هذا ما يتطلبه منا الميثاق القيادي به.

## ما يطلق عليه مسمى الإبادة الجماعية؟

بساطة، تعني الإبادة الجماعية أي الأفعال المعينة المرتكبة بقصد التدمير الكلي أو الجزئي لجموعة وطنية أو عرقية أو دينية بهذه الصفة، يُونّد تعريف الإبادة الجماعية على النحو الوارد في المادة

- 2 من الميثاق حرفيًا من المادتين 2 و 3 من الاتفاقية المتعلقة بمنع ومعاقبة جريمة الإبادة الجماعية التي تنص على أن كل فعل من الأفعال التالية بمجرده أو بمجموعها تشكل جريمة الإبادة الجماعية الدولية :
- (أ) قتل واحد من المجموعة.
  - (ب) إلحاق ضرر جسيم جسدي أو عقلي بأفراد المجموعة.
  - (ج) تعمد إلحاق بالمجموعة لظروف الحياة، يراد بها تدميرها المادي كلياً أو جزئياً.
  - (د) فرض تدابير تستهدف الحزول دون إنجاب الأطفال داخل المجموعة.
  - (هـ) نقل أطفال المجموعة عنوة إلى مجموعة أخرى.

لم يكن هناك دليل مهم مقدماً من قبل فريق جهة الادعاء فيما يتعلق بالأفعال (د) و(هـ) أعلاه، ولكن سمعنا 11 شاهداً، وفحصنا آلاف الصفحات من الوثائق المتعلقة بأفعال (أ) إلى (ج) استخدم فريق جهة الادعاء مراراً وتكراراً عبارة "التطهير العرقي" والمحكمة تعتبر "التطهير العرقي من أفعال (أ) إلى (ج) أعلاه.

#### ال فعل الإجرامي 15

كانت القضية الرئيسية أمامنا هي ما إذا كانت أفعال الإبادة الجماعية وقعت خلافاً لأحكام المادة 2 من الاتفاقية (الجزء 1، المادة 10 من الميثاق).

استمعت المحكمة إلى 11 شاهداً وفحصت الأدلة الوثائقية التي أسفرت بوضوح عن قائمة طويلة من الجرائم التي لا يتصور تصديقها منذ فترة طويلة في عام 1945 والمستمرة حتى الوقت الحاضر، والمهم هو أن هذه ليست أفعال معزولة في خضم هذه اللحظة ولكن النمط المتكرر من الفظائع التي ارتكبت ضد سكان فلسطين.

- \* الطرد القسري لأكثر من 700000 فلسطيني من بيونهم.
- \* مذابح أولئك، الذين رفضوا أن ينخلعوا عن الأرض التي ولدوا فيها.
- \* عمليات القتل الموربة والمتكررة ذات نطاق واسع من خلال غارات جوية وبحرية باستخدام الأسلحة الأكثر تطوراً على مدى 65 سنة الماضية.

- الاعتداءات الوحشية على العديد من مخيمات اللاجئين كما هو الحال مثلاً في صبرا و شاتيلا، ولا خلاف أن تقرير كاهان الإسرائيلي عام 1983 أدان العمل العسكري الإسرائيلي في صبرا وشاتيلا ، وجد التقرير العميد يaron متوافقاً في الفظائع والجذار التي ارتكبها الكاتب اللبناني، باعتبار العميد يaron قائد الجيش الإسرائيلي، فكتوره مستحق اللوم لا بد من إسناده إلى دولة إسرائيل، حصر الجيش الإسرائيلي المخيمات ومنع أي فلسطيني من المغادرة، وسمح لكتائب للميليشيات بالدخول إلى المخيمات وارتكاب جرائم القتل الجماعي، ولاحظ تقرير كاهان (وثيقة جهة الادعاء جـ3، ص291) أن العميد يaron ليست لديه تحفظات حول السماح للكتائب بالدخول إلى المخيمات، وأنه شهد بأنه كان مسرور بقراره، وبين موقفه في ذلك: “كنا نحارب هنا منذ أربعة أشهر بالفعل، وهناك مكان يمكن أن يشاركون فيه في القتال، القتال يخدم أغراضهم كذلك، فينبعي أن يسمح لهم بالمشاركة وعدم السماح للجيش الإسرائيلي القيام بكل شيء” شهد شهود موثوق بهم لنا أنه أطلقت النار على النساء والأطفال في منازلهم، وتم قتل الأمهات الحوامل وأطفالهن مقتوف من الأرحام، ومن بين الشاهدين الذين سمعت منهم المحكمة الطبية المعترف لها بالاحترام على الصعيد الدولي الدكتور أنج سوي تشاي الذي شهدت على حجم الفظائع والوفيات أنها شهدت مباشرة:
- الاستيلاء الدوري للأراضي والمزارع الفلسطينية وتحويلها إلى المستوطنات الإسرائيلية.
- بناء جدار/سياج طوله 190 كم الذي تم الحكم عليه بالمنع من قبل محكمة العدل الدولية (والذي تم ترشيد بنائه بقرارات المحكمة العليا الإسرائيلية 2).
- ظروف الثراء مثل التمييز العنصري في المستوطنات غير الشرعية، مع الحرمان الشديد في معازل الفلسطينية؛ بعض الطرق مخصص للسكان اليهود فقط.
- استخدام الفوسفور الأبيض الذي على السكان المدنيين المادة الكيماوية التي ترقق وتخرج داخل أجساد الإنسان.
- الاحتجاز بلون محاكمة وسوء معاملة المسجناء.
- التعذيب.
- الحرمان من الغذاء الكافي وسرقة موارد المياه، وإمدادات كمية غير كافية من المياه، ومواد البناء.
- الحصار البري والبحري للمناطق الفلسطينية خصوصاً في غزة.
- استخدام القوة المفرطة على المقاتلين الفلسطينيين المسلمين بأسلحة غير بارع، وفي بعض الحالات ضد من يلقون الأحجار من الأطفال

- ١      •      الحصار والسجن لأمة بأكملها.  
       •      الإذلال اليومي في المكاتب من نقاط التفتيش في الأراضي الفلسطينية والشروط التعجيزية للحياة.

٥      استمعت المحكمة إلى شهادات مثيرة من شهود موثوق بهم، الشهادات التي تفيد بأن ما حدث قط قد حدث لآلاف من إخوانهم.

٦      لاحظت المحكمة أيضاً بأن العديد مما تم سردها من الفظائع التي ارتكبها إسرائيل على مدى 67 سنة الماضية، كانت بين حين وآخر تم تنديدها من قبل مجلس الأمن الدولي والجمعية العامة للأمم المتحدة والمنظمات الدولية الأخرى.

٧      قدم لنا رئيس المستشار بمجموعة أصدقاء المحكمة حجة بارعة أنه لا يوجد أي الإبادة الجماعية في فلسطين؛ لأن عدد السكان الفلسطينيين يستمر في النمو، أكد أنه ما لم يكن هناك انخفاض ملحوظ في عدد السكان لا يمكن أن تكون هناك إبادة جماعية. خلصت المحكمة إلى أن هذا التقليل غير حساس تماماً وغير إنسانية؛ إذ تم التوثيق دولياً أن ما يقرب من 700,000 فلسطيني طردوا من منازلهم ليعيشوا حياة البدو في الأراضي الخاوية التي في الغالب أطعم فيها غير مرحبيهم.

٨      أما حقيقة أن السكان المتبقية من فلسطين بعد التطهير العرقي في منتصف 1940 لم تزل تظهر ثوابعاً معتدلاً لا تدحض حجة وجود القتل الدوري، والإذلال، والتجريد من الإنسانية.

٩      في تحديد ما إذا كان قد ارتكب جرائم الإبادة الجماعية، لا يمكن لواحد أن يلعب لعبة الأرقام، حتى لو قتل شخص واحد على حساب جنسه أو عرقه أو دينه معنية قتل الآخرين لنفس السبب وهذا هو إبادة جماعية.

١٠     فمن المستحيل أن يتحاول أعضاء المحكمة الأدلة الواضحة معاملتها من الوحشية وشيطنة والتجريد من الإنسانية لجميع السكان، لا يعقل أنه في عصر تسود فيه حقوق الإنسان، أن الفظائع مثل هذه يمكن أن تستمر لأكثر من 6 عقود، وأن هناك أشخاصاً في دول الذين يهونون الإنسانية

1 مثل هذه. وقررت المحكمة بالإجماع أن الأفعال التي ارتكبت ضد الفلسطينيين على سبع وستين سنة الماضية تعتبر من الإبادة الجماعية.

5 ومع ذلك يجب على المحكمة توضيح أنما علم بانتهاكات القانون الإنساني الدولي من قبل بعض أفراد المجتمع الفلسطيني، فمحاكمتهم وإدانتهم هي مسألة منفصلة.

### هل كان هناك القصد الجنائي؟

10 كما ذكرت المحكمة في وقت سابق، استمعت المحكمة إلى 11 شاهداً وفحصت الأدلة الوثائقية التي أشارت بوضوح قائمة طويلة من الجرائم التي لا يتصور تصديقها منذ فترة طويلة في عام 1945 والمستمرة حتى الوقت الحاضر، وللهم هو أن هذه ليست أفعال معزولة في حضن هذه اللحظة ولكن النمط المتكرر من الفظائع التي ارتكبت ضد سكان فلسطين المطرودين.

15 من المهم أيضاً ما سبق من الأفعال التي يستحق مرتكبها اللوم هي بشكل منهجي موجهة ضد نفس المجموعة ومن نفس الجنسي خلال 67 سنة للاضافة، حجم الفظائع التي ارتكبت وطابعها العام تشير إلى وجود القصد الواضح إلى الإبادة الجماعية.

20 وذكرت الدائرة التمهيدية الأولى للمحكمة الجنائية الدولية ليوغوسلافيا السابقة أن القصد المحدد بجريمة الإبادة الجماعية: "...يمكن الاستدلال على ذلك من عدد من الحقائق مثل النظام السياسي العام الذي أدى إلى أعمال يمكن أن يشملها التعريف الوارد في المادة الرابعة أو تكرار الأفعال التدميرية والتمييزية" قبلت المحكمة الأدلة من اعترف لهم بالاحترام على المستوى الدولي من العلماء المختصين في العلوم الاجتماعية، من بينهم البروفيسور إيلان بايه (Prof Ilan Pappe) وجون بيلجر (John Pilger) والبروفيسور نعوم تشومسكي (Noam Chomsky) أن التطهير العرقي في فلسطين هي مأساة العالم التاريخية التي هي نتيجة لسياسات الدولة المعتمدة للحكومات إسرائيلية المتعاقبة منذ عام 1948.

25 وتود المحكمة أن تذكر أن الاختبار المعمول به في تحديد الذنب كان اختبار "دون أي شك معقول".

هل كانت القضية قضية الدفاع عن النفس؟

1

استمعت المحكمة أدلة هامة من مجموعة أصدقاء المحكمة أن أفعال إسرائيل من القصف والقتل والتدمير وغيرها من التدخلات العسكرية وحظر التجول ونقاط التفتيش و"جدران الفصل العسكري" كانت ردا على الإرهاب الفلسطيني المستمر.

5

وافت المحكمة على أن هناك أدلة مقنعة من المقاومة الفلسطينية للوجود الإسرائيلي: حوادث التفجير الانتحاري، وأطلاق الصواريخ غير بارعة على الأراضي الإسرائيلية من قبل المقاتلين الفلسطينيين، ومع ذلك فإنه لدينا نتائج تحقيقات تدل على أن جل أعمال العنف التي صدرت من قبل الفلسطينيين ليست على أراضي إسرائيل نفسها، ولكن من وعلى الأراضي الفلسطينية تحت الاحتلال الإسرائيلي هي رد فعل على الأعمال الوحشية من العنصرية الشرسة، الوحشية والإبادة الجماعية التي هي مبرزة المأساوية للحياة الفلسطينية.

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يقدر ما نرفض العنف وندعو إلى السلام، فلا بد من أن نذكر أنه لا يمكن لأي قوة على وجه الأرض أن تحمد شعلة الحرية من روح الإنسان، فطالما يوجد هناك قمع وسيكون هناك دائماً أشخاص مستعدون للموت قائمين على أقدامهم من أن يعيشوا على ركبهم.

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ونحن نرى أيضاً أن القوة التي استخدمها الجيش الإسرائيلي هي مفرطة وغير متناسبة تماماً، وانتهاءً للقانون الإنساني الدولي، الأساليب المستخدمة غير إنسانية وسيئة للغاية لا يمكن وصفها وتعد من جرائم الحرب.

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توصلنا بالإجماع إلى أن دولة إسرائيل مدانة في التهمة الموجهة إليها.

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## ٩ قرار المحكمة

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بعد النظر في الأدلة المقدمة من قبل فريق الادعاء والمقدمة من كل من فريق الادعاء وجموعة أصدقاء المحكمة نيابة عن المتهمين، اقتنعت المحكمة من غير أن تدع مجالاً للشك أن ، عاموس بارون باعتباره المدعى عليه الأول، يكون مذنبًا بارتكاب جرائم ضد الإنسانية والإبادة الجماعية، 5 ودولة إسرائيل باعتبارها المدعى عليه الثاني مذنبة بارتكاب الإبادة الجماعية.

## ١٠ أوامر

١٠.١ ١0 أوامر المحكمة أنه تدفع تعويضات لضحايا الحرب المشتكيين الجريمة، التعويضات التي تناسب مع الضرر الذي تعرّضوا له والإصلاح والآلام والمعاناة التي مرروا بها، في حين أن المحكمة تدرك من غير شك نطاق صلاحيتها باعتبارها مجرد محكمة الضمير حالية من سلطة حقيقة للتنفيذ، فإن هذه المحكمة أدركت أن الشهود في هذه القضية يستحقون (*ex justitia*) أن تدفع لهم تعويضات من قبل المدانين، من أجل هذه المحكمة أن الشهود (الضحايا في هذه القضية) وهم مسلحين بالنتائج التي توصلت إليها هذه المحكمة، سوف يجلبون في المستقبل القريب دولة أو كيان قضائية دولية قادرة وراغبة في ممارسة الولاية القضائية وإنفاذ حكم هذه المحكمة ضد المدانين، وسيتم تسليم التعويضات التي فرضتها المحكمة إلى جنة جرائم الحرب؛ لتسهيل تحديد التعويضات وتحصيلها لضحايا الحرب باعتبارهم المدعى في هذه القضية.

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١٠.٢ المحكمة الجنائية الدولية والأمم المتحدة ومجلس الأمن.

وبصفتها محكمة الضمير، تدرك المحكمة تماماً أن حكمها هو مجرد خطاب في الطبيعة، ليست لدينا قوة الإنفاذ، فالذي يمكننا القيام به بموجب المادة 34 من القسم الثامن من الجزء 2 من الميثاق هو أن توصي جنة جرائم الحرب كولاً ملبيور، - وهو ما نفعله بموجب هذه الوثيقة- أن تقدم هذه النتيجة من الإدانة من قبل المحكمة، جنباً إلى جنب مع سحل من هذه الإجراءات، إلى المدعى العام للمحكمة الجنائية الدولية، كما تقدمها للأمم المتحدة ومجلس الأمن.

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### 10.3 سجل اللجنة لمجرمي الحرب

وعلاوة على ذلك، فبموجب المادة 35 من نفس الفصل، توصي هذه المحكمة بفتح جرائم الحرب لکوالا لمبور أن تضيف أسماء المذئبين في هذه الوثيقة وتدرجها في سجل اللجنة لمجرمي الحرب ويتم الإعلان عنه وفقاً لذلك.

10.4 توصي المحكمة لجنة جرائم الحرب لکوالا لمبور أن تعطي هذه الإدانة ومنع التغويضات إعلاناً أوسع نطاقاً على المستوى الدولي؛ ذلك أن هذه هي جرائم عالمية التي على الدول مسؤولية إقامة الدعاوى عليها.

10.5 تأسف المحكمة بشدة لفشل المؤسسات الدولية لمعاقبة دولة إسرائيل على جرائمها وعدم احترامها باحترام القانون الدولي ومؤسسات الأمم المتحدة، وتحث اللجنة على استخدام كل الوسائل لنشر هذا الحكم وعلى وجه الخصوص فيما يتعلق بالبرلمانات والجمعيات التشريعية للدول ذات القوى الكبيرة مثل أعضاء 58 وتحث هذه الدول على التدخل ووضع حد نهائى للاستعمار والسياسات العنصرية التي تمارسها دولة إسرائيل ومؤيديوها.

### 11 استنتاج

بعد إصدار قراراًهما وأوامرها التبعية، تود هذه المحكمة أن تسجل التقدير العميق إلى كل من فريق النيابة وأصدقاء المحكمة لجهودها للتأكد من إجراء هذا السماع المستأنف في أفضل عرف يعمل به في المحاكم.

تشنّي المحكمة على المدعىُين العامين البروفيسور (Gurdial Singh Nijar) سينغ نيجار وتان سري (Tan Sri) عبد العزيز عبد الرحمن وبقية أعضاء فريقهم لإعدادهم الشامل لقضيتهم.

25 كما تشنّي المحكمة أيضاً على كل عضو من أعضاء مجموعة أصدقاء المحكمة لقبول مهمتهم الصعبة كأصدقاء للمحاكم وإعطاء كل ما لديهم إلى حد ما يفوق الواجب باسم العدالة والإنصاف لنهيمائهم الغابس: السيد جاييسون كاي، والسيدة لاريسا جين كادد، والدكتور ماثيو

- 1 Witbrodt، الذين قاموا جميعهم بتقديم خطاب أمام المحكمة خلال جلسة الاستماع، وكان تقديمهم للقضية نيابة عن المتهمين تقديمها دقيقاً مع الإخلاص الاستثنائي على الرغم من عدم التلاقي أي منهم أو عدم تلاقي تعليمات مسبقاً من قبل المدعين عليه.
- 5 أخيراً، تندّ المحكمة شكرها للأعضاء الجمهور الماليزي والمحسنين الآخرين الذين أسهموا بسخاء في مؤسسة كوالا لمبور لترجم الحرب لتمويل عقد هذا الاستماع المؤجل.

أعضاء المقاضاة: الأستاذ غورديل سينغ نيجار، تان سري عبد العزيز عبد الرحمن، والسيد أفترنسينغ والسيدة قان في السرخس، والسيد نظام الدين حامد، والدكتور شرذلزين، والسيدة رفقة الشريعة، والسيدة مذلينا محلی والسيدة ديانا سليمان. مجموعة أصدقاء المحكمة: السيد جايسون كاي كيت ليون (رئيس)، والسيدة لاريسا حين كد، والدكتور عباس حردني، والأستاذ الدكتور رحيم شافعي، والدكتور رهيد نور الدين والدكتور مايلو ونبرودت.

مسلحون: السيد موسى إسماعيل، والسيدة فيفي أرميد محمد صائب (مساعد) والسيد رزيف محمد روسلی (مساعد)

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# ملحق أ



1 الحكم على طلب الادعاء لإجراء القضاء مؤجل إلى وقت غير محدد

محكمة جرائم الحرب لكوالالمبور، قضية رقم. 3-CHG-2013 وقضية رقم. 4-CHG-2013

5 أعضاء المحكمة: القاضي تان سري داتو الحاج لامين بن الحاج محمد يونس، والقاضي ألفريد لامبرمنت وير، القاضي صالح بوأنغ، والقاضي أريك ديفيد، والقاضي تونكو صفيه حيو، والقاضي شاد سليم فاروقى والقاضي مايكل هوريان.

22 أغسطس 2013م

10 القاضي الأستاذ صالح بوأنغ (تقديم حكم المحكمة).

وقد تقرر هذه الإجراءات لمدة أربعة أيام من 21-24 أغسطس 2013 إلى سماع مجموعتين من الاتهامات التي وجهها رئيس ادعاء جنة جرائم حرب لكوالالمبور مع مسجل محكمة جرائم حرب لكوالا لمبور (KLWCT)، وبتألف من قضية رقم 3 2013CHG في 15 عamous يارون قضية رقم. رقم 4 2013CHG في KLWCC دولة KLWCC الإسرائل (التهم).

في اليوم الأول من الجلسة، جعل الادعاء دون إشعار مسبق، طلب مفاجأة في غرف لشحي 20 القاضي أريك ديفيد من كونه عضواً في لجنة من سبعة (7) قضاة سماع هذه القضية. ودعماً لهذا الطلب، طرح الادعاء وثيقتين، الأولى هي صورة من رأي قانوني تعطى مبكراً من قبل القاضي ديفيد (بصفته الشخصية) إلى شعب المُحَاهِدِين لإيران (PMOI) غير مؤرخ. والثانية كونها صورة من تقرير إخباري من صحيفة ديلي ميل (UK) بتاريخ 10 فبراير 2012م (الوثائق الداعمة) (الطلب).

25 وكان الدافع الرئيسي لطلب الادعاء هو وجهاً نظراً لعلاقتهم مع منظمة شعب المُحَاهِدِين الإيرانية، وأنه لن يكون قادراً على الاضطلاع بواجباته بطريقة غير متزنة يليق بوصفه قاضٍ نزيه

من هذه المحكمة. وكذلك شددوا على أنه إذا لم ينح القاضي ديفيد في غرف فناهم سيكررون 1  
الطلب في جلسة علنية.

نظرت المحكمة في الطلب والوثائق الداعمة له، ومن ثم حكمت بالإجماع أنه ليس هناك أي 5  
أساس لطلب تتحي القاضي ديفيد، وعليه رفضت المحكمة الطلب.

ولما عقدت المحكمة قدم الإدعاء في جلسة علنية طلبا رسميا لتنحي القاضي ديفيد. ورفضت المحكمة هذا الطلب وأمرت ببدء الإجراءات.

بدلا من الالتزام باحترام حكم المحكمة والمشروع في المحاكمة كما كان مقررا، خاطب السيد 10  
فرانسيس بويل الحامي المشارك للإدعاء المحكمة في جلسة علنية، وقدم سلسلة من مزيف  
الادعاءات لا أساس لها ضد القاضي ديفيد. لم يقدم أدلة ذات مصداقية ومقنعة (أو ليس ثمة أدلة  
على الإطلاق) لذالك اعتبرت المحكمة هذه الادعاءات فاضحة. ورأىت المحكمة أن تصرفات  
السيد بويل غير لائقة ومخالفة لعملية المحكمة.

وتعتبر هذه المزاعم من السيد بويل اتهامات خطيرة جدا ضد المحكمة دون مراعاة لقواعد اللياقة 15  
والاحترام السليم المرجوة من كل عضو في نقابة المحامين قبل المحكمة، وتشكل ازدراء نحو مقاعد  
البلاء. ذكر الرئيس السيد بويل صابرًا بوقف صنع هذه الادعاءات التي لا أساس لها مبينا أن  
هذا الطلب قد تم تقديمها أمام المحكمة، وصدرت المحكمة أمرا. ومع ذلك تجاهل السيد بويل  
توجيهات الرئيس واستمر في مخاطبة المحكمة وذكر هذه المزاعم مراراً وتكراراً.

ثم أمر الرئيس بأن هذه الادعاءات التي لا أساس لها من السيد بويل، الحامي المشارك للإدعاء 20  
تشطب من سجل إجراءات المحكمة.

وبعد ذلك أمر الرئيس مرة أخرى ببدء الإجراءات.

أبلغ المدعي العام الأستاذ غور ديل سينغ نيجار المحكمة بأن الإدعاء ليس مستعدا للإجراء لأن 25  
شهوده ليسوا مستعدين لإدلاء بشهادتهم بحضور القاضي إريك ديفيد.

لاحظت المحكمة أن هذه المعلومات لم تشكل جزءاً من طلب الإدعاء، وأنه ينبغي أن يكون.  
 ثم ظهر كل من رئيس المدعي العام وجموعة أصدقاء المحكمة في مكتب القاضي على طلب الرئيس، وسئل رئيس المدعي العام مرة أخرى إذا كان شهوده لم يكن مستعدين لتقديم الأدلة الشفوية مع أنه مستعد لإجراء هذه القضية على أساس تقديم أدلة الشهود في شكل وثائق تجنبها ضرورة مشول الشهود شخصياً.

أجاب الأستاذ غورديل سينغ نيجار أن الإدعاء لا يواصل الاجراء دون أن يتحلى القاضي ديفيد عن مقعده. وطلب الأستاذ غورديل سينغ نيجار مزيداً من الوقت للتحدث مع شهوده، ومنح له ذلك. طلبت مجموعة أصدقاء المحكمة الإجازة لتقديم بيان للمحكمة في مكتب القاضي صباح اليوم التالي. وتم منحهم الإذن للقيام بذلك.

في صباح اليوم الثاني، أدللت مجموعة أصدقاء المحكمة بيانها في مكتب القاضي إلى أعضاء القضاء. وبعد سماع كل من فريق الادعاء ومجموعة أصدقاء المحكمة استمرت الإجراءات.

طلب الأستاذ غورديل سينغ نيجار الإجازة من المحكمة لممثل ضحية من ضحايا المجموعة لمواجهة المحكمة. ومنحنا الإجازة.

تحدث الضحية البالغ الذكر إلى المحكمة وكفر نفسي الذي أعرب البروفيسور غورديل سينغ نيجار. مفاده أن الضحايا يهتمون بسلامتهم من الظهور أمام المحكمة في شكله، وكانوا متعرضين في بعض الملاحظات المقدمة من المحكمة سابقاً لخاميهم لاحظت المحكمة أنها لم تطرح أي دليل يفصل المخاوف على سلامته الضحية.

طلب الأستاذ غورديل سينغ رسمياً لهذه الإجراءات أن تتأجل لأجل غير مسمى (الطلب الجديد).

وقبل إعطاء قرارها بشأن طلب جديد لوقف هذه الإجراءات، تشعر المحكمة أنه من المهم أن تذكر ما يلي للسجل.

- (1) يلاحظ القضاة مع بالغ القلق والأسف أن هناك عرقا خطيرا لقواعد الياقة والسلوك غير السليم من جانب السيد بويل، الحامي المشارك للادعاء في المسائل المذكورة آنفا. في هذه اللحظة لم يكن هناك أي محاولة من قبل الحامي المشارك لتقديم الاعتذارات دون تحفظ إلى أعضاء المحكمة، وبوجه خاص، إلى القاضي أريك ديفيد.
- (2) في حين تلاحظ المحكمة بيان رئيس المدعي العام إلى الهيئة القضائية، في كل من إجراءات مفتوحة وكتمان في الغرفة القضائية، أن شهوده يخالفون على سلامتهم إذا أدلو بشهادتهم في حضور القاضي أريك ديفيد، واعتبرت المحكمة سلوكهم في الإصرار على الحضور في المحكمة - رغم الأمر بخروج الشهود من المحكمة، سلوكا مخالفًا لاتجاه كافة القضاة
- (3) اتفق القضاة على رأيهم على رفض الشهود المستمر بإدلاء شهادتهم في هذه الإجراءات إلا إذا تناهى القاضي أريك ديفيد، وعلى الرغم من الحكم الصادر من القضاة ، يعتبر ازدراء نظام المحكمة وإنذار غير لائق يوجه إلى الهيئة القضائية. يريد الشهود أن تعتقد أن المحكمة أئم إذا أدلو بشهادتهم في إجراءات مفتوحة أمام ستة قضاة (مع القاضي أريك ديفيد على الهيئة القضائية) أئم سيكون في مأمن من الأذى عند عودتهم إلى وطنهم. في غياب أي دليل يدعم هذه المعاواف المزعومة فإن المحكمة ترى أن وجود القاضي أريك ديفيد على الهيئة القضائية ليس لها أي تأثير على سلامتهم.
- (4) في حين أنه من المفارقات أن مؤسسة كوالالمبور لجريمة الحرب (KLFCW) لها تكلفة كبيرة، حين أعطت لشهود يومهم في المحكمة ل لتحقيق العدالة عن جرائم الحرب المرتكبة ضدتهم. الشهود (بقيادة فريق النيابة) رفضوا للشول أمام المحكمة. وقد أهدر الشهود فرصة ثمينة. تشعر المحكمة بخيبة أمل أيضا في حين أنه قدمت المبادرات العديدة لخامي الادعاء للبحث عن الطرق لإعطاء الشهود الثقة لإدلاء بشهادتهم ولكن لا جدوى لهذه المحاولات. وخلصت المحكمة أن فريق الادعاء أراد أن يضع النهاية لهذه الإجراءات.
- (5) أخيرا، أراد القضاة أيضا أن يعبروا عن حزنهم وأستههم على الرغم من كل الاستعداد الذي يعيشمه كثير من الناس تحت قيادة حضرة الرئيس لمؤسسة كوالالمبور لجريمة الحرب KLFCW، فضلا عن هذه المحكمة بما فيها أحجزتها، فضلا عن مصاريف باهظة التي تم توفيرها من قبل الجهات المالحة السخية، وكل هذه الجهود ذهبت سدى. تعتقد المحكمة أن فريق المقاومة - وعلى الرغم من تأكيد أنها ستلتزم بقرار المحكمة، قد أدى بمفرده واحد هذه الإجراءات إلى الفشل إلا إذا كان طلبهم مسموعا. وهذا هو وضع لا يطاق أن المحكمة لا يمكن أن تتغاضى.

1 (6) ترى المحكمة أن تشير إلى أنه على الرغم من موقف القاضي أريك ديفيد الثابت من عدم وجود جدوى في طلب الادعاء أن ينتهي نفسه ، فإنه تطوع لسحب نفسه من الإجراءات. ومع ذلك فإن بقية القضاة بالإجماع لن يدعموا ذلك القرار. تؤكد المحكمة في وقت سابق من حكمها أن القاضي أريك ديفيد لا ينتهي نفسه من هذه الإجراءات.

5 وبالتالي، فإنه مع تردد كبير وأسف شديد أن تأمر المحكمة الآن أن هذه الإجراءات تأجل إلى أجل غير مسمى.

10 المحاكمة: الأستاذ غورديل سينغ نيجار، السيد فرانسيس بويل، السيد أفتون سينغ والستة قان بي السريجنس. مجموعة أصدقاء المحكمة: السيد جايسون كاي كيت ليون، السيدة لاريسا جين كد، الدكتور حربان عباس، والستة غالو نورسفينس. المسجل: السيد موسى إسماعيل



# ملحق ب



## 1 حكم على الاعتراضات الأولية التي أثارتها مجموعة أصدقاء المحكمة

- CHG 2013-3 قضية رقم. 4 - محكمة كوالالمبور لجرائم الحرب، قضية رقم. 3- CHG 2013.

5 أعضاء المحكمة: القاضي تان سري داتو الحاج لامين بن الحاج محمد يونس (الرئيس)، القاضية تونكو صفيه جيو والقاضي شاد سليم فاروقى، والقاضي محمد ساري يوسف، والقاضي صالح بوأنغ، والقاضي جون فيلبوط، والقاضي تونكو إنتن مينورا.

20 نوفمبر 2013م

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القاضية تونكو صفيه جيو (تقديم حكم المحكمة).

## الاعتراضات الأولية

15 في 20 أغسطس، 2013 قدمت مجموعة الدفاع أصدقاء المحكمة الاعتراضين الأوليين هذه الإجراءات-والاعتراض الأولي تدعي مجموعة أصدقاء المحكمة أن ثمة عيوب في التهم الموجهة ضد المتهمين، والاعتراض الثانية تدعي أن دولة إسرائيل لا يمكن محاكمتها في هذه الإجراءات على أساس الحصانة الدولية.

20 التوجّه الرئيسي للحجج بمجموعة أصدقاء المحكمة في اعتراضها الأولية هو أن الاتجاه في المحاكم الجنائية الدولية الحديثة أنه إما أن يكون لها اختصاص على الأفعال التي تم ارتكابها بعد أن يتم تشكيل هذه المحاكم، كالمحكمة الجنائية الدولية (ICC)، أو اختصاصها مدة محددة مثل المحكمة الجنائية الدولية لرواندا (ICTR) والغرفة القضائية الاستثنائية في محاكم كمبوديا (ECCC).

25 وقدمت بمجموعة أصدقاء المحكمة أن هذه المحكمة أنشئت في 6 يونيو 2008م، في حين أن مختلف الأفعال المرتكبة من قبل المتهم الأول في تهمة رقم 3 وقعت في شهر سبتمبر عام

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1 1982، وكما أن الأفعال المتركبة من طرف المتهم الثاني في حكمة رقم 4 وقعت منذ عام 1948 م ويستمر حتى يومنا هذا.

5 تعرف مجموعة أصدقاء المحكمة صراحة أنه إذا كانت المحكمة تعتقد أن اختصاصها مفتوح بلا أحد (كما في المحاكم العسكرية في نورمبرغ وطوكيو وغواناتانامو)، فإن اعتراضها الأولية يجب أن تفشل.

وفي هذا الصباح، سمحت المحكمة لفريق الدفاع أصدقاء المحكمة تقديم تقريره الشفوي فيما يتعلق بنفس الاعتراضات التمهيدية الآتتين.

10 نيابة عن فريق الادعاء، نوقشت إن مسألة السلطة القضائية يجب تأكيدها بالرجوع إلى الميثاق التأسيسي أو القانون الذي أنشأ المحكمة.

15 يصرح ميثاق مؤسسة كوالالمبور لتجريم الحرب (الميثاق) أن السلطة القضائية يجب أن تحكمها أحکام هذا الميثاق: الجزء 1، المادة 1. ليس هناك حد زمني. ولا سيما المادة 7 لا تحدد أي زمن. في هذا المعنى، فإن الميثاق مطابق السلطة القضائية اللاحديدة للمحكمة العسكرية في نورمبرغ أو المحكمة العسكرية الدولية للشرق البعيد.

20 قدم فريق الادعاء أيضاً أن المحكمة تدين بوش وبيلر بارتكاب جرائم الحرب في 2003م، التي تسبّق تأسيسها : لجنة جرائم الحرب كوالالمبور ، ضد جورج بوش وأنطوني بلير، KLWCT تقارير 2011م، ص.1. الحكم من قبل محكمة جرائم الحرب كوالا لمبور (KLWCT) ضدّ بوش وتشرني ورامسفيلد وآخرون عادت إلى التعذيب المتركبة من 2001م.

25 التوجه الرئيسي لحجج مجموعة الدفاع أصدقاء المحكمة في اعتراضه التمهيدي الثانية أنه ليس هناك سلطة التي يمكنها الميثاق لهذه المحكمة لسماع أي إجراء ضد الحكومة في بلد ما، على سبيل المثال، حكومة إسرائيلية.

1 جادل فريق الدفاع أصدقاء المحكمة أيضاً أن هنا لا يسمح القانون الدولي "دولة إسرائيل" أن تترافق باعتبارها المتهمة. إن دولة إسرائيل دولة قومية، معترف بها من قبل الأمم المتحدة، و كدولة قومية، فإن لها حقوق في القانون الدولي.

5 ويقدم فريق الدفاع أصدقاء المحكمة أيضاً أن دولة إسرائيل لم تتقدم أمام هذه الاجراءات القضائية، وبالتالي لم تعرف بسلطة هذه المحكمة. ويقدم فريق الدفاع أصدقاء المحكمة أن دولة إسرائيل تتمتع بالحسانة عن جرائم الإبادة الجماعية وجرائم الحرب وبالتالي يجب أن تكون حمماة 4 مرفوضة.

10 وفيما يتعلق الاعتراض التمهيدي الثاني، وقدمت الهيئة القضائية ، في جملة أمور، أن هاتين التهمتين هما جرائم الحرب الجنائية الدولية التي يتم تحكيمها من قبل محكمة دولية.

15 الدول التي لم يكن لها أي حسانة عن الجرائم قبل المحاكم. دعماً لمناقشتهم، استشهد الهيئة القضائية بقرار محكمة العدل الدولية في قضية البوسنة، التي تنص، في جزء منه، على النحو التالي:

بعد أن استمع وفقاً لمختلف الحجج، تؤكد المحكمة أن الأطراف المتعاقدة ملزمة بالالتزام 20 وفقاً للميثاق عدم ارتكابهما، جوهرة الإبادة الجماعية والأفعال الأخرى المذكورة في المادة الثالثة سواء عن طريق أعضائهم، أو الأشخاص أو الجماعات الذين يكونون سلوكهم منسوبة إليهم، وبالتالي إذا كان جهاز من أجهزة الدولة، أو شخص أو مجموعة التي كانت أفعالهم منسوبة إلى الدولة قانونياً، يرتكب أي فعل من الأفعال المحظورة تحت المادة الثالثة من الاتفاقية، فإن تلك الدولة تحمل المسؤولية الدولية: 179 (وثائق الادعاء، الجلد 1 : ص 170-171).

الطلبان

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في 15 أكتوبر 2013م، قدمت مجموعة الدفاع أصدقاء المحكمة طلبين لسحق الاتهام ضد المتهمنين، وهو المتهمن الأول، عاموس يارون و المتهمن الثاني، دولة الإسرائل. أساس هذين الطلبين كما قدمت مجموعة الدفاع أصدقاء المحكمة هي كما يلي:

- 1 أن هذه التهمة خلل في الإزدواجية و/أو الإزدواجية الكامنة.
- 2 أن هذه التهمة معيبة لعدم اليقين
- 3 أن هذه التهمة تعسف في الإجراء، و/أو فيه قمع.

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وبناءً على المتهمنين، طلبت مجموعة أصدقاء المحكمة من المحكمة إصدار الأوامر الآتية:

- 1 رفض التهمة الموجهة إلى المتهمنين.
- 2 ثبوت الادعاء ضد المتهمنين.
- 3 إعادة صياغة التهم وفقاً لمبادئ القانون الجنائي، وتكون بدليلاً للأول.

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تدعى مجموعة أصدقاء المحكمة أن هناك جرائم متعددة مدجحة في تهمة واحدة، وعدة أشكال تهمة الإجرام في تهمة واحدة. وقدّمت الجماعة أنه لا بدّ من التقييد بالحكم ضدّ الإزدواجية في الإجراءات الجنائية . ينصّ الحكم لكل جريمة متميزة التي بما يُتهم أي شخص، يجب أن تكون هناك تهمة منفصلة توجه إلى المتهمن وكل تهمة تحاكم على حدة.

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تقدم مجموعة أصدقاء المحكمة أنه لا يصحّ أن يقال بأن مبادئ الإزدواجية لا تطبق في القانون الجنائي الدولي، ويقدم الفريق أيضاً هذا حق توجيه الاتهام بتهمة تراكمية تحت القانون الدولي لا يوفر الحرية الكاملة لتجنب مبادئ الإزدواجية أو تعسف في الإجراء . فمثل حقوق توجيه الاتهام بتهمة تراكمية من شرطها يجب أن يكون مبادئ شاملة واضحة، وبالدقة والإنصاف للمتهمين.

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تقدم مجموعة أصدقاء المحكمة أن التهم الموجهة إلى المتهمن الأول والمتهمن الثاني يجب أن تعدل على أقل تقدير، إن لم يكن ملغاً تماماً. تقدم مجموعة أصدقاء المحكمة أن العيوب كانت جوهريّة

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تسوغ الاستكثار، بل هي ضارة، وتفشل في عدم استخدام لغة محايدة كما هو متوقع في دوره كمحكّب الادعاء.

وفي ردّه، قدم فريق الادعاء العام بأن هذه المحكمة تحكمها قواعدها الذاتية وهذه المادة صامدة في صياغة التهم لتطبيق الحكم ضد الإزدواجية.

والقانون ضد الإزدواجية كما هي موجود في النظم القانونية الوطنية، لا يمكن أن يطبق بالطريقة نفسها في الدعاوى المروضة أمام المحاكم الجنائية الدولية.

والأهم من ذلك أنه ينبغي للمحكمة أن تأخذ في عين الاعتبار حجم بشاعة هذه الجرائم المرتكبة.

وفيما قدّمت جموعة أصدقاء المحكمة للمحكمة، أن التهمة معيبة بسبب عدم اليقين، قدّمت جموعة الادعاء العام أن من السابق لأوانه أن يقول أحدا مثل ذلك دون تقدير تفاصيل الواردة في الأدلة . وتفاصيل هذه التهمة هي الحقائق التي تسعى جموعة الادعاء إلى إثباتها أثناء المحاكمة .

وقد قدّمت جموعة أصدقاء المحكمة أيضا أنه كان هناك مرور الوقت من وقوع الجرائم المزعومة لتأريخ هذه الإجراءات. هذا يثير احتمالات أن أدلة حاسمة في دعم قضية المتهمين قد لا تكون متيسرة، وبالتالي يشكل تحابيرا كبيرة للمتهمين.

ردا على ذلك، يشير فريق الادعاء إلى إقامة الدوائر الاستثنائية في محاكم كمبوديا (ECCC) في عام 2005 لسماع قضايا الأفعال الوحشية التي قام بها خمير روغو ما بين 1975-1979م.

وبعد النظر إلى الاعتراضات التمهيدية التي رفعتها مجموعة أصدقاء المحكمة والطلاب المقدمين من قبلهم، وما قدمته مجموعة الادعاء العام في عدة الوثائق المقدمة إلى هذه المحكمة وكذلك بعد اعتبار التقديم الشفوي من كلا الطرفين، ترى المحكمة بالاجماع أنه لا قيمة ثابتة للاحتجاجات التمهيدية والطلاب، فعليه ترى المحكمة رفضها.

قبل أن تنهي هذه الإجراءات الأولية وغاضي إلى سماع الأدلة بشأن التهمتين، ترغب هذه المحكمة أن تسجل البيانات التالية للفاصلة:

#### في مسألة اختصاصها بأثر رجعي

(1) - لم تقم هذه المحكمة ب مجرم مالم تكن جنائية من قبل. ليس هناك قضية لبرئة المحكوم عليه. يخول الميثاق محكمة جرائم الحرب كوالالمبور (KLWCT) أن تأخذ علما، وأن يفصل في جرائم بشعة تحت مجموعة كبيرة من القوانين والأعراف الدولية الموجودة من قبل.

(2) - للعديد من المحاكم الدولية الأخرى لديها سلطة قضائية مماثلة ذات أثر رجعي ضمن الفترات الزمنية المحددة التي بدأت قبل إنشاء المحاكم. ومحكمة جرائم الحرب كوالالمبور KLWCT لا توجد حدود زمنية من هذا القبيل. فتعزز محكمة جرائم الحرب كوالالمبور أن تأخذ علما بجرائم الدولة التي ارتكبت في فترات زمنية غير محدودة قبل إنشائها.

(3) - ويجدر الإشارة أيضا إلى أن العديد من الجرائم الدولية المذكورة في القرار الاتهامي لا تزال مستمرة.

(4) - وجهت إلينا دعوة من قبل محامي الادعاء اتباع نموذج المحكمة نورميرغ التي ليس لديها حدود زمنية صريحة يعكس بعض المحاكم الدولية الأخرى التي كانت سلطتها مقتصرة على فترات زمنية. نحن نميل إلى قبول هذا الواقع لأن ميثاقنا يسمح لنا الفصل القضائي في الجرائم ضد السلام التي كان كثير من المحاكم المخصصة لم يكن لديها القدرة على الفصل القضائي.

## بشأن مسألة حصانة الدول ذات السيادة من الإجراءات الجنائية في المحاكم الأجنبية

(1) هل يمكن أن تُحاكم الدول الأجنبية أمام محكمة جرائم الحرب كوالالبو (KLWCT)؟<sup>1</sup> ميثاقنا في الفصل الثالث، المادة 6 (ب) صريح بأنه "إذا كانت التهمة تشمل دولة ذات سيادة، فالرئيس الحالي للدولة أو للحكومة، وتسلیم نسخة (دعوة الادعاء) إلى أي سفارة ذات الصلة أو مفوضية يكون كافياً ويعتبر أن المتهم قد وجهت إليه الدعوة".

(2) -السلطة القضائية التي ينص على أن القانون الدولي ضد محكمة دولة أجنبية يجب أن تفسر وفقاً لعرف القانون الدولي (القواعد الأممية) التي تحرم جريمة الإبادة الجماعية، كما يظهر في حكمين لمحكمة العدل الدولية الآتية وهما:

(أ) جمهورية الكونغو الديمقراطية ضد رواندا (2006م) في فقرة 64؛

(ب) -تطبيق الاتفاقية على منع ومعاقبة جريمة الإبادة الجماعية (اليونسة والمرسك ضد يوغوسلافيا)، 26 فبراير، 2007م (حكم محكمة العدل الدولية) في فقرة 161.

(3) نحن متفقون مع اقتباس الإدعاء في قضية محكمة العدل الدولية: تطبيق الاتفاقية على منع ومعاقبة جريمة الإبادة الجماعية (اليونسة والمرسك ضد صربيا وMontenegro)، وتقدير حكم محكمة العدل الدولية 2007م، ص. 43 في ص. 113 أنه "إن المحكمة تلاحظ أن ازدواج المسؤوليات ما زال تكون سمة ثانية من سمات القانون الدولي" التي "تظهر في المادة 25، فقرة 4 من قانون روما لمحكمة الجنائية الدولية" . . . "إذا كان جهاز من أحجزة الدولة، أو شخص أو مجموعة والتي يمكن عز تصرفاتها إلى الدولة قانونياً، يرتكب أي فعل من الأفعال المحظورة تحت المادة الثالثة من الاتفاقية، فإن تلك الدولة قد تتحمل المسؤولية الدولية بحاجة هذه التصرفات".

أعضاء المقاضاة: الأستاذ غورديل سينغ نيجار، تان سري عبد العزيز عبد الرحمن، والسيد أفترنسينغ والسيدة قان في السرحس، والسيد نظام الدين حامد، والدكتور شرذلين، والسيدة رفيقة الشريعة، والسيدة مذليتا محلی والسيدة ديانا سليمان، مجموعة أصدقاء المحكمة : السيد جاييسون كاي كيت ليون (رئيس)، والسيدة لاريسا جين كد، والدكتور عباس حربن، والأستاذ الدكتور رحيم شافعي، والدكتور رهيد نور الدين والدكتور ماثيو وتيرودت.

مسجلون: السيد موسى إسماعيل، والسيدة فيفي أرميد محمد صائب (مساعد) والسيد رزيف محمد روسلی (مساعد)



# ملحق ج



1 الاستئناف العارضة من قبل أصدقاء المحكمة للحكم على الاعتراضات الأولية التي أثارها  
بمجموعة أصدقاء المحكمة

مصدرة من قبل

محكمة جرائم الحرب كوالالمبور

5 بتاريخ 20 نوفمبر 2013<sup>46</sup>

محكمة جرائم الحرب كوالالمبور - قضية رقم 3-4 -- CHC 2013CHG 2013

أعضاء المحكمة: القاضي تان سري داتو حاجي لامن بن حاجي محمد يونس (رئيس)،  
القاضي توكو صفيه حبوا، القاضي شاد سليم فاروقى، القاضي محمد ساري يوسف، القاضي  
صالح بوأنغ، القاضي جون فيلغوفت و القاضي توكو إتان مينورا.

22 نوفمبر 2013

15 أ. المقدمة:

1. يقتضى الحكم الصادر بتاريخ 20 نوفمبر 2013، فإن أعضاء محكمة جرائم الحرب  
كوالالمبور حكم أن الاعتراضين الأوليين الذين قدمتهما أصدقاء المحكمة نيابة عن  
عاموس يرون و دولة إسرائيل بخصوص اختصاص المحكمة الزمبي والمحصنة السيادية  
لدولة إسرائيل في ظل الظروف الحالية.

20 2. أيضاً يتضمن الحكم ما يتعلق بالطلبين بخصوص المعايير الدولية المتعلقة بصياغة تهم و  
عدم اليقين المزعوم الناجم من صياغة التهم.

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<sup>46</sup> انظر الحكم لطلب الاستئناف في صفحة 297 ، سطر 13-10

3. إن الاستئناف الحالي الذي قدم سويا مع الاستئناف العارض الثاني للموضوع المتميز والذى طلب تصحيح منفصل مقبول، على أساس أن تصحيح خطأ في القانون في الحكم المتعلق بقضية اختصاص المحكمة على تصرف إسرائيل المزعوم مطلوب.

4. تقديم الحكم:

يجب قبول الاستئناف لتصحيح خطأ فاحش في القانون الذي أدى إلى القرار المتوصل إليه من قبل أعضاء المحكمة (*coram*) في الحكم المتعلق بمدى الشرعية الدولية للمحكمة المتزاولة اختصاصها على الادعاءات الموجهة ضد دولة إسرائيل. وبكل احترام، طلبت مجموعة أصدقاء المحكمة من أعضاء المحكمة توضيح المعيار القانوني الصحيح ومراجعة تحقيقات القرارات.

5. أسست محكمة جرائم الحرب بالشخصية القانونية الدولية والأهلية القانونية المطلوبة "لمارسة وظائفهم ولتحقيق أهدافهم".<sup>47</sup> إن هدف المحكمة هو أن يحاكم مجرمي الحرب "لضممان الاحترام الدائم للمحكمة الدولية ولتنفيذ العدالة الدولية".<sup>48</sup> إضافة إلى ذلك، فإن الميثاق قد أشار بشكل واضح إلى أنه في حالة وجود خلل في الأحكام، "فإن على المحكمة تبني تلك الأحكام التي توافق المعايير الدولية للانصاف والعدالة".<sup>49</sup> وفقا للإطار القانوني الدولي المعاصر والثابت، لا ينبغي لمحكمة جنائية دولية أن تسعى لتأييد وتنفيذ أحكام القانون الدولي وهي في نفس الوقت تلغى أحكام القانون الدولي في إدارة مهماتها.<sup>50</sup>

6. القرار الصادر فيما يخص مسألة اختصاص المحكمة على الجرائم مختلف للقانون الدولي العربي وقرارات الميليات القضائية الدولية. فيما يخص الحكم، يبدو أن أعضاء المحكمة،

<sup>47</sup> المادة 4 من ميثاق مؤسسة كوالالمبور لجرائم الحرب (يشار إليها بـ"الميثاق" بعد هذا).

<sup>48</sup> مقدمة للميثاق.

<sup>49</sup> جزء 2، المادة 2(K) للميثاق.

<sup>50</sup> المدعي ضد سليمان وأخرين، سري من طرف واحد: قرار بشأن اقتراح المدعي بموجب المادة 73 لقرار بشأن شهادة الشاهد، 27 بوليو 1999 فقرات 9-22.

اعتبرت فقط طبيعة الجريمة المرتكبة وحالة الجريمة تحت القانون الدولي.<sup>51</sup> علاوة على ذلك، فأعضاء المحكمة تصر على أن تأكيد الاختصاص متضمن في أحكام الميثاق نفسه.<sup>52</sup>

وفي محاولة تأييد قرارها، أحالت أعضاء المحكمة إلى تطبيق اتفاقية منع جريمة الإبادة الجماعية والعقاب عليها<sup>53</sup> في فقرات 161، 173، 54، 55، 179، 56 وكذلك الأعمال العسكرية على حدود كنغو (التطبيق الجديد: 2002)<sup>57</sup> في فقرة 64.<sup>58</sup> ولكن المعلومات المذكورة لا تدعم حجة أعضاء المحكمة التي تأكيد أن الاختصاص سار على جريمة تحت القانون الدولي.

على وجه خاص، وبالإشارة إلى القرار بشأن الأعمال المسلحة على أراضي الكونغو (التطبيق الجديد: 2002)، استشهدت أعضاء المحكمة بفقرة 64. والجزء ذات الصلة بفقرة 64 يشير كالتالي:

والمحكمة تلاحظ، كما لها الفرصة أن تأكيد من قبل، أن أسلوب المواجهة الكافية لقاعدة وحكم المعاشرة لاختصاص شيئاً مختلفاً... وأن مجرد الحقيقة أن الحقوق والالتزامات تجاه الكافة قد يكون مسألة النزاع لا تعطي المحكمة اختصاص حق استماع ذالك النزاع.

فمحكمة العدل الدولية (I.C.J.)، بتصويت 15 ضد 2 ، قررت أنه رغم أن الإبادة الجماعية تشكل الالتزام تجاه الكافة أو القواعد الأممية بالطبيعة، وبالرغم أن روندا قد أبدت التحفظ من

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<sup>51</sup> القرار ص. 3، 6-7.

<sup>52</sup> القرار ص. 7.

<sup>53</sup> بوستن والميرك ضد الصربية والبوسنة والهرسك . حكم I.C.J. تقرير 2007. ص . 3

<sup>54</sup> القرار ص. 7.

<sup>55</sup> القرار ص. 7 . يجب أن يلاحظ أنه يوجد الخطأ في الوثيقة الأصلية للاقتباس من القرار. والاقتباس من ص 77 في فقرة 173 من قرار المحكمة وليس من ص 43 فقرة 113 كما اقترح القرار

<sup>56</sup> القرار ص. 4.

<sup>57</sup> الجمهورية الكنغولية الديمقراطية ضد رواندا، الاختصاص والمقيولة، قرار المحكمة الجنائية الدولية (I.C.J) تقرير 2006 وص 6.

<sup>58</sup> القرار. ص. 7.

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المادة 9 اتفاقية الإبادة الجماعية، يستبعد تلقيها تأكيد اختصاص محكمة العدل الدولية على المحاكمة كما أن عدم حصول عل المموافقة من رواندا بخصوص اختصاص محكمة العدل الدولية يستبعد تأكيد اختصاص محكمة العدل الدولية على النزاع.<sup>59</sup>

وعلاوة على ذلك، فإن الإشارات إلى القرار في تطبيق اتفاقية منع جريمة الإبادة الجماعية والمعاقبة عليها لا تؤيد نتائج أعضاء المحكمة. تشير فقرة 161 إلى جزء القرار الذي أنشأ القانون الدولي العربي وطبيعة القواعد الآمرة بشأن قانون منع الإبادة الجماعية. وفي الوقت نفسه فإن فقرة 173 بشأن القضية تشير إلى "ازدواجية المسؤولية" فيما يتعلق بالالتزامات تجاه الكافة؛ مسؤولية الدولة و المسئولية الجنائية الفردية/ مسؤولية الفرد. وفي فقرة 179، فمحكمة العدل الدولية رأت أن لها اختصاص على النزاع فيما يتعلق بالالتزامات الدولة بشأن الإبادة الجماعية بموجب المادة 9 بشأن اتفاقية الإبادة الجماعية.

في حين أكدت محكمة العدل الدولية الاختصاص، فإنه ليس على أساس مسؤولية الدولة ولا على أساس طبيعة الفعل غير المشروع، لكن أثيرت من الموقفة الصريحة.<sup>60</sup> فإن القرار ينفي على العبارة الصريحة من المادة 9 بشأن اتفاقية الإبادة الجماعية التي أعطت اختصاص على نزاعات تقع بين طرفين في اتفاقية الإبادة الجماعية، وذلك إثر الطلب من أي طرف في النزاع.

فإن الأحكام بشأن الموقفة الصريحة للاختصاص تعتبر جزءاً من مجموعة القانون الدولي العربي . إن متطلبات الهيئة القضائية الدولية للحصول على المموافقة من الدولة

<sup>59</sup> الجمهورية الكونغولية الديمقراطية ضد رواندا ، الاختصاص والمقبولية، قرار المحكمة الجنائية الدولية (I.C.J) تقرير 2006 ص 6 ، فقرات 125-128.

<sup>60</sup> يومية المرس克 ضد الصربية و المتسيغورو . حكم I.C.J. تقرير 2007. ص ، 3، فقرات 147-148، 450، و 451.

1 قبل أن تمارس تلك الهيئة السلطة القضائية قانونياً قد تم تأييده بشكل مستمر.<sup>61</sup> لا يمكن لحاكم دولية ممارسة الاختصاص على دول بدون موافقة صريحة نظراً لطبيعة وحدود النظام الدولي المعاصر.<sup>62</sup> أضف إلى ذلك، أنه لا توجد قاعدة آمرة تتطلب من الدول موافقة على اختصاص حيث يتم عرض المسائل المتعلقة بالامتثال بقاعدة آمرة.<sup>63</sup> كما أن حالة قاعدة من القواعد الآمرة لا توفر أساساً لإسقاط مبدأ الموافقة.<sup>64</sup>

10 12. إن الأسس للاستئناف العارض الحالي ناجمة من هدف الحكمة في المحاكمة على الادعاءات الجنائية الدولية؛ والتزام المحكمة كهيئة قضائية يتمحور في تقديم قرارات وأحكام بطريقة تتفق مع المبادئ العامة للقانون الدولي والعربي؛ وال الحاجة لتصحيح الخطأ الكامن في قرار المحكمة بتاريخ 20 نوفمبر 2013. لا يتم تقديم مبادة الاحترام والإدارة السليمة للعدالة من قبل محكمة تصدر قراراً أو حكماً ليس منسجماً مع القانون الدولي، ولا مدعوماً من القانون الدولي.

#### جـ. الاختتام

15 13. للأسباب المذكورة آنفاً، يجب أن يسمح للاستئناف العارض من قبل مجموعة أصدقاء المحكمة وينبغي لأعضاء المحكمة أن يمنع التعديل إما بشكل ملخص قرار ثان يتفق مع المبادئ العامة للقانون الدولي والقانون الدولي العربي مع خيار المرافعات الشفوية التي تستمع إليها حول المسألة إذا كانت المحكمة الموقرة تتطلب توضيحات

20 <sup>61</sup> على سبيل المثال ، انظر تطبيق اتفاقية مع الإيادة الجماعية وللغاية عليها (بوسنة وهرسك ضد الصربية والبوشنة)، حكم I.C.J. تقرير 2007 . ص . 3 ، فقرة 148؛ شرق تيمور (البرتغال ضد أستراليا، حكم I.C.J. تقرير 1995 ، ص . 90 ، فقرة 29؛ و الأنشطة المسلحة على أراضي كونغو (التطبيق الجديد: 2002 ) (الجمهورية الكونغورية ضد كونغو ضد رواندا) ، الاختصاص والمقبولية، قرار المحكمة الجنائية العدلية، تقرير 2006 ص 6 ، فقرات

25 <sup>62</sup> الجمهورية الكونغورية الديمقراطية ضد رواندا ، الاختصاص والمقبولية، تصريح قرار ألازي ، المحكمة الجنائية العدلية (I.C.J.) تقارير 2006 ص 82 ، فقرات 2 و 7.

<sup>63</sup> الجمهورية الديمقراطية كونغو ضد رواندا ، الاختصاص والمقبولية، رأي منفصل للقاضي المخصوص دوغاد المحكمة الجنائية العدلية (I.C.J.) تقارير 2006 ص 86 ، فقرة 3.

<sup>64</sup> المرجع السابق، فقرة 14.

إضافية، وأن تصدر المحكمة الرأي الاستشاري بدلاً من إصدار قرار بشأن تحمة رقم 4 ضد دولة إسرائيل.

14. بالإضافة إلى ذلك، ونظراً للاقتراب، تطلب مجموعة أصدقاء المحكمة بكل احترام البقاء على الإجراءات القضائية إلى حين إصدار قرار بشأن الاستئناف العارضة.

5 بتاريخ يوم 22 من شهر نوفمبر 2013.

السيد جاسن كي كيت ليون

10 الداعية والخامي

رئيس مجموعة أصدقاء المحكمة

السيدة لاريسة جاني قد دتملد

15 شامية معارضه للقانون

مجموعة أصدقاء المحكمة

الدكتور عباس حرداني

مستشار قانوني

مجموعة أصدقاء المحكمة

20

الدكتور ماتيو وتبرودت

مستشار لمجموعة أصدقاء المحكمة

الأستاذ الدكتور روحيمي

25 مستشار لمجموعة أصدقاء المحكمة

الدكتورة روحيدة نوردين

مستشار لمجموعة أصدقاء المحكمة

28

**NOTES  
OF  
PROCEEDINGS**



1 Chief Prosecutor of the Kuala Lumpur War Crimes Commission  
v.  
Amos Yaron and the State of Israel

5 Kuala Lumpur War Crimes Tribunal - Case No. 3-CHG-2013 and  
Case No. 4-CHG-2013  
Coram: Judge Tan Sri Dato' Haji Lamin Bin Haji Mohd Yunus  
10 (President), Judge Alfred Lambremont Webre, Judge Tunku Sofiah  
Jewa, Judge Shad Saleem Faruqi, Judge Salleh Buang, Judge Michael  
Hourigan and Judge Eric David.

**NOTES OF PROCEEDINGS**

15 **Venue:**  
2nd Floor, No. 88, Jalan Perdana  
Taman Tasik Perdana  
50480 Kuala Lumpur  
Malaysia

20  
**Judges:**  
Judge Tan Sri Dato' Haji Lamin Mohd Yunus (President)  
Judge Alfred Lambremont Webre  
25 Judge Tunku Sofiah Jewa  
Judge Shad Saleem Faruqi  
Judge Salleh Buang  
Judge Michael Hourigan  
Judge Eric David

30  
**Prosecution Division of the Legal Team:**  
Professor Gurdial Singh Nijar  
Professor Francis A. Boyle  
35 Mr. Avtar Singh  
Ms. Gan Pei Fern

**Defence Division of the Legal Team (*Amici Curiae*):**  
40 Mr. Jason Kay Kit Leon  
Ms. Larissa Jane Cadd  
Dr. Abbas Hardani  
Ms. Galoh Nursafinas Samsudin

**Registrar:**

Mr. Musa Ismail

1

21 August 2013  
(Morning session)

5

(10.20am)

**Registrar Musa Ismail:**

The Kuala Lumpur War Crimes Tribunal will sit today to hear 2 charges against Amos Yaron, and the State of Israel. I wish to invite Mr. Gurdial to introduce both parties this morning.  
Mr Gurdial ...

10

15

**Prosecutor Gurdial Singh Nijar:**

May it please Your Honours; I appear for the prosecution together with colleagues, Mr. Francis Boyle, Ms. Gan Pei Fern, Mr. Aytaran Singh.

20

Appearing for, not appearing for defence, but appearing as *Amicus Curiae* in this case, are my learned friends, Mr. Jason Kay, Ms. Larissa Jane, Ms. Galoh Nursafinas Samsudin, and Dr. Abbas Hardani. I hope I pronounced the names correctly.

25

Your Honours, as has been announced, this is a trial in respect of two charges, one is against the State of Israel and the other is against Yaron. Before proceeding to this, we have an application to make with regard to requesting that one of the judges be asked to recuse himself, if he does not wish to do so voluntarily.

30

As Your Honours know, we have broached this topic in private because of the delicate nature of the allegations that we are making against one of the judges and we say with all respect, having no disrespect at all, but for purposes of preserving the integrity of this Tribunal and its findings which will be far-reaching, because this is the first time that I know that the state of Israel has been charged for one of the most ultimate crimes that can be committed by mankind: act of genocide against an entire group of populace, which is continuing.

35

40

1 So it is with regret that I have to ask that Judge Mr. Eric David  
recuse himself on the ground that justice must not only be done  
but be seen by the public to be done. This is a people's tribunal.  
It is a public tribunal, a tribunal of conscience.

5 And it is our contention that Mr. Eric David \*\*\* Of course, in  
fairness to Justice Mr. Eric David, we stand guided if there is  
indeed absolutely no connection whatsoever in the past, direct  
10 or indirect, and that several allegations that have been made  
openly in public \*\*\*. I leave the thrust of my submission, this is  
my opening, ... I leave the actual contention with regard to this  
to be advanced by my esteemed colleague Professor Francis  
Boyle, with your leave. Thank you.

15 **Prosecutor Francis Boyle:**

Distinguished Judges, may it please the Court. We have  
provided you all with a legal opinion by Eric David in support  
of the People's Mujahideen Organization of Iran, PMOI, \*\*\*.  
We have also provided an article from the Daily Mail, February  
20 10, 2012, \*\*\*.

25 We submit that the appropriate test for any judge on this  
Tribunal is to avoid even the appearance of impropriety and  
certainly Judge David's appearance on this Tribunal to judge  
Israel is inappropriate \*\*\* Israel is on trial here today for war  
crimes, crimes against humanity and genocide, \*\*\*.

30 It is also a matter of public record in the United States, as  
documented in the New York Times and the Wall Street  
Journal, \*\*\*.

\*\*\*.

35 \*\*\* this has been publicly recorded in the New York Times  
and the Wall Street Journal - matters of public records in the  
United States, \*\*\*.

40 So, Your Honours, under these circumstances, we believe there  
is no alternative but for Judge David to recuse himself because  
there is definitely more than appearance of impropriety for him  
being on this panel and it is not a question of him believing that  
he could be objective - the prosecution does not believe he can.

The question is: the public, do they believe Judge David can be objective \*\*\*. And the answer is clearly no. Justice must not only be done but be seen to be done. And clearly with Judge David on this panel, injustice be done to the Palestinians and the state of Palestine. Thank you, Your Honours.

*Amicus Curiae Jason Kay:*

Thank you Your Excellencies. On this, the Amicus team would like to just say a few, to make a few points. The points that we would like to make are as follows:-

Point number one: The 2 documents that were referred by the Prosecution Team - an alleged opinion written by Judge David. This is for Judge David to confirm or deny.

Number two: the article that was cited is, excuse me, Professor Boyle referred \*\*\* well documented by the New York Times and the Wall Street Journals. These documents have not been put forward. So, where are they? That's the main question.

A citation was given, and the second document tendered was from the Mail Online, \*\*\*. Now at the bottom of the page of the cited source, it says <http://www.dailymail.co.uk>. I have called up specifically that particular website. So this is the current "Daily Mail" today. I shall read the three top headlines of the Daily Mail. The first headline on today's [dailymail.co.uk](http://www.dailymail.co.uk): '*Burglars in prison paid £20 a week to quiz you about your valuables; Convicts asking unsuspecting families if they want to save money on house insurance*'. That's the first headline.

Second headline: 'Horror as 23-year-old British tourist's leg is SEVERED after cab swerves to avoid cyclist under the Rockefeller Center in New York'.

And I shall not bore the Panel any further. The third headline from today's Daily Mail: '*A vicious catfight, a married GP's six-year affair with a patient, and the VERY colourful story which could end his career*'. This is the source that is cited by the Prosecution. This, the Daily Mail's website today.

Allow me to quote from Professor Boyle himself when he

1 was speaking during the first sitting of this Tribunal in 2011.  
When the defence-amicus team in that case cited Fox News as  
a source, these were his words, verbatim: "*They cited sources*  
5 *from FOX News. Excuse me? FOX News? A sewer and a gutter*  
*and a toilet if anyone ever knew it. Owned by the Fascist-Zionist-*  
*warmonger Rupert Murdoch. How could anyone cite to this court*  
*FOX News?*"

10 I think I can do no better than that submission. So, I shall leave  
one last point to co-counsel, Ms. Cadd, on the standard.

**Amicus Curiae Larissa Cadd:**

15 May it please this Honourable Court, the test that is before  
Your Honours is the question of whether there is a "reasonable  
or substantial suspicion of bias". It is not whether there is any  
"semblance of bias" and it cannot be based on an indirect series  
of leaps of faith between certain things which are said to have  
occurred leading to the bias of the judge.

20 I have done a very quick search for some authority for this  
position, and unfortunately because I am Australian it will  
be an Australian authority - and I apologise for that, however  
I refer to the case of **British American Tobacco Australia**  
25 **Services Limited vs. Laurie [2011] HCA 2**. It is a decision on  
the 9 February 2011 at paragraph 35 to 37, one of the Judges of  
the High Court goes on to discuss what those tests are, and if  
I may just briefly read this to the court, because I think that it  
would assist the court in making its decision, "*The reasonable*  
30 *or substantial suspicion of bias as a criterion of apparent bias was*  
*enunciated in Allinson v General Council of Medical Education and*  
*Registration,*" that was an English case, "*Because a reasonable*  
*suspicion attributable to a non-lawyer must have some non-judicial*  
*vessel, the Court constructed the reasonable person as its arbiter*".

35 "That approach was followed by this Court," and I paraphrase  
a little, 'in 1993 the reasonable person whose apprehension  
was the test of the appearance of bias was retired from duty  
by the House of Lords in favour of a "real danger of bias" test  
to be administered by the court'.

40 That new approach was not accepted by the High Court of  
Australia. The "reasonable person" was recalled by the Court

of Appeal in the UK, and it is by way of a "modest adjustment" to that "real danger of bias," the question for the court under the revised test was "*whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.*"

And the revised test was approved later in the House of Lords. In 2000, the test was stated in Australia to require requires two steps. The first is "*the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits.*" The second is, "*an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.*"

We would submit to this Honourable Court that if it applies those test in considering the material which my learned friend has said is already of a somewhat spurious nature, that Your Honours would be able to ascertain that there is no reasonable apprehension of bias. There is not even a real danger of an apprehension of bias. May it please this Honourable Court.

**Prosecutor Gurdial Singh Nijar:**

I will just give a very short rebuttal to what has been suggested. Your Honours, we are not here to debate forensic arguments and clever sophistry. What we are here is, this is a court of conscience. Judges have to decide and people, not only here but those who listen to and receive this verdict, must have the highest respect for the outcome that emerges from this panel of judges. There must not even be a single blot on the integrity of this panel - and this is what we are trying to preserve. And this is why we reject these forensic arguments about proving Australian arguments and so on.

It is very simple. If we look at the ICJ charter, Article 2: The court shall be composed of a body of independent judges elected regardless of their nationality from among persons of high moral character. Very simple. We do not doubt that Judge Eric David, that is why we say it with greatest respect. That's why we try to move this in chambers, to do it behind closed doors. But Judge Eric David, you have rendered an opinion \*\*\*. You cannot deny that, can you? That is why we say that

1 we are not interested in the defence's points about whether you signed or did not sign and so on, the argument that was raised - you know for a fact whether you did or did not act.

5 Now what signal does that send to the world at large? \*\*\*. Now what impression does that give to the world at large? That he can be unbiased? So let's get to the nub of the matter. We want to preserve the integrity of this panel. I want to be part and parcel of a proceeding which will be respected. I do not want to go out and say, "You have ... what kind of a panel is that?"

10 We have gone to the most extensive, scrupulous plans to make sure our charter, our submissions, our authorities adhere to the highest standards of proof. And we want the panel to be with us on this. It is not like, if Judge David recuses himself that the panel is crippled - it is not. We have 6 other eminent judges. The same thing happened when the defence raised objections with regard to Judge Niloufer. They raised the objection. We did not stand up and object because we want to preserve the integrity and she then herself recuse. So we cannot, we state it categorically, we cannot accept the panel with Judge Eric David here.

15 20 25 We are very sorry. But with the kind of evidence that we have here, and it is for you to refute, you cannot apply an impartial mind. \*\*\*. The world is watching. This is the first time that the State of Israel has been charged with genocide. \*\*\*. We cannot accept Judge Eric David sitting on this panel and we state it very categorically. We cannot participate in a panel that will be so hindered. Thank you.

30 **Judge Alfred Webre:**

35 I like to ask a question of counsel, Professor Gurdial. You make it very difficult for us if you present such an ultimatum because has there been any evidence adduced that Judge David was aware of \*\*\*, and the PMOI at the time when he was approached to write this legal opinion, of which as an academic in Brussels he does as a matter of course to many NGOs?

40 **Prosecutor Francis Boyle:**

Judge Webre, I'm a professor of international law. Professor David is a professor of international law. It is well known

among international law professors that this Iranian terrorist organization works hand in glove ... 1

**Amicus Curiae Larissa Cadd:**

You Honours, I want to interject to that point. I have an 5  
objection.

**Prosecutor Francis Boyle:**

\*\*\*

**Amicus Curiae Larissa Cadd:**

I have an objection. 10

**Prosecutor Francis Boyle:**

Excuse me Counsel, I am responding to Judge Webre's ... 15

**Judge Lamin Yunus (President):**

Would you kindly stop here, hello?

**Prosecutor Francis Boyle:**

Judge Webre, let me answer your question. It is well known.  
It is a matter of a public record ... 20

**Judge Michael Hourigan:**

Professor Boyle, there's an objection. 25

**Judge Lamin Yunus (President):**

Professor Boyle, that is a strong objection here. Can we listen  
to her for a minute? And then we go on. Alright. 30

**Amicus Curiae Larissa Cadd:**

Your Honour, I have an objection for Professor Boyle. Actually,  
Professor Boyle is providing evidence from the Bar table of his  
own experience as of the international law that he practices.  
That is evidence from the Bar table. It is not the appropriate  
way to persuade this court. You persuade this Court with  
references to legal cases, to legal principles. You do not sit here  
and say, "*because I have this experience, you should be persuaded.*"  
And I object my learned friend continuing in that vein. May  
it please the court. 35 40

1      **Prosecutor Gurdial Singh Nijar:**

Just to respond to that before Mr. Francis Boyle continues. The point is this: if you want evidence, we have to put Judge Eric David on trial. We will produce the evidence. You have to give us time. And then we can then make a decision. But we are trying to avoid that because this is not a case ... we are not interested in a case on Judge Eric David. This is the problem. You want evidence, there is an abundance of evidence ...

10     **Judge Lamin Yunus (President):**

If we go by way of evidence, then probably we are going to have full trial?

Prosecutor Gurdial Singh Nijar:

15     Yes.

Judge Lamin Yunus (President):

Ok, let's go on. As quickly as you can.

20     **Prosecutor Gurdial Singh Nijar:**

That is our point: \*\*\* Judge Eric David knows himself. Even whatever is said and done, at the end of the day, it is for the judges themselves to make a decision whether or not it would be proper for a people's tribunal, a tribunal of conscience, to have this kind of disquiet. If the prosecution can feel this kind of disquiet, this will vibrate throughout and then our judgment will have that vibration that will affect the quality, that will taint the quality of this whole trial for which immense amount of money has been spent, effort and energy.

30     So we really plead that if Judge Eric David does not want to recuse himself, that there be some effort made by the panel to understand the position, the invidious position in which we are placed. Thank you.

35     **Prosecutor Francis Boyle:**

I did want to continue my response to Judge Webre out of respect for Judge Webre before I was so rudely interrupted by the defence counsel.

40     It is well known, reported, in reputable news media sources all over Europe and in the United States that the People's

Mujahideen (PMOI) \*\*\*. Everyone knows this who read any reputable news media sources, certainly in the United States, Judge Webre. Thank you.

Judge Lamin Yunus (President):

Nothing more to add on this? We will now adjourn and come back, and we will tell you what we think.

Registrar Musa Ismail:

All rise.

(10.50am)

\*\*\*\*\*

(11.18am)

Judge Lamin Yunus (President):

Alright ladies and gentlemen, my apologies for the delay. But this is what we have come to say about the application. After careful consideration of the application and supporting materials and the learned arguments from both sides, the Tribunal is unanimously of the agreement that a fair-minded and informed observer will not doubt Judge David's ability and commitment to hear this trial. The application is dismissed.

Prosecutor Francis Boyle:

Your Honours, if I may, in response to that and my colleague, Professor Gurdial, is not here ...

Judge Lamin Yunus (President):

No. Once I've said this, "*your application is dismissed*," I expect no more submissions.

Prosecutor Francis Boyle:

Your Honour, there are no more submissions on this Your Honour. Under these circumstances we have no alternative but to call for a mistrial. Our witnesses are threatened and intimidated by the presence of Mr. David on the panel of the Judges. We have witnesses from Palestine here who had come at risk to their lives to give this testimony. And in good faith and conscience, we cannot \*\*\*. So we call for a mistrial.

1       Respectfully, we ask the panel to consider our request for a  
mistrial.

5       **Judge Lamin Yunus (President):**

You request for what?

10      **Prosecutor Francis Boyle:**

We want the proceeding terminated. It's a mistrial. We cannot call our witnesses. We cannot put on our case.

15      Our witnesses are threatened and intimidated \*\*\* by Mr. David's presence. They are in danger of their lives by coming here in any event, and they certainly are not going to appear before and give testimony \*\*\*. And as an attorney who has worked with the Palestinians since 1982, there is no way I, in good faith, could call upon any of the Palestinian to appear here to give testimony in front of \*\*\* and risk their lives going back to the Palestine.

20      **Judge Lamin Yunus (President):**

Can you please sit down? Once we've made a decision, I didn't expect any more words. And you go the way as you think you can. We made that decision. Ok? Thank you.

(pause)

25      Ah yes, Professor Nijar, you want to say something?

**Prosecutor Gurdial Singh Nijar:**

30      Yes I just wanted to, seek some guidance from Your Honours on this issue. The reason why I walked in a little late is because we were in consultation with some of the witnesses, and some of the witnesses had expressed very serious reservations about appearing, for the reasons that we have discussed earlier.

35      So we have a difficulty and little time to talk to them about this particular position and so on. They said you don't understand that for example, they have to go back to West Bank. There are so many checkpoints, there are very serious security problems and they feel nervous wanting to come forward to give evidence. And I did speak to some of them, and there was a lot of discussion, and we have to go through interpreters because a lot of them doesn't speak English.

So what I would like to suggest is that for us to complete our discussion with the witnesses because without the witnesses I can't start the case. I have got my opening ready and I have got my statutory declarations. But without the witnesses I am placed in a rather difficult position.

So what I would like to urge the panel is to accommodate the concerns of the witnesses and at least give us time to confer with them as completely as possible so that we can then advice on an informed basis the position of the witnesses themselves.

**Judge Alfred Webre:**

Can I ...

**Judge Lamin Yunus (President):**

No, no, please no more.

**Judge Alfred Webre:**

I must say something.

**Judge Lamin Yunus (President):**

I said no, and then it means no. Alright? Now I've heard you. Once we've made a decision like this, in any court of law, that depends on how you carry on with yourself later on, whether you can have your witnesses or whether you cannot have your witnesses. We will adjourn and you will make your own position. And another thing, I don't expect any more submission or words because this thing has been quite difficult. A simple matter can be made difficult. And that's it. We will carry on with this case and no more mention of the result of our decision. The application has been dismissed.

**Prosecutor Gurdial Singh Nijar:**

Yes, the request that we were making is that there'll be an adjournment so that we can confer as completely as possible.

**Judge Lamin Yunus (President):**

Alright. The court is adjourned.

**Registrar Musa Ismail:**

Court is adjourned until 2.30pm. All rise.

1                   **21 August 2013**  
                      (Afternoon session)

5                   (3.05pm)

5                   **Registrar Musa Ismail:**

All rise.

10                  **Judge Lamin Yunus (President):**

We now proceed. Before we begin this afternoon's proceedings, let me on behalf of my brother Judges express the disquiet of event at the breakdown ... this morning. I wish to remind the learned counsel that once an objection is overruled, there should be no attempt to reopen the issue. Once considered, a decision is made, it must be respected.

15                  Now counsels, as well as the public, must know that the court has observed impeccable standards on administrative evidence. The court cannot adopt a populist approach. It must act on credible, not on unsubstantiated, undocumented, and spurious allegations. I therefore instruct the Registrar to *expunge* from the records all the allegations against Judge David - \*\*\*

20                  Now I wish to ask the prosecution: Are you proceeding with the case?

25                  **Prosecutor Gurdial Singh Nijar:**

30                  Thank you Mr. President. First I want to say that we share your sentiment that once the court makes a ruling, there must be adherence to that ruling. On that, there is no issue at all as far as we are concerned because that is the decision of this eminent panel and we abide by it. But I did say before the break that we note the disquiet of the Bench. But I did note that there was also disquiet amongst the witnesses and I undertook to confer with them carefully and anxiously so that I could see what their disquiet was about and how that disquiet, if any, could be allayed.

35                  I regret to inform that the disquiet has grown into serious concern about this Tribunal, and they are seated here today to ensure that I convey accurately their concerns and no doubt

they'll crack me where I go wrong. Hence, they are seated in front. There are 3 points that they want to make.

The first is that they came here for justice. They have waited a long time for justice, international justice. The first witness, her SD has been declared in the KL War Crimes Commission, related back to her injurious concerns since 1948 when she and her family were dislocated from the then State of Palestine. So she has waited since 1948. She was also the victim for Sabra and Shatilla in 1982. She had to walk over the dead bodies of her husband, her sons, her daughters, uncles at gun point. So there is a lot of pain. So there's a disquiet. If there's disquiet by the Bench, there is more than disquiet by these victims who have come here to assuage and obtain and secure a sense of justice. So if they have come here for justice, then they want to be assured that the process, not just the actual situation, but the process in attaining the justice is untainted. The streams of justice must be pure from the source to the end. That diamond that is called justice must, from the moment it is dug until it is delivered to whoever, must not have the slightest taint, otherwise it becomes almost worthless. So that is their concern, the first concern, therefore is, they have come here for justice. And they want that justice. If they don't get justice, they are prepared to wait another 31 years, another 5 generations maybe. So that is the first point that they asked me to convey. They waited a long time for justice, and they do not feel secure that with the kind of concerns - I don't want to raise the issue because they also accept the ruling. We accept the ruling. I accept the ruling. I'm a mouthpiece, a lawyer for them. We accept the ruling, as well, that has been made. We are not reopening the issue. But we are just talking about the consequence of that ruling. That's the first point we make. No doubt it has been suggested that it is scurrilous and so on - we don't want to question that, but there has been no opportunity to canvas that point because this is not a trial about the judge, this is a trial of the victims, so we have not gone down that pathway. We just raise these concerns *ex facie*, on the face of it, so that something could be done.

The second point they asked me to convey is that they fear for their personal security with this kind of appearance of a lack of confidence in the panel. They have to go back to their

1 abodes in the West Bank for example. For your information,  
Dr. Walid, when he gave evidence at the KL War Crimes  
Commission, the last time, as he was giving his evidence, his  
son was abducted. His son was abducted. All I'm saying is:  
5 they fear for their personal security. We are dealing here with  
the State of Israel. We are accusing them of genocide; abducting  
one or two people, again is scurrilous, you say. But that's the  
reality that they have to face and it is their perception that is  
10 more important than our rulings because they, when they go  
back, they have to face these terrors. So they feel a great sense  
of personal insecurity if the Panel as constituted proceeds. We  
have accepted the ruling as is. We are not questioning that  
whatsoever.

15 And the final point that they asked me to make is that this is  
a matter of principle, also, to them, where there is a lack of  
confidence, and it is backed up, in their perception. You see,  
the law is about justice must not only be done but be seen to  
be done. Seen. If you see something and does not visualize  
20 in accordance with what you perceived, then the justice  
will be denied. That is a basic cardinal principle of which I  
have been brought up and, I'm sure, all of us have been  
brought up.

25 So, in essence, on these three grounds, they feel that they  
have, they have instructed, that they will not be able to walk  
this little, to get into the witness box to give evidence. And  
therefore, I will have no evidence to tender on their part.

30 On a personal note, I wish to say, with great respect to the  
Panel, that as far as we are concerned, we have been ready to  
proceed. We took part in the KL War Crimes Commission. We  
introduced copious documents. As a result of that, myself as  
Chief Prosecutor, filed charges. The charges run into several  
35 pages and covers the whole gamut of historical period - you  
would have seen the charges. We have covered and given  
particulars, specific particulars, on every kind of genocidal  
perpetration which we intended to prove at this, right from  
the time of 1948, with witnesses, historian, right up to the time  
40 when even today, you can look across and see settlements  
having huge amounts of water in swimming pools while  
the Palestinians, these who sit in front here, cannot

even get the kind of water, acceptable water by World Health Organization standards, never mind the quantity of it.

So, we have come prepared with those charges. We have here 10 bundles of documents to tender in support that we have already presented to the Registry and if the trial was to go on we would have given. We have 14 witnesses, some of whom are now waiting in Gaza because they cannot come out of Gaza because of the situation there, the turmoil. And even well before the turmoil, when the Prosecution, myself and one other member of the Prosecution wanted to go into the West Bank - as you know West Bank is controlled by Israel - they refused us a visa. Such is the nature of this democratic, genocidal, those we accuse, not scurrilously, of genocidal activity.

On behalf of the Prosecution, it is a matter of great regret for us that we are not able, at least in this hearing, be able to proceed to give all that evidence that we have so assiduously tried to collect so that we can present it to a panel where the witnesses feel, with the panel that the witnesses feel very comfortable with.

But as I said: we do not question the ruling. I've been a lawyer for 30 over years, as we know, once a ruling is made, and I've appeared before Your Lordship in a different context, in normal courts; that once a ruling is made, of course, ... the utmost respect for that ruling. But our hands are tied. There will be no witnesses that we can proffer, and therefore we would be applying for this case to be adjourned *sine die*, until, I don't know, until something happens.

**Judge Alfred Webre:**

I have some serious questions as to the good faith of the Prosecution at this stage and, for example, I have not heard any reference to the fact that Judge David has been a key member of the legal team of the Russell Tribunal on Palestine and that, in fact, over 80% of the opinions and verdicts of the 5 sessions of the Russell Tribunal on Palestine from 2010 to 2013 were the direct result of Judge David's keen scholarship, and his legal position, his ethical position - number one.

I have not heard a single scintilla of evidence linking Judge

1 David \*\*\* - at all. What I have heard is what's called in the  
gutter as "agent baiting" and I have heard a proceeding in  
which many parties, the witnesses who have given 65 years,  
a million people displaced as a result of Plan Dalet in 1947  
5 and 1948, ... canal in 2013, the prosecution, the defence, the  
bench, including an eminent scholar who has given up his life  
to the prosecution of justice in the Palestinian cause, namely  
Professor Eric David, who has been unjustly accused here  
without evidence, in my judgment, professionally irresponsible  
10 way.

So I must say that I am gravely distressed. I am gravely disappointed in the lack of professionalism of both prosecutorial counsel who in this way taint the prosecution witnesses with false allegations as to the character of the judge. You are dealing with a man who is one of the key legal counsels to the Russell Tribunal, the 5 sessions on Palestine. How do you respond to that, sir?!!!

20 **Prosecutor Gurdial Singh Nijar:**

Thank you. I'm not going into that because we accept the ruling that has been made.

**Judge Alfred Webre:**

25 You have poisoned the witnesses. You have poisoned the witnesses and you yourself now are crippling this, and you have called for an adjournment *sine die*. And in my mind, what you have done is created the circumstances for a mistrial through prosecutorial misconduct. That is what I believe is occurring here. And I'm calling you out! And I'm calling it!

**Prosecutor Gurdial Singh Nijar:**

Well, if we can calm down a little.

35 **Judge Alfred Webre:**

Sir, I am calm. This is justice talking.

**Prosecutor Gurdial Singh Nijar:**

40 Yes, let's talk justice then. You see, first is, you suggest that the prosecution has poisoned their mind and created this circumstance. You see how by your own rules you fall foul because you make an allegation that we have poisoned the

minds without a scintilla, to use your words, of evidence. How dare you do that? 1

**Judge Alfred Webre:**

Because your co-counsel has made accusations in this court which are calumnies, which are probably legally actionable for slander and libel under Malaysian law for damages. Ok! And because the witnesses heard those, in the witness box, through the video. So if we're going to adjourn this, after having prepared all of these months, and adjourn *sine die* because of the prosecutorial misconduct of your co-counsel, I want that on the record. 5 10

**Judge Lamin Yunus (President):**

I don't think we can carry on with the discussion. I would rather adjourn for awhile and I would invite counsels to chambers that certain things, more sensitive to the ear, rather than having it ... I therefore wish these proceedings to be adjourned for awhile. 15

**Prosecutor Gurdial Singh Nijar:**

That would be an appropriate action. Thank you. 20

**Registrar Musa Ismail:**

All rise. 25

(3.15pm)

\*\*\*\*\*

(5.35pm) 30

**Registrar Musa Ismail:**

Order please. The tribunal will re-convene tomorrow at 9.30am. Thank you. The tribunal is adjourned. 35

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1                   **22 August 2013**  
5                   **(Morning session)**

10.15am:  
5                   Both Prosecution and Amici Curia teams enter chambers.

10.20am:  
The Prosecution team comes out of chambers.

10.24am:  
10                 The Amici Curia team comes out of chambers.

(10.28am)

15                 **Registrar Musa Ismail:**

All rise. The Kuala Lumpur War Crimes Tribunal sits to hear two cases today. There will be 2 charges.

20                 The first is Case No. 3-CHG-2013 Chief Prosecutor of the Kuala Lumpur War Crimes Commission against **Amos Yaron**. The charges are war crimes, crimes against humanity and genocide. They are briefly as follows:

25                 The defendant Amos Yaron perpetrated war crimes, crimes against humanity and genocide in his capacity as the Commanding Army General in military control of Sabra and Shatilla, both are refugee camps in Lebanon but occupied by Israel in September 1982 when he knowingly facilitated and permitted the large scale massacre of the residents of those two camps in violation of Hague Declaration on Land Warfare of 1907, in violation of the 4th Geneva Convention 1949, in violation of 1948 Genocide Convention, in violation of the Nuremberg Charter 1945, in violation of the Nuremberg Charter Judgment 1946, in violation of the Nuremberg Principle 1950, and of customary international law, the law of war and international humanitarian law and finally in violation of Articles 9, 10, and 11 of the Charter of the Kuala Lumpur War Crimes Commission. That's the charge.

30                 The second charge is the Kuala Lumpur War Crimes Commission against the **State of Israel** for the crimes of genocide and war crimes. They are as follows:

From 1948 and continuing until today, the State of Israel carried out against the Palestinian people, a series of act, namely killing, causing serious bodily harm and deliberately inflicting conditions of life calculated to bring about physical destruction. The conduct of the state of Israel was carried out with the intention of destroying in whole or in part the Palestinian people. These acts were carried out as part of a manifest pattern of similar conduct against the Palestinian people. These acts were carried out by the State of Israel through the instrumentalities of ... listed in the appendix. These acts were carried out by the defendant. Such conduct amounts to the crimes of genocide under international law, including the Convention on the Prevention and Punishment of Genocide 1948. In particular, Article 2, and this act was punishable by Article 3 of the said Convention. It also constitutes a crime of genocide as stipulated in Article 10 of the Charter of the Kuala Lumpur War Crimes Commission. Such conduct by the defendant, that is the State of Israel, as an occupying force, also violates customary international law as embodied in the Hague Convention of 1907, and also in violation of the 4th Geneva Convention 1949. And last, such conduct also amounts to war crimes and crime against humanity under international law.

Those are the charges. Thank you.

*Amicus Curiae Jason Kay:*

Your Excellencies, good morning. Before the prosecution opens its case, we have given notice that we the defence-amicus team will be raising two preliminary objections on the charges ...

**Prosecutor Gurdial Singh Nijar:**

Sorry to intervene, I don't intend to interrupt. But I've been advised by the witnesses that they wish to make a statement before the start of the proceedings. If we could indulge them, they wish to make a statement before the start of the proceedings.

The witnesses wish to make a statement to the Tribunal before

1 the start of the proceedings and I seek the indulgence of the  
Judges to accommodate their request.

5 **Judge Lamin Yunus (President):**

Alright.

10 **Prosecutor Gurdial Singh Nijar:**

Thank you. The witnesses who approached me, Dr. Walid who  
is the head of the Palestinian National Authority, a doctor by  
profession. And the witnesses ....

15 **Judge Lamin Yunus (President):**

Professor Nijar, we have decided that there is no necessity for  
a statement. We just go on with the case.

20 **Prosecutor Gurdial Singh Nijar:**

I think they have something very important to say. I think it  
will have a bearing on the proceedings and I really request  
that you accommodate their interest. They have something  
very important to say which has a bearing on the proceedings  
itself. I leave it entirely to your wisdom to decide.

25 **Judge Lamin Yunus (President):**

Alright. You can go on a short while.

30 **Prosecutor Gurdial Singh Nijar:**

It's a short statement I believe. It's in Arabic. I don't know  
what it says. So maybe some ... Is it in Arabic, Dr. Wahid? Yes.  
So maybe some translation can be provided as well.

35 **Prosecutor Francis Boyle:**

Translation is being provided.

**Prosecutor Gurdial Singh Nijar:**

Okay. Thank you. I thank the panel for the indulgence.

[Dr. Walid Elkhatib speaking in Arabic]

40 **Translator:**

Good morning to all.

**Judge Lamin Yunus (President):**

Could you kindly give your name and where you are from? 1

**Dr. Walid Elkhateib:**

My name is Dr. Walid Elkhateib. I'm a Palestinian. I live in  
Occupied Palestinian Territories. 5

**Judge Lamin Yunus (President):**

Yes. 10

**Dr. Wahid Al-Khateeb**

I could read my statement in English, but for some reason I ...  
my home in the Arabic and ... will translate everything I say. 15

**Prosecutor Gurdial Singh Nijar:**

Maybe they can come here, two of them and sit down. It's  
quite awkward, and then, if the witnesses wish, they can stand  
behind. 20

[Dr. Walid Elkhateib speaking in Arabic]

**Translator:**

Mr President, Prosecution and defence; all present.

I would like to start by giving a small introduction. I would like  
to state that Jews have lived peacefully, and in security with  
full rights with other religions in Arabic and Islam civilizations  
for hundreds of years. 25

Until today, there are still Jewish who, Jews who are living  
among us in Palestine carrying Palestinian IDs struggling the  
same struggle that we are facing. 30

Zionism, which was created by a group of Jews with archaic  
and reactionary ideologies wish for the creation of a Jewish  
state of Israel on the expense of another nation with the help  
of the British Empire, signalling the start of the Palestinian  
struggle. 35

And ever since then, since 1948, and all the wars that followed,  
we've been prosecuted, murdered and been treated with  
genocide. 40

- 1      We are here Palestinians, witnessing the injustice, and we are  
also victims of this historic injustice.
- 5      And there are so many others back in our country.
- 10     We came here without a decision or a condemnation.
- 15     We are here not asking for anyone or any State to be condemned.
- 20     We are only here asking for justice and peace because we are  
a country that looks forward to living in peace with all other  
nations.
- 25     We saw yesterday the inappropriate and condescending tone  
the Panel addressed to the Prosecution who was a group of  
well-known and respected lawyers.
- 30     So we fear that we might suffer the same treatment or even  
worse.
- 35     I would like to remind Your Excellencies that we are not  
only witnesses but also victims, victims of Israeli crimes and  
violence for decades of time.
- 40     We are victims with the evidence of torture, insults and  
violations of our human rights in all fields.
- 45     Not to mention the massacres that we have faced in Palestine  
and Lebanon.
- 50     Thus we have no right to expose ourselves or our people to  
more insults.
- 55     And we do not wish for the court to carry against us.
- 60     For all these reasons, we have no choice but to express our  
dissatisfaction to continue with this Panel under these negative  
circumstances.
- 65     Thank you.

**Prosecutor Gurdial Singh Nijar:**

Thank you. I think they have made their position very clear. Therefore I apply that this proceeding to be adjourned *sine die* because what they have said in no uncertain terms, that they are unable to proceed in these circumstance, with this panel, with this negative atmosphere. Thank you very much.

**Amicus Curiae Larissa Cadd:**

May it please this Honourable Court, the defence would like to speak with the Prosecution and Bench in chambers, if possible.

**Prosecutor Gurdial Singh Nijar:**

Mr. Chair, just to indicate that I have absolutely no intention of any discussion with the Defence especially in chambers in view of, I don't want to say what happened just now where I had to walk out - so I have absolutely no intention - I was shut down, of appearing in chambers. If anything is to be done, it is to be done in open Court in the presence of my Palestinian victims. Thank you.

**Prosecutor Francis Boyle:**

May I also ... for myself, I will abide the instructions of my clients and certainly not go to chambers.

**Judge Lamin Yunus (President):**

There was this presentation briefly, and then the application. And after all this, I don't see any other except to grant or not to grant *sine die*.

**Amicus Curiae Jason Kay:**

Mr. Chairman, Tan Sri Chairman; before the Panel decides to rule on the Prosecution's application, may we ask a 5-minute recess? I wish to confer with my colleagues, to decide our reply to that, before the Panel makes a decision, if the Panel could grant us 5 minutes, just 5 minutes, if possible.

**Judge Lamin Yunus (President):**

The Court is adjourned.

(10.55am)

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1                   **22 August 2013**  
5                   **(Morning session)**

10                  (11.10am)

15                  **Registrar Musa Ismail:**

20                  All rise.

25                  **Amicus Curiae Larissa Cadd:**

30                  May it please this Honourable Court, I would like to call this morning exactly what it is; which is a rehash of the things that happened yesterday.

35                  The position that the Prosecution is putting the Bench in is untenable and unfair because it is asking it to go behind its ruling. Making an application for an adjournment *sine die* would have the same effect of potentially reconstituting this Bench. That, in itself, makes it an application exactly the same as was ruled on yesterday. It is essentially an attempt to bully this courtroom by saying, "*If we don't get what we want, we won't play.*"

40                  The Prosecution said it would abide by the ruling of this court, in this courtroom. And it has chosen not to do that. It is showing disrespect to this Honourable institution. It seeks to rehear the decision via the witness statement that you've heard this morning. It is an attempt, in one sense, to get fresh evidence for this court on that very application.

45                  I will refer Your Honours to a judgment of the International Criminal Tribunal for Yugoslavia. I have a copy which I would request the honourable Registrar give to the Prosecution and there is a copy for the Bench. Unfortunately, we don't have the required numbers because of the short time-frame, and I apologize for that.

50                  I am sorry Your Honour. There is only one copy because of the short time-frame.

55                  The decision is on the application of the **Prosecutor v. Popovic**. The reference is case number IT-05-88-AR73.5. The decision was given on the 24th of September 2008.

The case referred related to the attempt to re-open the case, which is akin to what is happening here, although not exactly the same, an analogy could be drawn, on the direct involvement of the appellant in that case in the execution and burial of 30 Muslim men in a mass grave. The evidence hadn't been heard by the time the Prosecution had closed its case. What is particularly notable about this decision is that the appellant argued that the evidence not in the possession of the Prosecution during its case-in-chief could have been discovered in a timely fashion if the prosecution had acted with reasonable diligence.

The relevance of this evidence could have been understood by a reasonably diligent prosecutor before the close of the case.

Your Honours will recall that immediately upon Your Honours' giving the ruling, Professor Boyle came to his feet and Professor Boyle addressed the court immediately upon that ruling that his witnesses felt threatened. Therefore you can draw an inference that he was aware of that knowledge before your ruling.

Therefore, I submit that that was either a failure of the Prosecution for which this Bench and the Defence should not be placed in that position.

The paragraphs that I've referred to was paragraph 5 of that decision. It is consistent throughout. It referred, at paragraph 10, in making that determination, to another judgment called *Celebici*, holding that the primary consideration in allowing the admission of fresh evidence is whether the evidence could, again, with reasonable diligence could have been identified and presented in case-in-chief by the party making the application.

And I say that this is exactly analogous in this situation. I could go further through the case but I think those are the 2 most pertinent paragraphs, and I don't wish to waste the courts' time further on that decision.

I would like also to address the Court on the clear misrepresentation the Prosecution has on its role in these proceedings. We have heard time and again in this courtroom

1 from the prosecution, "*My client*". Prosecutors do not have  
clients. In criminal law, prosecutors are independent. They  
have witnesses they bring to the court to give their evidence.  
They do not take instructions. They are independent. And  
5 what we have seen from the language and the demeanor and  
the consistent applications and the way this Bench has been  
treated by the Prosecution, is that they have misconceived  
their role here completely. There is no independence in their  
10 Prosecution. It is a witch-hunt against the Bench and it's a  
witch-hunt against whoever they feel like.

When charges are filed in this Court, you take this Court's  
proceedings as they come. It is not up to witnesses to decide  
15 who will hear their case. It is up to the Bench to decide that,  
after hearing submissions. And that is what we had here. We  
had a decision from Bench. We had a backdoor attempt, which  
Your Honours are very well aware of, to try and get around  
that decision.

20 What this amounts to, Your Honours, is an attempt to *forum-*  
*shop* the Bench. I am very distressed that they will pick and  
choose who they feel they will get justice from. That is not  
justice. Justice is accepting the constitution of the Bench. There  
25 are 7 judges here. None of us know what they will say when  
they hear the evidence. None of us know what they will say  
when they have concluded their case, when we have submitted  
on it. This is simply a waste of this Honourable Court's time.  
May it please the Court.

30 **Prosecutor Gurdial Singh Nijar:**

I have no wish to address the comments made by learned  
counsel *Amicus Curiae* who doesn't understand, the stage at  
which we are at. All this back door, front door. This is not a  
35 game that we are playing here. Do not lecture to us on the role  
of the prosecution. We don't need your wisdom in this respect  
- thank you very much, nonetheless.

40 But the point is this: there was a ruling, which we accepted.  
There's a consequence of the ruling - that the witnesses, who  
are victims, who have come here for a particular cause, to come  
and give evidence. And the consequence of that ruling is the  
statement they made. There is no back door and front door

here. This is not a game of architecture. This is about people who are aggrieved coming here and feeling discomforted as a result, the consequence of something happening.

So what is the best thing to do in the circumstances? Ignore them? Because of the lecture that we have just heard? Because of the case that we had cited to us? Or do we realize ... or the things about the client's and witnesses, duty of prosecutions and so on.

So what do we do? They do not want to participate in these proceedings, in this atmosphere, because as they said, they have already borne the mark of torture, of massacre, and continue to that. Does Amicus know anything of that? Sitting in the comfort, as also I do, the comfort and luxury of our condition of life.

You know, genocide, Article 3 of the Genocide Convention says that, "*creating conditions of life which are designed to destroy a whole population*", of which these witnesses are a part.

So don't come and lecture to me about the role of the prosecution if you don't understand that whole sentiment behind an international tribunal of conscience, you have no role to be staying here. Sit somewhere else. Sit where there are forensic arguments, on fine points, on procedure and evidence. Go there. I think your arguments will be well-received there. But do not come here. And do not lecture on something on which you have not borne those marks of torture and massacre. This is about genocide. This is not a joke.

So this is the consequence of the ruling. What you are to do? You can say, "*oh they are not your witnesses*," "*they are not your clients*." So what? They have stated, all of these witnesses who have came here - Amicus came once, they have come here many times. They came here for the War Crimes Commissions. There is a filtering process. They came here for that, and their recommendations were made.

Now this is their feeling. So we cannot proceed. That is why we applied for adjournment *sine die*. That is why we applied that in the absence of witnesses who we wanted to present,

1 whose statutory declarations have already been made, who  
have come here ready to give evidence; in the absence of their  
comfort with the situation that has arisen yesterday, the whole  
day, they do not want to participate.

5 So condemn them if you like. Go ahead. But that is the  
consequence of the ruling. We accepted the ruling. And I  
gave an assurance, in open court as well as in chambers,  
that I will talk to the witnesses to ascertain what their real  
10 concerns were. I gave that undertaking to the Bench, and then  
I communicated that at great length yesterday. And even after  
that we communicated with the witnesses until quite late and  
then we told them to confer amongst themselves as they wish,  
and to be ready, if needed, for the trial. This is the result.

15 What are we saying? Because they are mischaracterized as  
"clients", you condemn the prosecution? Then we ignore this?  
We throw this in the trash bin, is it?

20 They are the witnesses. They are here for justice. You see, you  
forget, the *Amicus Curiae*, forget, and I hope the Bench doesn't  
forget ... (short pause to take Charter) ...

25 You see, the whole purpose of this setting up of the KL War  
Crimes Commission and the KL War Crimes Tribunal, of which  
you are distinguished Judges, the whole purpose is, "*Outraged  
over the frequent resort to so and so, the use of armed force.*" Alright?  
And then we go on to talk about, why when we talk about the  
actual charter itself, we are saying, in the preamble, we talk  
30 very clearly about the fact that there has got to be a recourse  
given to justice for victims of the various wars that we talked  
about. And we talked about what has been committed in Iraq;  
what has been committed in Palestine.

35 So this is all about people coming here, presenting themselves  
willingly and voluntarily to say, "*we want closure, because this  
has happened to us.*" And of course it's up to the Bench to decide  
one way or the other. But when they are in this circumstance,  
when they have made it very clear, they said, "*thus we have  
no right to ourselves, or our people,*" the Palestinian people on  
40 behalf of which they come, "*to more insults and we do not wish  
for the court to carry against us.*" I don't know what, maybe some

translation problem, "to carry against us." "For all these reason we have no choice but to express our dissatisfaction to continue with this Panel under these negative circumstances."

So no, this is not an entry by any door. This is a plea by victims of genocide that we condemn. Continuing victims. We don't know when the next "Cast Lead" is going to be, you know? When the Israelis attack - They have all this fancy names, you know, "Autumn Rain," spring, it is "Summer Rains," you know, summer rains, phosphorus. Have you felt it? Amicus felt it? You know what phosphorus does? So do not articulate their concerns. Do not dismiss their concerns in forensic language. You have no right to do that.

And so I beseech the Bench, in all humility, to consider their statement in its proper context. They are not bullying you. How can they bully you? You are all of eminent positions. These are Palestinian people who can even withstand the checkpoints. They sometimes have to stand at checkpoints and wait for hours. And are rejected. You are saying they are bullying you? You want to listen to the Amicus on that point? Have they ever tried to bully you? You are all very eminent people - America's professors. Respectful. Justice Michael Hourigan has served in so many departments, FBI, CIA, have been the prosecutor in various departments. Mr. Salleh Buang, who I also know personally, who excelled at the Bar, the Inns of Court, not local. And so of Dr. Sofiah. So to suggest that this is bullying, then, you know, ignore them and ignore their pleas, how can that be, Judge?

So I, in all humility, want to revive my request and say, they just are not comfortable continuing with this in these circumstance. You must understand their plea. They are making a plea to you. They are saying, "*let's call it off*," and then we apply *sine die*, meaning that let's then decide what else will happen so that the true meaning of this Charter which is to handle the cause of the victims of wars can be truly ventilated in an atmosphere in which everyone feels at ease, confident, the witnesses, the Judges, the Prosecutor.

And we have done this before. We have had 2 trials before, in which Tan Sri Judge President has presided. In which

1                   Justice Webre, Judge Tunku Sofiah, Judge Salleh Buang,  
2                   Judge Shad Faruqi, you all have participated, you know that.  
3                   And we carried it out in complete fashion - witnesses from  
4                   Guantanamo, from Bagram. So please understand, this is  
5                   about victims. This is not a fancy court trial for displaying  
6                   melodramatic fashion. None of that. We will have none of that.  
7                   This is about victims seeking justice. Their sense of discomfort.  
8                   They've expressed their discomfort at great risk to themselves.

10                  And so let's listen to them. The question then is, will you all  
11                  listen? Thank you.

**Judge Lamin Yunus (President):**

15                  Thank you for the submission of both sides. We have decided  
16                  to adjourn this hearing until 2 o'clock.

(11.20am)

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22 August 2013  
(Afternoon session)

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(3.40pm)

**Judge Lamin Yunus (President):**

Thank you ladies and gentlemen. We have prepared a ruling and I am inviting Professor Salleh Buang to read the ruling of the court.

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**Judge Salleh Buang:**

Thank you.

These proceedings have been scheduled for four days from the 21st to the 24th of August 2013 to hear two charges filed by the Chief Prosecutor of the Kuala Lumpur War Crimes Commission with the Registrar at the Kuala Lumpur War Crimes Tribunal.

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On the first day of the hearing, the Prosecution, without prior notice made a surprise application in chambers to have Judge Eric David recused from being a member of the panel of 7 judges hearing this case. In support of his application, the prosecution tendered two documents, the first being a photocopy of a legal opinion given much earlier in time by Judge David in his private capacity to the People's Mujahideen of Iran (PMOI) undated, and the second being a photocopy of a news report from the Daily Mail UK dated 10th February 2012, supporting documents.

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The main thrust of the prosecution's application was that because of his relationship with PMOI, Judge Eric David will not be able to discharge his duties in an unbiased manner as depicting an impartial judge of this tribunal. Further, they said, that unless Judge David recuse himself in the chambers, they would repeat the application in open court. The Tribunal considered the application and supporting materials and unanimously ruled that there is no basis to recuse Judge David and we dismissed the application.

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The Court then convened, and the prosecution made a formal application in open court for Judge David to be recused. The

40

i court formally dismissed the application and directed the proceedings to commence.

5 Instead of respectfully abiding by the ruling of the Tribunal, and proceeding with the trial as scheduled, Mr. Francis Boyle co-counsel for the prosecution then addressed the Tribunal and made a series of further unfounded and malicious allegations against Judge David. He offered no cogent and credible supporting evidence for what the Tribunal considered to be 10 scandalous allegations.

15 The Tribunal considered Mr. Boyle's conduct to be improper and an abuse of process of the court. These allegations by co-Prosecutor Francis Boyle were very serious allegations made to the Tribunal without due regard for the proper decorum and respect owed by a member of the Bar and constituted contempt towards the Bench.

20 The President patiently reminded Mr. Boyle to cease making these unfounded allegations as the application had already been heard and a tribunal order made.

25 Notwithstanding this, Mr. Boyle continued to address the court, repeating his allegations. The President then ordered that these unsubstantiated allegations by the co-counsel for the prosecution be expunged from the record of the tribunal proceedings.

30 The President then once again directed the proceedings to begin.

35 The Chief Prosecutor, Professor Gurdial Singh Nijar then informed the Tribunal that the prosecution is not prepared to proceed because its witnesses were not willing to give their testimonies in the presence of Judge Eric David. The Tribunal noted that this information did not form part of the Prosecution's application, when it should have.

40 When both the Chief Prosecutor and the *Amici Curiae* appeared in chambers as a request of the President, the Chief Prosecutor was again asked if he is prepared to proceed with the case on the basis of documentary evidence, that is, without the presence of its witnesses.

Professor Gurdial Singh Nijar replied that the Prosecution will not proceed. Professor Nijar did request for further time to speak with his witnesses which was granted. The *Amici Curiae* asked for leave to make a statement to the Tribunal in Chambers the following morning. Permission to do so was granted.

On the morning of the second day, the *Amici Curiae* made his statement in chambers before the bench. Having heard both the prosecution team and *Amici Curiae*, the President ordered the proceedings to begin.

Professor Gurdial Singh Nijar then sought leave from the Tribunal, for the victim representative of the victim group to address the Tribunal and leave was duly granted.

An adult male member of the victim group then addressed the Tribunal and repeated their concerns, expressed earlier by counsel, Professor Gurdial Singh Nijar, that the victims feared for their safety from appearing before the Tribunal in its form, and further, that they were distressed of some of the remarks from the Tribunal panel made previously to their counsel. The Tribunal noted that no evidence was tendered detailing the safety concerns of the victims.

Professor Gurdial Singh Nijar then made a formal application for this proceeding to be adjourned *sine die*. We shall call this "the new application."

Before giving its decision on the new application to suspend these proceeding, the Tribunal feels it is important to state the following for the record:

The judges observe with deep concern and regret that there has been serious breach of decorum and improper conduct on the part of co-counsel for the Prosecution, Francis Boyle, in a matter already mentioned about. At this moment there has been no attempt by the said co-counsel to tender his unreserved apologies to the bench, and in particular, to Judge Eric David.

Whilst we take note of the Chief Prosecutor's statement to the bench, both in open proceedings as well as in chambers,

1 that his witnesses are very concerned for their safety to give  
their testimony in the presence of Judge Eric David, we find  
their conduct in insisting to be present in court even though  
5 all witnesses were ordered from the court to leave were in  
defiance of the wishes of the judges. The judges are unanimous  
in their opinion that the witnesses' continuous refusal to give  
their testimony in this proceeding until and unless Judge  
10 Eric David recuses himself despite the ruling made by the  
Bench is in contempt of the Tribunal order and amounts to an  
improper ultimatum being given to the Bench. The witnesses  
would have us believe that if they were to give their testimony  
15 in open proceeding in front of the six judges with Judge Eric  
David not on the Bench, they would be safe from harm upon  
their return to their homeland. In the absence of any evidence  
to support these alleged concerns, the Tribunal is of the view  
that Judge Eric David's presence on the Bench will have no  
effect on their safety.

20 It is ironic that whilst KLFCW has at great cost and effort given  
their witnesses their day in court, so to speak, to seek justice for  
the war crimes committed against them, the witnesses, led by  
the Prosecution team have instead chosen to refuse to appear  
25 before this Tribunal. The witnesses have effectively squandered  
an invaluable opportunity. The Tribunal is also disappointed  
that whilst it made numerous overtures to the Prosecution  
counsel to find ways to give the witnesses confidence in the  
Tribunal process, each and every offer was dismissed out of  
30 hand. The Tribunal could only conclude that the Prosecution  
team was committed to bringing this proceeding to an end.

35 Finally, the judges would also put on record their sorrow and  
regret, that despite all preparatory work being carried out by so  
many people under the leadership of the Honourable President  
of the Kuala Lumpur Foundation for the Criminalization of  
War, for which this Tribunal is an organ, as well as substantial  
40 expenses which are basically provided by generous donors  
from amongst the general public, everything has now come  
to nought. The Tribunal believes the Prosecution team, despite  
asserting that they will abide by the decision of the tribunal, has  
itself single-handedly brought these proceeding to a deadlock  
until and unless their demands are met.

Final paragraph 6, Judge Eric David had volunteered in chambers to recuse himself but the Tribunal reaffirms its earlier ruling that Judge Eric David will not recuse himself from this proceedings. Consequently, it is with great reluctance and regret that we now order this proceeding to stand adjourned *sine die*. Dated this 22nd August 2013.

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**Registrar Musa Ismail:**

The Tribunal is now stand adjourned until such time and date to be decided by the tribunal. All rise.

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(4.23pm)

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1 Chief Prosecutor of the Kuala Lumpur War Crimes Commission  
v.  
Amos Yaron and the State of Israel

5 Kuala Lumpur War Crimes Tribunal - Case No. 3-CHG-2013 and  
Case No. 4-CHG-2013

10 Coram: Judge Tan Sri Dato' Haji Lamin Bin Haji Mohd Yunus  
(President), Judge Tunku Sofiah Jewa, Judge Shad Saleem Faruqi,  
Judge Mohd Saari Yusuf, Judge Salleh Buang, Judge John Philpot  
and Judge Tunku Intan Mainura.

## NOTES OF PROCEEDINGS

15                          **Venue:**  
2nd Floor, No. 88, Jalan Perdana  
Taman Tasik Perdana  
50480 Kuala Lumpur  
20                          Malaysia

### Judges:

Judge Tan Sri Dato' Haji Lamin Mohd Yunus (President)  
25 Judge Salleh Buang  
Judge Tunku Sofiah Jewa  
Judge Shad Saleem Faruqi  
Judge Mohd Saari Yusof  
Judge John Philpot  
30 Judge Tunku Intan Mainura

## **Prosecution Division of the Legal Team:**

35 Professor Gurdial Singh Nijar  
Tan Sri Dato' Abdul Aziz Bin Abdul Rahman  
Mr. Avtaran Singh  
Ms. Gan Pei Fern  
Dr. Shahrizal M. Zin  
Ms. Rafika Shari'ah Hassan

40 Mr. Nizamuddin Abdul Hamid  
Ms. Mazlina Mahali  
Ms. Diyana Sulaiman

Defence Division of the Legal Team ( <i>Amici Curiae</i> ):	1
Mr. Jason Kay Kit Leon	
Ms. Larissa Jane Cadd	
Dr. Abbas Hardani	
Professor Dr. Rohimi Shapiee	5
Dr. Rohaida Nordin	
Dr. Matthew Witbrodt	
 <b>Registrar:</b>	 10
Mr. Musa Ismail	
Ms. Fiffy Armiza Muhammad Sahit (Assistant)	
Mr. Razif Mohamed Rosli (Assistant)	

20 November 2013  
(Morning session)

<b>Registrar Musa Ismail:</b>	
Today the Kuala Lumpur War Crimes Tribunal will sit and hear 2 cases. There are 2 charges for today. One is Kuala Lumpur War Crimes Commission against Amos Yaron. The other one is the Kuala Lumpur War Crimes Commission against the State of Israel.	20
I shall now read the first charge. The First charge is case number 3-CHG-2013, that is Kuala Lumpur War Crimes Commission against Amos Yaron. The charge is as follows. It is for war crimes, crimes against humanity and genocide:	25
The defendant Amos Yaron perpetrated War Crimes, Crimes Against Humanity, and Genocide in his capacity as the Commanding Israeli General in military control of the Sabra and Shatilla refugee camps in Israeli occupied Lebanon in September of 1982 when he knowingly facilitated and permitted the large-scale Massacre of the Residents of those two camps in violation of the Hague Regulations on Land Warfare of 1907; the Fourth Geneva Convention of 1949; the 1948 Genocide Convention; the Nuremberg Charter (1945), the Nuremberg Judgment (1946), and the Nuremberg Principles (1950); customary international law, ' <i>jus cogens</i> ', the Laws of War, and	30
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1           International Humanitarian Law and the provision  
set forth in Article 9, 10 and 11 of Charter of the Kuala  
Lumpur War Crimes Commission.

5           And now for the second charge.

**Assistant Registrar Fiffy Armiza Muhammad Sahit:**

10           From 1948 and continuing to date, the State of Israel (hereafter  
'the Defendant') carried out against the Palestinian people a  
series of acts namely killing, causing serious bodily harm and  
deliberately inflicting conditions of life calculated to bring  
about physical destruction.

15           The conduct of the Defendant was carried out with the  
intention of destroying in whole or in part the Palestinian  
people. These acts were carried out as part of a manifest pattern  
of similar conduct against the Palestinian people. These acts  
were carried out by the Defendant through the instrumentality  
20           of its representatives and agents as listed out in Appendices  
1 and 2

25           Such conduct constitutes the Crime of Genocide under  
international law including the Convention on the Prevention  
and Punishment of Genocide 1948 ('the Genocide Convention')  
in particular Article II and punishable under Article III of the  
said Convention. It also constitutes the crime of genocide as  
stipulated in Article 10 of the Charter of the Kuala Lumpur  
War Crimes Commission.

30           Such conduct by the Defendant as an occupying power also  
violates customary international law as embodied in the  
Hague Convention of 1907 Respecting the Laws and Customs  
of War on Land, and the Fourth Geneva Convention of 1949.  
Such conduct also constitutes War Crimes and Crimes against  
35           Humanity under international law.

**Prosecutor Gurdial Singh Nijar:**

40           Honourable and esteemed members of the Tribunal, my name  
is Gurdial Singh Nijar. I have place before you the list of both  
the prosecution as well as the *Amicus Curiae*. I shall read them  
out. Appearing together with me is Tan Sri Dato' Abdul Aziz  
Bin Abdul Rahman, Mr. Avtar Singh, Ms. Gan Pei Fern, Dr.

Shahrizal M. Zin, Ms. Rafika Shari'ah Hassan, Mr. Nizamuddin Abdul Hamid, Ms. Mazlina Mahali, and Ms. Diyana Sulaiman.

Appearing for the *Amicus Curiae* are my learned friends Mr. Jason Kay Kit Leon, Ms. Larissa Jane Cadd, Dr. Abbas Hardani, Professor Dr. Rohimi Shapiee, Dr. Rohaida Nordin, and Dr. Matthew Witbrodt.

There have been 4 preliminary objections filed by the defence some time ago and we have been directed to submit written submission. The defence have filed theirs and we have responded. And we were directed that there would be a ruling in respect of each of the preliminary objections before commencement of the trial proper. So we await your ruling and your further direction on this.

**Judge Lamin Yunus (President):**

What I thought would be done this morning is the submissions by the counsel on the preliminary objections. Then only after recess, we deliver the ruling.

***Amicus Curiae Jason Kay:***

Your Excellencies, may it please the Tribunal. Defence-*Amicus* has raised 4 preliminary objections. They have been bound in this copy titled, "Defence-Amicus Curiae Preliminary Objections 1, 2, 3 & 4".

In brief, our 4 objections are as follows: the first one relates to the temporal jurisdiction of this Tribunal. We say that this Tribunal does not have the temporal jurisdiction to hear cases regarding incidents that are contained within charge 3 and charge 4. The second objection is specifically for charge number 4, in that we are asserting that there cannot be a charge proffered against the State of Israel. That charge is wrong. Preliminary Objection number 3 relates to the form of the charge against Yaron for duplicity, defectiveness, and latent duplicity. Preliminary Objection number 4 is for the same reasons in the charge against the State of Israel.

Written submissions have been tendered, and I will briefly run through it and refer to our Bundle of Authorities 4 which supports the preliminary objections.

1 If I may draw your attention to page 1 of the written submission.  
The rules of this Tribunal have a *lacuna* provision, in that if  
5 there is a *lacuna* in the rules of this Tribunal, reference can  
be made to rules of procedure and evidence of similarly  
constituted international Tribunals relating to international  
humanitarian law. We have made comparisons with the rules  
10 of the International Criminal Court, the ICC, the ICTY, the  
ICTR; and the basis of the first objection against the temporal  
jurisdiction of this Tribunal is one against retroactivity of the  
laws.

15 The rules are silent for this Tribunal. Article 7 of our Charter  
states that, "*The Commission and the Tribunal shall have  
jurisdiction under this Chapter in respect of the following crimes:  
Crimes against peace; Crimes against humanity; Crime of genocide;  
War crimes.*"

20 By analogy, the ICC will only hear cases for incidents that  
happened after the entry into force of the Statute of Rome.  
That date is 01 July 2002.

25 By analogy, the International Criminal Tribunal for the former  
Yugoslavia (ICTY) will only hear cases for incidents that occur  
from 1st of January 1991 onwards.

30 The references for these are Article 11, 24(1) Statute of Rome  
- which can be found at pages 691 & 698 of our first Bundle  
of Authorities. Reference is also made to Article 8 of the ICTY  
Statute of our Bundle volume 1 page 22.

**Judge Shad Saleem Faruqi:**

35 Thank you for your arguments. I wish to clarify. I am not so  
clear on your statement about retroactive laws. It seems to  
me that you are giving a very broad interpretation against  
the prohibition against retrospectivity. My understanding of  
retrospectivity is that crimes cannot be created: retrospectively  
you cannot illegalize what was legal yesterday and give the  
law that effect.

40 What difference if that action was illegal at the time it was  
committed but there was no court at that time, the court is  
created later to try or have jurisdiction over matters committed

earlier. So, your statement that laws must not be retroactive is 1  
a little bit too general, it appears to me.

*Amicus Curiae Jason Kay:*

Judge Faruqi, you have gone to the heart of my point. May 5  
I seek the Tribunal's indulgence to move to page 4 of the  
submissions at point number 11.

It is merely an analogy that we are making that modern day 10  
tribunals such as the ICTY, ICTR, ECCC and SCSL - all of those  
modern day tribunals which deals with essentially the same  
type of acts that we are dealing with, they have a start date at  
the very least. Some have a date range. The ones with the start  
date are the ICC, ICTR and SCSL. A date range is the ICTR & 15  
ECCC, that means there's a start date and an end date for the  
jurisdiction of that Tribunal.

*Judge Shad Saleem Faruqi:*

And the start dates are often backwards in time, isn't it? 20

*Amicus Curiae Jason Kay:*

Yes it is. I will concede that. We contrast this with the earlier  
Tribunals that have been formed for such cases, Nuremberg  
and Tokyo are 2 that come to mind immediately. If we read the  
charter of Nuremberg and Tokyo, they are worded extremely 25  
generally, very open ended. Of course the maxim is that a  
person cannot, and should not, face a criminal prosecution for  
an act that was not criminalised, as Judge Faruqi has pointed  
out. There are arguments for and against this position. 30

But there is only a simple point that we hope this Tribunal  
takes into account. In present day constituted tribunals, other  
than Nuremberg and Tokyo, there's only one other tribunal  
that we know of that has wordings that are open ended as  
to temporal jurisdiction and that is the Military Tribunal  
at Guantanamo. The exact wording can be found at s.948d 35  
Military Commissions Act 2006 and that can be found at  
paragraph 14 of my submissions, "A military commission under  
this chapter shall have jurisdiction to try any offense made punishable  
by this chapter or the law of war when committed by an alien unlawful  
enemy combatant before, on, or after September 11, 2001." 40

1 This Tribunal came into existence on 6th of June 2008. The  
acts allegedly committed by Amos Yaron in charge number 3  
are described to have happened in September 1982, while the  
acts allegedly committed by the accused in charge number 4  
5 - starting in 1945 up to the present date and continuing - long  
before this Tribunal came into existence.

10 As a friend of this Tribunal, Defence-Amicus makes this point:  
This objection is really about the soul of this Tribunal. Where  
do we go? What position do we take? Do we take that of  
Nuremberg, Tokyo or Guantanamo, on the one hand; or do  
we take the position of ICC, ICTY, ICTR, SCSL, ECCC. That is  
the essence of what we are saying.

15 **Judge Shad Saleem Faruqi:**

Your learned submission mentions 3 Tribunals which have  
retrospective jurisdiction, but you very adroitly left out the  
Kuala Lumpur War Crimes Tribunal; what does our Charter  
say? Article 11, *'For the purpose of this Charter, "war crimes" means  
20 Grave breaches of the Geneva Conventions of 12 August 1949'*.

*Amicus Curiae Jason Kay:*

Yes, we have 1949 there. But I believe I have made the point  
as best as I could.

25 May I move on to the short explanation of my second  
preliminary objection?

The State of Israel cannot and or should not be made an accused  
30 in charge number 4 and alternatively, if it can be made an  
accused, the State of Israel enjoys immunity from prosecution  
from the alleged offences.

35 From the wording of our Charter and our Rules, there  
shouldn't be a charge against the State of Israel. This Tribunal is  
the judicial arm of the Kuala Lumpur War Crimes Commission.  
Objectives are similar to the Statute of Rome. For the ICC, ICTY,  
ICTR - those statutes are specific: they are only against natural  
persons. ECCC uses the term 'senior leader', by definition  
40 would mean persons, normal natural persons.

Article 2(1)(iii) of our Charter specifically states, "*The general*

objectives of the Commission are to bring war criminals of any nationality to justice." Given a literal interpretation, to have a nationality implies it's a natural person.

Our submission is that by using the word 'nationality', our Charter is in harmony with the statutes of the ICC, ICTY, ICTR and ECCC in that it should only have jurisdiction over natural persons, not nation States. This inference can be made by reading how the word "person" or "persons" are used several times in our Rules and our Procedure at Articles 2, 3, 4, 5, 11, and 12. These are from the Rules of Procedure and Evidence.

"The minimum standards of fair procedure and evidence shall comprise the following: Every person against whom a petition or charge is made shall be presumed innocent until his culpability is established on the evidence,"

"His", as per normal rules of statutory interpretation, can also denote male or female, but it is, impliedly, a natural person.

In Article 3 at page 33 of the Charter, the word "person" is also used: "The Charge shall state the offence with which the person is charged before the Tribunal."

Article 4: The offence must be positively and precisely stated so that the person charged may know with certainty the charged offence.

Article 5 ... I will not continue. I hope the point has been made.

The charge against the State of Israel, we submit, is against the very Charter of the Tribunal.

The second part of this preliminary objection number 2 is that Article 2(1) of the Charter speaks of the general and specific objectives of the Commission. This trial is before the Tribunal. By the Charter, there is no authority conferred on this Tribunal to hear any action against the government of a country, for example, the government of Israel. Article 2(ii) of the Charter, page 4 of the book, "The general objectives of the Commission are to put an end to all war crimes and crimes against humanity currently perpetrated by any government in any part of the globe."

1. It says 'government'. It does not say nation State. The State of Israel is different from the government of Israel.

5 The third part of preliminary objection number 2. International law simply does not allow a nation State to be impleaded as an accused in a criminal Tribunal. The State of Israel is a nation State. It is recognised by the United Nations. It was admitted as a member on 11 May 1949. As a nation State, it has rights under international law.

10 By comparison to the Nuremberg Tribunal, all 24 accused there were natural persons. The decision of Jones v. Ministry of Interior, Saudi Arabia (United Kingdom, House of Lords decision - 2006), the important paragraph is 29 and 31:

15 "I would respectfully agree with the Court of Appeal that Mr Jones's claim against the Kingdom should be dismissed on the ground of state immunity for the reasons given by Mance LJ in paras 10-27 of his closely-reasoned leading judgment, with which Neuberger LJ and Lord Phillips of Worth Matravers MR agreed."

20 25 "A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings."

30 The International Court of Justice, ICJ, on 3 February 2012 also decided in the case of Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening) - at point 31 of my submission.

35 Judgments of the International Court of Justice (ICJ) "are always considered as pronouncements of what the most authoritative international judicial body holds to be in international law on a given point, having regard to the a given set of circumstances." It carries weight.

40 The case concerned the claim by Italy against Germany for reparations for injuries - it's a tortious claim, we admit this - caused by violations of international humanitarian law committed by the German 3rd Reich during the Second World War (WWII). Italy had constrained Germany's State properties

within the territory of Italy. Italy had also allowed enforcement of decisions of the Greek civil courts against Germany in Italian courts.

Germany's contention was that Italy had failed to respect the jurisdictional immunity the Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts.

The decision did encompass the issue of the role of immunity of States in cases which involved crimes against humanity and breaches of international law of armed conflict as a result of the "massacres" committed by the 3rd Reich during WWII - that is at paragraph 52 of the judgment.

The question before the ICJ was this: Whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity?

It is not entirely on all fours - we admit that - with the issues before this Tribunal. But there are many pronouncements made by the ICJ in the case that can be of particular assistance/guidance to this Tribunal on the issue of State immunity for crimes of genocide and war crimes, the substance of charge number 4.

The key paragraphs I have listed in paragraph 37(a) to (f) of my submission, on pages 11 to 13.

I turn now to paragraph 38 of my submission, at page 13. Oppenheim, in the 9th edition of his book wrote, "... *the practice of states over a long period has established that foreign states enjoy a degree of immunity from the jurisdiction of the courts of another state. ... customary international law admits a general rule, to which there are important exceptions, that foreign states cannot be sued.*"

The examples are given in paragraph 39, citing the European Convention on State Immunity, and the Foreign Sovereign Immunities Act 1976 (USA), and the State Immunity Act 1978 (UK).

1      Judge Tunku Sofiah also opined in her book, “*It is an established rule of international law that foreign States ... might sue in our local courts but could not be sued here unless they voluntarily submit to the jurisdiction of our local courts, which submission can either be on an ad hoc basis or generally under the terms of a treaty.*”

5      This is not a local court, I agree. I’ll admit that point right now. The State of Israel has not entered proceedings. We appear as Defence-Amicus. We have not received instructions. By not entering appearance, the State of Israel has, by inference, not submitted to the jurisdiction of this Tribunal.

10     One more point: There are 32 countries in the world that do not recognise the State of Israel. Malaysia is one of them. If charge number 4 stands, and this Tribunal hears the prosecution’s case against the State of Israel, by implication this Tribunal, sitting in Malaysia, recognises the State of Israel.

15     Thank you Your Excellencies. I cede the podium to my learned colleague for preliminary objections numbers 3 and 4.

20     ***Amicus Curiae Larissa Cadd:***

25     May it please this Honourable Court, I understand that written submissions were delivered to the Secretariat some time ago, and I am curious as to whether Your Honours have had the opportunity to review those submissions, because if you have, my submissions will be much briefer. So I take it that most of the Court have read them.

30     The starting point is, of course, as always, the powers and jurisdiction of this Honourable Tribunal. I take Your Honours to the KLWCC Charter, in particular, Article 2(c), “*Every person charged must be informed of the exact charge(s) against him which must be expressed clearly and exactly and supported by sufficient and relevant grounds and facts*”

35     Subsequently, the Charter in Article 2(k) indicates that when there is a *lacuna* in the Charter, “the Tribunal shall adopt rules which comply with international standards of fairness and justice.”

40     When it uses the word “shall”, that is permissive language, it

is not mandatory language such as the use of the word "must".  
So the Tribunal is not required necessarily to adopt those  
principles but is indicative that the Charter should guide the  
Tribunal towards those principles.

Articles 3, 4 and 5 of chapter 2 of part 2 of the Charter, it is  
clearly stated, at Article 4, "The offence must be positively and  
precisely stated so that the person charged may know with  
certainty the charged offence." And it is very important, those  
few words, because what we have in the State of Israel and  
the Yaron charges are essentially cumulative charges. Whilst  
cumulative charges are permissible at international law, they  
are not desirable. And they are not desirable because they do  
not necessarily provide for the principles of fairness and justice  
and clarity and efficiency.

Some will say that the principles that we seek this Tribunal  
to adopt are national criminal principles, and therefore do  
not apply in the international sphere. We would reject such a  
contention, and there is, in fact, judicial support for that in the  
case of the Prosecutor v Norman, Fofana and Kondewa Case  
No. SCSL-04-14-I (2 August 2007) at pages C3-C4. You'll find  
a small extract of that case midway through, towards the end  
of Tab C of this particular volume. It doesn't have a traditional  
heading because that is the way that the Sierra Leone website  
has actually produced that particular document.

I refer in particular, and read this passage,

*"As a matter of principle, international criminal tribunals should not resile from their sacred responsibility, in dispensing even-handed justice, of acknowledging and applying recognised defences to criminal liability in municipal law systems."*

And by that I take it that the court is referring to domestic  
criminal law principles.

*"To this effect, I can do no better than adopt the observation of one learned author, McAullife de Guzman, M. in the Commentary on the Rome Statute,*

1       *"In developing the international criminal law relating to  
defences, it is essential, that the Court be permitted to draw on  
principles of criminal law derived from national legal systems  
... which therefore enhances the Court's ability to fill lacunae  
in the international criminal law"*

5

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And it's interesting that they also use the word *lacuna* because  
that reflects very strongly with Article 2(k) of the Kuala  
Lumpur Tribunal Charter where we heard that in the event  
of a *lacuna*, principles should be drawn which comply with  
international standards of fairness and justice.

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Here's the problem with these 2 particular charges: They are  
drafted as cumulative charges. And where cumulative charges  
are permissible is where there is one charge heading and those  
things that flow under those charge heading are cumulative.  
So it would be, for example, to charge a war crime and have  
possibly several different version of what that war crime was.  
That is a cumulative charge which is permissible.

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But if we look at the language of the charges in this particular  
matter, we will see that the charge against Yaron, for example, is  
identified as 3 different types of criminal conduct. War crimes,  
crimes against humanity, and genocide. And it proceeds to  
cumulatively charge all of those 3 separate offences together.  
And that is not a permissible cumulative charge at international  
law. We would submit that this creates a difficulty for this  
Tribunal when it hears the evidence. This Tribunal will need  
to consider each one of those charges, each one of the elements  
that must be proved to make those charges. And unfortunately,  
the way this charge is being cumulatively bundled together,  
Your Honours are going to have great difficulty, as in fact we  
have had, trying to respond to which part relates to which  
charge. Which bit of evidence will go to which element?

40

This would be so much easier if they had separated war  
crimes - these are the particular types of war crimes we allege,  
this is the evidence that will be lead in respect of that. This is  
the crimes against humanity - the particular crimes against  
humanity and the evidence which will be lead against that.

We could see then how the evidence would attach to the

elements which must be proved by the prosecution beyond reasonable doubt.

The charges are also defective because, "it is a fundamental rule of pleading that an indictment must identify each of the essential factual ingredients of the offence charged. That requirement includes a legal prerequisite to the application of the offence in the circumstances of the particular case. Such a rule is not a mere technicality. Compliance with it is an essential to enable the accused to know the nature of the case against him," or her. That is a quote from Prosecutor v. Brdanin & Talic (Decision on Objections by Talic to the Form of the Amended Indictment) (20 February 2001).

That particular decision was followed in the same case by a decision on the 26 June where it was stated that, "The right of the prosecution to lead evidence in relation to facts not pleaded in the indictment is not as unlimited as its response to this complaint may suggest." There is an entitlement that, "the accused "to be informed promptly and in detail [...] of the nature and cause of the charge against him". For example, it would not be possible, simply because the accused was not alleged to be directly involved," and that would become very important later on, we submit, "to lead evidence of a completely new offence which has not been charged in the indictment without first amending the indictment to include the charge. Where, however, the offence charged, such as persecution and other crimes against humanity, almost always depends upon proof of a number of basic crimes (such as murder), the prosecution is not required to lay a separate charge in respect of each murder."

What this tells us is, that it's not duplicitous in a crime against humanity to charge several murders - that's not duplicitous because it's forming part of the whole context of crimes against humanity. So it is different from the domestic duplicity, we would submit. But nevertheless, in this particular instance, that cumulative charging has gone beyond that, as we have already submitted.

The other aspects, from the case of Brdanin & Talic, which show what is difficult with these particular charges, even in that case, the counts were separated clearly into the following offences: genocide and complicity of genocide, persecution as a crime against humanity, extermination as a crime against humanity,

1 torture as a crime against humanity. So even within that particular case they had 'counts' which attached to particular types of criminal conduct.

5 In this particular case, we don't have counts. We have one charge. One charge which charges genocide, war crimes and crimes against humanity; and we would submit, again, that goes beyond what is permissible with cumulative charging. In fact, I would submit that it comes down to one proposition:  
10 When in doubt, charge separate counts to ensure fairness.

These principles aren't inconsistent with the Malaysian criminal code. This is not an unfamiliar principle to this Tribunal. You would all have experienced it in your practice at some point. All of these defective aspects which I have generally addressed you on orally today, and particularly in writing, ultimately separated into a table which is at the end of the written submissions. This table goes through the particular problems that each aspect of the 2 charges encounters. There is regularly no identification, within each of the factual assertions, as to which each of the 3 generic offences are applicable.  
15  
20

If we go to the charge of Yaron, for example, at paragraph 8, Your Honours will see that that paragraph attributes knowledge to Yaron that, "*Phalangists were likely to attempt to perpetrate massacres and other atrocities against the civilian population of the Sabra and Shatilla camps.*"  
25

It's a very very large statement even though it's very short. Does it deal with a war crime? Does it deal with some form of genocide? Does it deal with a crime against humanity? - which one is it, out of those 3 which were collectively charged at the beginning? We are not the ones who need to determine that. This Tribunal should not be placed in the position where it has to determine that. It is the task and role of the prosecution to separate those into the respective charges that it says is supported by those statements.  
30

The table that I did goes through collectively for both Israel and Yaron. The problem arise everywhere and are inherent though both of them. It's impossible to know which facts are attaching to which charge, and which facts are attaching

to which elements of those charges; and in responding and attempting to clarify the position, the *Amicus* Defence is placed in an unenviable position and that places this Honourable Tribunal in an even more unfair position because it is not the task of the Tribunal to work out what the charges should be.

Those are my submissions, Your Honour.

**Prosecutor Gurdial Singh Nijar:**

May it please Your Honours, I will deal with the first 2 preliminary objections and Tan Sri Abdul Aziz will deal with the third and fourth preliminary objection.

The first objection that is raised, and I have for reference the bundle which says "Prosecution - Preliminary Objections," and I am referring to Tab A which sets out in writing our submissions.

The first is temporal scope. What is suggested is that 'you cannot have retrospective charges' because we refer the genocide charge against the State of Israel, for example, from a time in 1945 and the KL War Crimes Charter is from 2007, so what is suggested is we are creating an offence which never existed before, they say that we cannot do that, that violates the principle of retroactive. With respect, we say that jurisdiction is always founded on the basis of the Charter that sets it out. Does it, or does it not grant jurisdiction to deal with offences that took place earlier in point of time. This is set out very clearly - Part 1, Article 1 Charter Of The Kuala Lumpur War Crimes Commission, "*jurisdiction, ... shall be governed by the provisions of this Charter.*" And this Charter does not set any temporal limit. It's exactly the same as the Nuremberg Charter. There also they did not set a temporal limit and there, as we know, the war was over, Nazi Germany was defeated, and then only the proceedings started thereafter on the basis of the charter that was established in respect of crimes that were committed during the Second World War, prior in point of time. So it's exactly the same. There is not statement in our Charter that limits the jurisdiction to something that happens after 2007.

My learned friend has cited various charters, laws, that have been set up to deal with specific tribunals. Let's look at their

1 bundle, "Preliminary Objections by Defence-Amicus," page 3,  
they have cited the International Criminal Court - the ICC will  
only hear cases concerning conduct committed after the entry  
into force of the Statute of Rome that is 1 July 2002. So they  
5 state very clearly, 'you have to consider conduct after this date'.  
That is very clearly limited. Then we look at the International  
Criminal Tribunal for the former Yugoslavia, "*The ICTY will  
only hear cases concerning conduct occurring from 1 January 1991  
onwards*". *International Criminal Tribunal for Rwanda*, there it  
10 says, "*The ICTR will only hear cases concerning conduct committed  
between 01 January 1994 and 31 December 1994.*" And then the  
*Cambodia* says, "*between 17 April 1975 and 06 January 1979*" and  
Sierra Leone says "*from 31 November 1996 onwards.*"

15 In short, the statutes that have been cited have absolutely no  
relevance with this position they are taking, that you have no  
jurisdiction. And to put the matter beyond doubt, if we look  
at our Charter, we see that we are required by Part 1, Article  
20 1 to investigate war crimes committed in Iraq, Palestine,  
Afghanistan, Lebanon. Committed. Already taken place. Just  
like Nuremberg, in respect of war crimes committed by Nazi  
Germany during the war before the Charter was set up.

25 Then the point that was raised by Your Honour Judge Faruqi:  
Did the Charter create a law that never existed, the law of  
genocide so that when the State of Israel committed this they  
did not realise, they thought there was no such offence, and  
so now they are taken by surprise because they said, 'how  
30 can you make something a crime which never was a crime  
before?' But the point that we make, and it's confirmed by  
statutes, that genocide has always been a crime. Everybody  
knows that. Everybody knows that there are obligations not to  
commit genocide. Not to destroy, maim, kill whole population  
35 on the grounds of their ethnicity, race, etc. All we've got to do  
is look at the Genocide Convention itself. It says, "*Contracting  
Parties confirm that genocide is a crime under international law.*"  
That's 1948.

40 So even in 1948, even before the Genocide Convention came  
in, it was already a crime. And Contracting Parties, which  
mean the world community, which drew up this Genocide  
Convention in 1948 recognised this fact. So they've always

considered it a crime. And Israel is a party to the Convention. It signed this on 17 August 1949. They know it's a crime. They are not taken by surprise. They have obligations. They ratified it on 9 March 1950.

Finally, the point is that the crimes committed are also crimes under international law, regardless of the Genocide Convention, confirmed by statutes, treaties, customary international law, *jus cogens*, the laws of wars, international humanitarian law; and these are all set out in Articles 9 to 11 of the Kuala Lumpur War Crimes Charter. And these treaties are dated from 1907, 1945, 1946, 1948, 1949, 1950. So these are long-standing extant, existing, international law. These offences already existed under international law. So the principle of retroactivity has absolutely, with respect, no application. That deals with the first aspect of the temporal scope.

But further they argue that there was no Tribunal (this Tribunal only came into existence in 2007) - how can you lay a charge in respect of a period of time before the Tribunal came into existence? That is the argument. No tribunal therefore you have no jurisdiction to hear this case because we are dealing with offences before 2007, facts alleged before 2007, you only came into existence in 2007.

The first point we want to make is: Look at the practice of this court itself. We have had 2 cases tried here and judgments have been delivered by this honourable Tribunal. The first was against George Bush and Anthony Blair for crimes of aggression, crimes against peace. And this was in respect of crimes committed in 2003, 4 years before this Tribunal came into existence. We have the verdict on another charge against Bush, Chaney, Rumsfeld and their lawyers for the crime of torture - that was committed in 2001 - that was 6 years before the Tribunal came into existence. So we have very clear basis upon which we have acted. And we were not wrong at that time. We were entirely correct in doing so because international war crimes jurisprudence reinforces the view - the fact that there is no tribunal set up to resolve a dispute does not mean that therefore you have no obligations in international law in respect of crimes that are recognised by international law. So the obligations always exist.

1 And I have it at my submissions, page 2 paragraph 8, the  
case of Application of the Convention on the Prevention and  
Punishment of the Crime of Genocide, Judgment, I.C.J. Reports  
5 2007. It is known as the Bosnia and Herzegovina v Serbia &  
Montenegro case. And I read from paragraph 148.

10 "As it has in other cases, the Court recalls the fundamental distinction  
between the existence and binding force of obligations arising  
under international law and the existence of a court or tribunal  
with jurisdiction to resolve disputes about compliance with those  
obligations. The fact that there is not such a court or tribunal does  
not mean that the obligation does not exist. They retain their validity  
and legal force. States are required to fulfil their obligations under  
international law, including international humanitarian law, and  
15 they remain responsible for acts which are attributable to them..."

20 The jurisdiction of the Court is founded on Article IX of the  
Convention, ..., but it does not follow that the Convention stands  
alone. In order to determine whether the Respondent breached its  
obligation under the Convention, ..., and, if a breach was committed,  
to determine its legal consequences, the Court will have recourse  
not only to the Convention itself, but also to the rules of general  
international law on treaty interpretation and on responsibility of  
States for internationally wrongful acts."

25 So this, in our respectful submission, refutes the argument  
that because you were constituted after these alleged acts the  
tribunal therefore has no jurisdiction.

30 We conclude by saying that there is clear authority that  
evidence that predates events may also be relied upon as  
evidence, for example, the International Criminal Tribunal for  
Rwanda talked about '*evidence of acts that occurred prior to 1994*  
35 *may be relied upon as evidence of a conspiracy that culminated in*  
*the genocide committed during the period between January 1994 and*  
*31st December 1994.*' And so in our case, we are talking about  
a series, a pattern, of genocidal acts committed prior even to  
the setting up of the State of Israel, 1945, we will bring experts,  
from 1945 and continuing to the present day.

40 So that deals with the first point as to whether you have  
jurisdiction or not.

The second preliminary objection is that you cannot charge the State of Israel. The first aspect of that argument is, they say, '*if you look carefully, it only talks about persons, some specific individual, not the State.*' If we look at the Charter of the KL War Crimes Charter, it states its objectives, the 2 key ones, at Art 2.1(iii) and (iv), "*to put an end to all war crimes*";  
"to prevent the recurrence of war crimes"

This would require, in our respectful submission, that everybody including persons within the jurisdiction of the nation State, as well as the nation State itself, cannot commit the crime. They may be charged if they do so.

A similar argument was raised in the case of Bosnia and Herzegovina.

"The Article does not expressisverbis (expressly state) require States to refrain from themselves committing genocide. However in the view of the Court taking into account the established purpose of the Convention, the effect of Article 1 is to prohibit States from themselves committing genocide."

So it's directly on point because here our Charter also says you have to prevent and put and end to these war crimes. The purpose,

"Such a provision follows first, from, the fact that the Article categorises genocide as a "crime under international law": by agreeing to such a categorisation, the States parties must logically be undertaking not to commit the crime so described. Secondly, it follows from the expressly stated obligation to prevent the commission of genocide...It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessary implies the prohibition of the commission of genocide."

The Court went on to hold that although several provisions in the Genocide Convention emphasised responsibility of individuals and punishment of individuals. "that international

1 law imposes duties and liabilities upon individuals as well as upon States has long been recognised" citing the Nuremberg judgment.

5 At para 13 of the case of Bosnia and Herzegovina,

10 "The Court observes that that duality of responsibilities continues to be a constant feature of international law" which is "reflected in Art 25, para 4 of the Rome Statute for the International Criminal Court."

15 And to address the point that this is not specifically mentioned, I refer Your Honours to my page 4, at para 174 of the case of Bosnia and Herzegovina.

20 "The Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs (a) to (e) of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals. Furthermore, the fact that Articles V, VI and VII focus on individuals cannot itself establish that the Contracting Parties may not be subject to obligations not to commit genocide and the other acts enumerated in Article III."

25 And the Court concluded, "Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred."

30 If we look at the various provisions and apply them, and the case law I have cited, it is very clear that the obligations extend to the State itself.

35 It has also been suggested that the Tribunal has no authority conferred. The Tribunal is the judicial arm of the Commission. Whatever jurisdiction is bestowed on the Commission flows naturally and clothes the Tribunal with that same jurisdiction. The Commission has recommended that the State of Israel be charged for the crime of genocide.

40 The second aspect of this argument, the word is "government". Article 2(1) uses "government" not "State" or "nation State,"

and Israel is a nation State, and therefore you cannot charge Israel, you can only charge the government of Israel - I mean, we'd be quite happy to charge the government of the State of Israel - but just on this question itself, the point is, logically, when you refer to "government" it logically extends and must mean the governing authority of a State. "Government" is nothing more than the governing authority for the State. The State does not exist in a vacuum. It does not function on its own. The act of the government must necessarily be attributed to the State. It is an organ of the State. Here we are referring to the genocide charge activities, we are referring to the official governmental character of the acts which are attributable to the State of Israel.

Quoting their own case, Jones, '*The very official or governmental character of the acts ... and which still operates as a bar to the civil jurisdiction of national courts, was now to be the essential element which made the acts an international crime.*' This is in reference to the Torture Convention and supports the contention that governmental acts are acts of the state. So when you talk about government, you are talking about the State. So the second argument must, with respect, be rejected.

The third and final argument on this point is: International law does not allow the State of Israel to be impleaded as an accused, and that the Charter of Nuremberg trial, all were persons, not States. And they go on to say that the State enjoys immunity from being charged. I will deal with this very quickly.

The Nuremberg judgment does not state that you cannot charge States. This is what it says, "*international law imposes duties and liabilities upon individuals as well as upon States has long been recognised.*" Their contention that the charge against a State is not envisaged by the Nuremberg trials flies in the face of what the judgment itself says. In that case, they brought 20-odd people before the court. There the defence was different. There the defence was, '*it was the State that is responsible - the lawyers, the judges and others who carried out the dictates of the Nazi party, you cannot charge them because they were just carrying out orders, they were just functionaries.*' So there they had to deal with the question of individual. But this makes it very clear. Duties and liabilities upon individuals, as well as upon States.

1 Then they raised the fact, they cite Jones v Ministry of Interior, Saudi Arabia, and they quote, "*a state is not criminally responsible in international ... law, and therefore cannot be directly impleaded in criminal proceedings.*" This is exactly the argument that was  
5 raised in the Bosnia & Herzegovina case. The court answered, "*The Applicant accepts that general international law does not recognise the criminal responsibility of States. It contends, on the specific issue, that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention. The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature. This argument accordingly cannot be accepted.*"  
10  
15

Then they raised the case of Germany v. Italy, but we wish to add that the case of Germany v. Italy although it related to compensation arising out of matters that arose during the  
20 Second World War, the armed conflict waged by Germany, these were matters raised in domestic court and were civil claims, and I quote here, "*The Court is not called to decide whether these acts were illegal... The question for the Court is whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity.*"  
25

It involved the question of whether one court, the role of  
30 domestic court of one State to make decisions against another State. These are the 2 clear distinguishing factors, one is a civil claim, another is that you cannot have one court in the State to make decisions against another State. So you cannot have, in respect of a civil claim, arising here, a local court making a judgment against the United States, for example, in respect of civil claims - they enjoy immunity.  
35

The Jones' case makes it clear that when you talk about immunity, you are talking about immunity in civil claims, if you look at the judgment of Lord Bingham, "*The rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state.*"  
40

It goes on to say, "The majority, however, held that the grant of sovereign immunity to a state in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another stat's sovereignty." 5

So a State should not have the jurisdiction over another State in civil claims - immunity is granted, that is recognised. And this case that they cite makes that very clear.

And there are qualifiers which says, "save in cases recognised by international law," and we have already seen that genocide is a case recognised by international law as a war crime.

And then it goes on to say, "But the case was categorically different from the present, since it concerned criminal proceedings falling squarely within the universal criminal jurisdiction mandated by the Torture Convention and did not fall within Part 1 of the 1978 Act. The essential ratio of the decision ... was that international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged. The Torture Convention was the mainspring of the decision and certain members of the House expressly accepted that the grant of immunity in civil proceedings was unaffected." 15 20 25

So it's very clear that we are talking about civil, not criminal proceedings. As the court says, the former head of the House of Lords of England, Lord Bingham, has said it'd be absurd to say Torture Convention applies to everybody, Genocide Convention applies to everybody, and then to say that the moment the person is charged, then he is granted immunity if we are talking about international war crimes that are going to be adjudicated at the international tribunal level.

The final conclusion is, "having heard the various arguments, the Court affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by 30 35 40

1       Article III of the Convention, the international responsibility of that  
State is incurred."

5       One final point that was made, which is not in their written  
submission, is that if we allow Israel to be charged then it  
implies that Malaysia is recognising Israel, and Malaysia does  
not recognise Israel. With due respect, this is an international  
tribunal. It is geographically sitting in Malaysia. It can also,  
10      under the Charter, sit in various other jurisdictions - the  
Charter is very clear. So it has nothing to do with State policy.  
The fact that the Rwanda Tribunal sat at a particular place  
and the former Yugoslavia Tribunal sat at a particular place is  
not decisive of the issue. With respect, this argument cannot  
be sustained.

15      I thank Your Honours.

**Judge Shad Saleem Faruqi:**

20      Before you sit down, with the permission of Mr. President, can  
I request you and perhaps Jason to address us on Chapter 3,  
Article 6(b), page 24 of this [the Charter book]? Service of the  
charge and trial dates.

**Prosecutor Gurdial Singh Nijar:**

25      Yes. Indeed, this makes it very clear, "*If the Charge involves a  
Sovereign State, a current head of state/government or a former head  
... then we can serve, we have applied this service ... this puts it*  
beyond peradventure that their argument cannot be accepted.

**30      Prosecutor Tan Sri Dato' Abdul Aziz:**

May it please Your Honours, I am very honoured to appear  
before Your Honours this morning, and I am taking over from  
Professor Boyle who is unable to attend and I will proceed to  
prosecute in this case.

35      The Defence has filed 2 applications. I shall deal with that first.  
These 2 applications came just very recently. I understand that  
this case, we had already had a trial in this case and there were  
no application of this nature in the first trial when they agreed  
40      to proceed with the trial. This must be an afterthought. On that  
ground alone, I think the application should be dismissed.

In any case, I shall proceed to respond to some of the points raised. Their application suggests that the charge is defective for duplicity. Two, the charge is defective for uncertainty. Three, the charge is an abuse of process, or oppressive.

What I like to clarify, I think they have misconstrued the charge. This charge is against a General who had committed breach of his duty for facilitating and allowing international crimes to be committed. It is not a case of Mr. A murdering Mr. B at a certain time of the day at a certain place. It is not that kind of crime. They want us to be specific - time, date and so on. Well you can do it if we're dealing with one murder. Here is a case of a General facilitating or allowing the commission of crimes. He himself didn't murder anybody. It is a case of large-scale massacre. The number of people murdered, 3,000, and it happened in 3 days or so. I am saying that we stand by our written submission here, to refute all of the allegations made by the defence because as far as we are concerned, I can say that the charge is not defective for duplicity. Where is the duplicity? He is charged for failing to do his job. To stop the massacre. It's very clear. There's no duplicity. All the offences committed by those other people during those 3 days. Many have died. Many were tortured. Many suffered injuries. You don't need to be specific about all those because the charge is about failure to do his duty. There is no question of duplicity. And there is no question of uncertainty. Where is the uncertainty? And I must say that the charge even elaborates the particulars of the charge - all in detail. It is very clear. There is no uncertainty about it.

The next one they say: the charge is an abuse of process. I don't think there is a shred of evidence that the process has been abused. We've followed proper procedure in accordance with the law. There's no abuse at all. There's no oppression here. What we are asking is a fair transparent trial.

So I want to be brief. I submit that the arguments are without merit, and I pray that their objections be dismissed.

*Amicus Curiae Jason Kay:*

I have 4 short points and my colleague will take the rest of it.

1       The first point: The prosecution may have misconstrued the  
difference between a State and a government. Our objection  
is that a State cannot be impleaded in a tribunal of this nature.  
The government of the State is elected by the people. The  
government changes, the State does not change. Therefore, as  
5       with the first trial handled by this Tribunal, George W. Bush,  
the head of the government of America was charged for crimes  
against peace; Tony Blair, the head of the government of the  
United Kingdom was charged for crimes against peace. The  
10      State, the United States of America nor the United Kingdom,  
they were not charged. In the second trial that was before this  
court, 8 natural persons were charged: George Bush, Donald  
Rumsfeld, Dick Chaney, and the rest - they were natural  
15      persons. The State, the United States of America, was not  
charged. This trial now brings things to a different level. The  
charge against Yaron, yes, he's a natural person - no issues  
there. But the charge against the State of Israel is wrong in  
law. If the charge had been against the head of the government  
20      of Israel at the times when the incidents were enumerated in  
charge number 4, all the incidents that were enumerated from  
1945 to the present day, if each head of government, the Prime  
Minister at that time had been charged, that would be alright.  
But the charge against the State of Israel is wrong, that's the  
25      first point.

25      **Judge Lamin Yunus (President):**

Just to disturb. Whatever is undertaken by a government,  
or a State, or a group of people forming a State, without the  
participation or involvement of human beings, nothing would  
have happened, right? There must be some human beings, not  
just robots or machinery. That is just what I want to disturb  
you on.

35      **Amicus Curiae Jason Kay:**

I totally agree. Had charge number 4 been framed against the  
different Prime Ministers of Israel, had each of the surviving  
Prime Minister of Israel been indicted in charge 4, that would  
not be a problem. But because the State of Israel as a whole has  
been indicted, that is a problem, we humbly submit.

40      My second point. I believe the learned prosecution may  
have misconstrued. Our submission was that if this Tribunal

allows charge number 4 against the State of Israel to stand, this Tribunal, not the Government of Malaysia, this Tribunal would impliedly recognise the validity of the State of Israel, the existence of the State of Israel - THIS Tribunal. We are not saying anything about the Government of Malaysia or the State of Malaysia.

Point number 3. I refer to the excellent point brought up by Judge Faruqi - page 34 of our Charter. Page 34 is in Chapter III - Service of Charge and Trial Dates. It reads, "*If the Charge involves a Sovereign State, a current head of state/government or a former head ...*". This is the procedural and evidentiary part. It is not the Charter per se. It falls under Part II, the Rules of Procedure and Evidence of the Tribunal - these are the rules. Rules cannot go against entrenched principles of law. If we take a different reading of it, we can say charge 3 against Amos Yaron "involves" the Sovereign State of Israel because Yaron was a General serving in the State of Israel at the time, so it "involves" the State of Israel - we can take that reading, and this portion would harmonize with the position taken by the *Amicus* in preliminary objection number 2. This one line cannot go against entrenched principles of law.

My final point. These 4 preliminary objections were not an afterthought. Far from it. Preliminary Objections number 1 and number 2 were before the Tribunal before it sat in August ...

**Prosecutor Gurdial Singh Nijar:**

With respect, just to correct. The argument that was made by Tan Sri was that the third and fourth preliminary objection were an afterthought, not the first and second.

**Amicus Curiae Jason Kay:**

The third and fourth preliminary objections were not an afterthought because the panel when it sat in August did not go beyond the reading of the 2 charges when it adjourned the trial *sine die*, the reasons for which have been enumerated in the Order given by the then panel - I will not go into that.

However, subsequent to that, the President issued an order that all written submissions were to be in by a certain date and time. Preliminary Objections numbers 3 and 4 along with the

1 replies from the learned prosecution were put in before the cut off date and time. They are valid. They were presented before this Tribunal sat.

5 I cede the podium. My learned colleague have some points to address.

*Amicus Curiae Larissa Cadd:*

10 May it please this Honourable Court, I have just 2 general points in reply to my learned colleague.

15 The first is, my learned colleague had submitted to Your Honours that we had misconstrued the charge and how it was framed. The manner in which my learned colleague addressed the charges as having been formulated, he suggested that they were being formulated in the permissible cumulative sense. Unfortunately, when you actually look at the charges - what I am saying, and what my learned colleagues are saying - is that those particular charges are not permissible cumulative charges because they bundle 3 offences. That is the duplicity. We do not suggest that the duplicity of multiple counts of murder which may support a crime against humanity would be duplicitous. We would suggest that that would be the permissible cumulative charge under the heading 'crime against humanity'. But what we do suggest is that bundling them with the 3 other offences is duplicitous because each one of those offences has separate elements. So we have not misconstrued the form that the charges are contained.

25 30 The second point is that my learned colleague has referred to General Yaron as having failed to do his job. To some extent, what was put to Your Honours was that that was the crime. Nowhere in any one of the crimes - crimes against humanity, war crimes or genocide - is there a separate sub-heading which says, "failing to do your job." It is extremely important that you determine what it is, and my friend alluded to it - there was killing, there was torture. Then those are the things which you attach the particulars to so that with fairness everybody knows the particular acts which relate to that alleged offence. I would rely further on my learned colleague Mr. Kay and my submission and I hope they would clarify completely the position that the Defence-Amicus takes. May it please the court.

**Judge Lamin Yunus (President):**

Thank you for the submissions of both sides. They appear to be very simple, straightforward. But actually it can be quite complicated. We adjourn to 2 o'clock.

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**Registrar Musa Ismail:**

All rise.

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1                   **20 November 2013**  
                      **(Afternoon session 1)**

Judge Lamin Yunus (President):

5                   You will now hear the position of the Court on the preliminary objection, and I am asking Judge Y.T.M. Tunku Sofiah to read the findings of the Court.

Judge Tunku Sofiah Jewa:

10                  On August 20, 2013 the *Amicus* Team filed two preliminary objections to these proceedings – the first contending that there are defects in the Charges preferred against the Accused, and the second contending that the State of Israel cannot be impleaded in these proceedings on the grounds of State Immunity.

15                  The main thrust of the *Amicus* Team's arguments in its first preliminary objection is that the trend in modern international criminal tribunals is either to have jurisdiction for acts that have been committed after these tribunals have been constituted, such as the International Criminal Court, or alternatively its jurisdiction is for a limited duration of time such as the International Criminal Tribunal for Rwanda and the Extraordinary Chambers in the Courts of Cambodia.

20                  The *Amicus* Team submits that this Tribunal came into existence on 6 June 2008, whilst the various acts allegedly committed by the Accused in charge no. 3 occurred in the month of September 1982, while the acts allegedly committed by the Accused in charge no. 4 occurred since 1948 and continue up to the present day.

25                  The *Amicus* Team openly concedes that if the Tribunal holds that its jurisdiction is open-ended (as in the military tribunals at Nuremberg, Tokyo and Guantanamo), then its preliminary objection must fail.

30                  This morning, the Tribunal allowed the *Amicus* Team to make its oral submission in respect of the same two preliminary objections.

35                  On behalf of the Prosecution Team, it was argued that the

jurisdiction issue must be established by reference to the founding Charter or statute that sets up the Tribunal.

The Charter of the KL Foundation to Criminalise War states that the jurisdiction of the Tribunal shall be governed by the provisions of this Charter: Part 1, Article 1. There is no temporal limit. In particular, Article 7 sets no time limit. In this sense the Charter is identical to the 'open ended' temporal jurisdiction of the Military Tribunal at Nuremberg or the International Military Tribunal for the Far East.

The Prosecution Team also submitted that the Tribunal had convicted Bush and Blair of war crimes committed in 2003 – which also predates its setting up: KL War Crimes Commission v George W. Bush and Anthony L. Blair, KLWCT Reports 2011, p. 1. The verdict by the KLWCT against Bush, Cheney, and Rumsfeld et al went back to torture committed from 2001.

The main thrust of the *Amicus* Team's arguments in its second preliminary objection is that there is no authority conferred by the Charter on this Tribunal to hear any action against the government of a country, for example, the government of Israel.

The *Amicus* Team also argued that international law does not allow the "State of Israel" to be impleaded as an accused. The State of Israel is a nation state, recognized by the United Nations, and as a nation state, it has rights under international law.

The *Amicus* Team further submits that the State of Israel has not entered appearance in these proceedings and has therefore not submitted to the jurisdiction of this Tribunal. The *Amicus* Team submits that the State of Israel enjoys immunity for the crimes of genocide and war crimes and therefore Charge 4 should be dismissed.

With regard to the second preliminary objection, the Prosecution Team submits, *inter alia*, that these two Charges are international criminal war crimes being adjudicated by an international tribunal. States have no immunity for such crimes before such tribunals. In support of their contention,

1 the Prosecution Team cited the decision of the ICJ in the Bosnia  
case, which stated, in part, as follows –

5 Accordingly having heard the various arguments, the Court  
affirms that the Contracting Parties are bound by the obligation  
under the Convention not to commit, through their organs  
or persons or groups whose conduct is attributable to them,  
10 genocide and the other acts enumerated in Article III. Thus if an  
organ of the State, or a person or group whose acts are legally  
attributable to the State, commits any of the acts proscribed by  
Article III of the Convention, the international responsibility  
of that State is incurred": para 179 [Prosecution Documents,  
15 vol 1: pp. 170-171].

20 On 15th October 2013, the *Amicus* Team submitted two (2)  
applications to quash the charge against the two Accused -  
Amos Yaron and the State of Israel. The grounds of applications  
as submitted by the *Amicus Curiae* are as follows:

- 25 1. The charge is defective for duplicity, and/or latent  
duplicity.
2. The charge is defective for uncertainty.
3. The charge is an abuse of process and/or oppressive.

30 On behalf of the two Accused, the *Amicus* Team sought for the  
Tribunal to make the following orders:

- 35 1. That the charge against the two Accused be quashed.
2. That the prosecution against the two Accused be  
permanently stayed.
3. In the alternative, that the Charges be redrafted according  
to the principles of criminal law.

40 The *Amicus* Team contends that there were multiple offences  
within one charge and multiple forms of alleged instances of  
criminal conduct within one charge. The *Amicus* Team submits  
that the Rules against Duplicity must be strictly adhered to in a  
criminal proceeding. The rule prescribes that for every distinct  
charge, and every such charge shall be tried separately.

45 The *Amicus* Team submits that it is incorrect to say that the

principles of duplicity do not apply in international criminal law, and submits further that the right to indict on cumulative charges under international law does not provide a complete freedom to avoid principles of duplicity or abuse of process. Such right to indict on cumulative charges must be subject to the overarching principles of clarity, precision and fairness to the accused.

The *Amicus* Team further submits that the charges against the First Accused and the Second Accused ought to be amended at the very least, if not altogether quashed. The *Amicus* Team submits that the defects are so substantial as to warrant censure; they are prejudicial, and fail to use impartial language as expected in the role / office of the Prosecution.

In rebuttal, the Prosecution Team submits that this Tribunal is governed by its own Rules and these Rules are silent on the application of the Rule against Duplicity in drafting charges. This rule against duplicity, as it exists in national legal systems, does not, and cannot, apply in the same way in proceedings before international criminal courts. More importantly, the Tribunal should take into account the heinous nature of these crimes and the scale they were alleged to be perpetrated.

On the *Amicus* Team's submission that the charge is defective due to uncertainty, the Prosecution Team submits that it is premature for anyone to say so without appreciating the particulars contained in the charge. The particulars in the charge are facts that the Prosecution seeks to prove in the course of the proceedings.

The *Amicus* Team had also submitted that there has been lapse of time from the occurrence of the alleged crimes to the date of these proceedings. This gives rise to probabilities that critical evidence in support of defendants' case may not be available, hence significantly prejudicing the defendants.

In response to this, the Prosecution Team refers to the setting up of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2005 to hear cases of the Khmer Rouge atrocities from 1975 to 1979.

1 And now, the finding of the Tribunal.

Having considered the Preliminary Objections raised by the  
5 Amicus Team and the Two Applications filed by the Amicus Team and the submissions by both the Amicus Team and the Prosecution Team in the several documents already filed with this Tribunal, and having considered further oral submissions by both parties, it is the unanimous finding of this Tribunal that the Preliminary Objections and Two Applications have  
10 little merit and are accordingly dismissed.

Before we terminate these preliminary proceedings and proceed to hear evidence in respect of the two Charges, this Tribunal wishes to state for the record the following:

15 On the issue of its retrospective jurisdiction

- (1) This trial is not criminalising what was not criminal before. There is no issue of autre fois acquit or autre fois convict. The Charter of the Kuala Lumpur Foundation to Criminalise War empowers the Kuala Lumpur War Crimes Tribunal to take cognisance of, and to adjudicate on, heinous crimes under a plethora of pre-existing international statutes and norms.
- (2) Many other international tribunals have similar retrospective jurisdiction albeit within specified time periods that commenced before the tribunals were established. The KLWCT has no such time limits. It is empowered to take cognizance of international crimes committed in unlimited time periods prior to its establishment.
- (3) It is also noteworthy that many of the international crimes mentioned in the charge sheet are continuing.
- (4) We were invited by the learned counsel for the Prosecution to follow the model of the Nuremberg Tribunal whose retrospective jurisdiction had no express time limits as opposed to some other international tribunals whose powers were confined to time periods. We are inclined to accept this suggestion because our Charter permits

us to adjudicate on crimes against peace which many  
*ad hoc* tribunals do not have the power to adjudicate on.

On the issue of the immunity of sovereign states from criminal process in foreign courts

(1) Can foreign states be impleaded before the KLWCT? Our Charter in Chapter III, Article 6(b) is explicit that "*if the Charge involves a Sovereign State, a current head of state/government, service of a copy thereof to any relevant Embassy or High Commission shall suffice and the accused is deemed to have been served.*"

(2) The jurisdiction that international law doctrine against impleading a foreign state must be read subject to a more peremptory norm of international law (*jus cogens*) that prohibits the crime of genocide, as can be seen in the following two ICJ judgments, namely:

(i) Democratic Republic of the Congo v. Rwanda (2006) at para 64;

(ii) The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 26 Feb 2007 (ICJ Judgment) at para. 161.

(3) We are in agreement with the Prosecution's citation in the ICJ Case: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro), Judgment, I.C.J. Reports 2007, p. 43 at p.113 that "The Court observes that duality of responsibilities continues to be a constant feature of international law" which is "reflected in Article 25, para 4 of the Rome Statute for the International Criminal Court" .... "Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred."

1   **Prosecutor Gurdial Singh Nijar:**

Much obliged Your Honours. We have filed 14 bundles of documents. The defence has 3 bundles of documents. We have provided a list of witnesses, as well as reports we hope to tender at the appropriate time. We also have a bundle of statutory declarations of the witnesses we propose to call. There is another witness statement that we will furnish. We will also be providing evidence through Skype of 4 witnesses who are listed in that list of witnesses.

10   This is by all accounts an extraordinary trial. This Tribunal is a laudable effort by the citizens of the world community to utilise international law to meet the gravest yet threat to human civilisation - the 'crime of all crimes'. It's called genocide.

15   It is self-evident that law must not stop with the punishment of a select few for such a heinous crime. It must also reach nations that seem to enjoy impunity because of their presently powerful benefactors. Nations that inflict acts of such great evil that we must pause to consider why the foremost nations of the world and the United Nations, with its machinery to establish international criminal tribunals, and the existence of international institutions to try international crimes such as the ICC, they eschew bringing to justice such nations that create such evil.

20   While they are ever so quick, so vigilant, to prefer charges against personages from weak developing countries. Unlike the Nuremberg trials which actually charged 20 broken men of a thoroughly defeated nation, this trial is significant because it charges a nation that thumbs its nose, continues to thumb its nose at UN resolutions, resolutions made by the entire world community. It thumbs its nose at decisions of the ICJ in which they have participated and shakes our confidence in the meaning of civilisation itself.

25   This trial is perhaps the first step to deliver an unequivocal message that - to paraphrase Robert H. Jackson, Chief of Counsel for the United States at the Nuremberg Trials - "*Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively*

with rogue nations." We will patiently and temperately disclose that such an epithet is deserving of this defendant. We will give you incontrovertible, we hope, proof of the catalogue of incredible crimes conceived as long ago as 1945 and continuing till the present.

For the Palestinians, it is a continuing tragic saga of huge proportions. What they term as Nakba, or 'catastrophe,' which started in 1948 with their forced dispossession and eviction from their homeland is a history of the present: on-going dispossession, dislocation, massacres, ethnic cleansing and all else that genocide embraces.

In short, the continuity of the trauma is not just the result of 1948 when all this occurred, but is an on-going process, and continuing into the present and linked to current Israeli policies and practices.

The prosecution will show a gruesome tapestry of sustained acts of ethnic cleansing, followed where necessary by killings, arrests, imprisonment without trial, torture, denial of adequate food, denial of adequate quantum of water, usurpation of lands, incessant bombardment including by phosphoric bombs which tear out the insides of human bodies upon contact and the siege and imprisonment of an entire nation and peoples who are then subject to daily humiliation and virtually impossible conditions of living. This nation, the accused, that now occupies Gaza and the West Bank under incredulous conditions that defy belief in this modern century implemented - and continues to do so - an updated version of a slow but steady holocaust against the Palestinian peoples.

An example: In the 40 hours in September 1982 at the Sabra-Shatilla refugee camps in Lebanon. And who resided there? The hubris of those who had fled their homeland in 1948, amidst equally gruesome massacres, burning of houses, expropriation of lands. And these people, the hubris, who had left, dispossessed, forced to leave their homes, and arrived and were staying in these camps, they were set upon and massacred, as we will show, with the clearest complicity of the State of Israel.

1 Every hour 857 Palestinians and few others in their midst were  
5 slaughtered. It has recently been acknowledged, at the British  
House of Commons, that there were 3,500 men, women and  
children. Many unaccounted for till today. Many more maimed  
10 and brutalised. Their shanty homes reduced to rubble. Even  
babies torn out of their mother's womb. An act so dastardly  
that even the defendant Israel State's Commission of Enquiry  
called the Kahan Commission condemned its perpetrators  
15 - including the then Prime Minister Menacham Begin, the  
Defence Minister Sharon, the Chief of Staff Eitan and the  
Commander of the outpost at Sabra-Shatilla, Yaron - who is  
the subject of a separate charge.

20 Such acts of evil represent a continuation of previous such acts.  
25 And they have not ceased since. They have further intensified  
and metamorphosed into acts so grave as to fall within the  
ambit of the Genocide Convention 1948. We will show that  
each of these acts could constitute such an offence. But taken  
cumulatively they show the establishment beyond doubt of  
30 the crime of genocide - a pattern of a clear intent to kill, injure  
and create impossible conditions of life designed to destroy the  
Palestinian populace, its spirit and determination to survive  
as a people, as a nation.

35 At the heart of the matter is land. When the United Nations  
General Assembly approved the plan to divide the country,  
Palestine, into a Palestinian and Israeli State on November  
29, 1947, the breakdown of land and population was at that  
time, Arabs, that is Muslims and Christians, the percentage of  
30 population was almost 70%. And the Jews were 30%. The Jews  
with 30% held 6% of lands that were owned or settled whilst  
the Arabs in the Palestinian lands settled in 95% of the lands.

35 But this partition plan, the United Nations partition plan  
allotted for those who own land 31% of the population owning  
6% they awarded 52% of this new area. And offered 48% to  
those who had occupied almost 95% of the land mass and  
constituted 70% of the population.

40 So naturally it was rejected by the Palestinian Arabs - there was  
rebellion because of the sheer inequitability of this distribution  
of land. The Jewish Agency, which was the provisional

government before Israel declared statehood in 1948, it immediately began to execute its strategic plan to cleanse its partition of the indigenous Palestinian population. This plan developed over the previous decade was called Plan Dalet.

By the time Israel declared its independence on May 14, 1948, the majority of the Palestinians living within Israel had been forcibly expelled from their homes by Israeli regular and irregular military forces. Many were massacred; their villages destroyed. Their lands seized. This sad episode has been captured - there's a photographic record of this entire destruction and State formation and we have photocopied and provided a copy of the book by Ariella Azoulay and it tells in pictorial terms the razing, of the destruction, of the killings and so on. We will make a copy of this available.

At the close of the 1948 war, Israel not only continued but continued to capture an additional 23% of historic Palestine. Then they began to hold 77% of the land - starting from 6%, awarded 52% by the United Nations, now 77% of the land, leaving Palestinians only 22% of their ancestral land. By the end of 1949, Israel had expelled over 750,000 Palestinians from their homes and land and destroyed over 400 villages. That's one year after they declared independence. This is in clear violation of international law and includes a UN resolution those who are expelled have, until to date, not been allowed to return to their homes.

Then, in the Spring of 1967, Israel captured the entire Sinai desert, the so-called West Bank as well, including East Jerusalem, Gaza and the Golden Heights. In one campaign, Israel virtually doubled its size by taking huge chunks of Syria, Jordan and Egypt. These lands are called today "the Occupied Territories" and they are hotly disputed. This means that the remaining 22% has been taken over and now placed under a brutal military occupation and has illegally transferred over half a million of its own citizens there. This colonisation of occupied territory is strictly prohibited by international law, as is the acquisition of territory through war.

If we look at the map - Palestinian loss of lands - how it has progressed from 1946 [displayed on TV] you can see Palestine

1 it's completely green, and the dark green becomes less and less,  
and that is 1947. And then you find a small strip on the left,  
1967. And present day, 2010 you can see what has happened  
5 from 1946 up to 2010 where you see on the right-hand side  
a smattering of pattern, that's called the West Bank; and on  
the left, the small strip consisting presently of 1.7 million  
10 population, one of the most densely populated in the world,  
is Gaza. And these 2 are occupied. And as we shall presently  
show, in the West Bank itself, there you also have more than  
600 checkpoints that are manned by the Israeli, the defendant.

15 On November 22, 1967 the UN passed Resolution 242 declaring  
that Israel must withdraw from these Territories. Israel, under  
a treaty with Egypt, returned the Sinai to Egypt but it still  
holds the Golan Heights (which were taken over in December  
1981) and most of the West Bank. Israel even increased the size  
20 of Jerusalem significantly, and annexed it for its own. To this  
day Israel continues its strategic pattern of settler colonisation  
combined with ethnic cleansing while constructing more  
illegal Jewish settlements and Jewish-only roads. It demolishes  
25 at will Palestinian homes and has built a wall that confines  
Palestinians into small isolated regions. Israel maintains  
hundreds of military checkpoints which inhibits Palestinians  
from travelling to other parts of the West Bank. It has closed off  
and controls all borders, air space, and natural resources. The  
Palestinian economy is thus starved and thwarted producing  
poverty, resentment, and conflict.

30 On a personal note, we from the prosecution, two of us, applied  
to go to the West Bank but were denied access by the Israeli  
authorities - so they control everything, immigration.

35 You will hear witnesses testify as to their actual conditions of  
living which they have had to endure right up to now. We will  
be adducing evidence through witnesses.

40 As far as the issues concerned, they are clear enough. The  
Tribunal will have to examine the facts to satisfy itself first  
whether the alleged acts occurred, and second whether such  
acts, if established, fall within the scope of Article 2 of the  
Genocide Convention and, of course, the related provisions  
in the KL Charter. That is to say, whether the facts we have

succeed in establishing the fact and whether the facts establish the existence of an intent on the part of the perpetrators of those acts to destroy in whole or in part a defined group. There must be *dolus specialis*, specific intent, to carry these acts of genocide.

In this context we submit the Tribunal should consider the facts alleged in light of the question whether there is consistent and persuasive evidence or a pattern of the alleged acts that will constitute evidence of this specific intent on the part of the defendant of the accused.

It will not be necessary to examine every single instance, nor is it necessary to make an exhaustive list of all the allegations. It is sufficient to examine those facts that would illuminate the question of intent or illustrate the claim by the applicant of a pattern of acts committed against members of the group such as to lead to the inference from such pattern of the existence of specific intent. And we actually quote this from the Bosnia case, paragraph 242.

The elements of the crime of genocide are set out in the Convention, a copy has been placed before Your Honours, as well in the Bundle Volume 1, and it consists of 2 parts, the *actus reus*, the physical act and the *mens rea*, the intent to commit the crime. We have the *actus reus* is in Article 2 and it says any designated "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." And here is very clearly would be national and ethnical when we refer to the Palestinians.

The *mens rea* is also in Article 2, the act must be the following, and we rely on 3 which is, "Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."

What we are saying is that the accused committed the actual physical acts of killing, causing serious bodily and deliberately inflicting on the group conditions of life with the intent to destroy in whole or in part the Palestinian people.

1 As far as the evidence is concerned, of course we are going  
back to before 1948 to 1945, we submit that it is crucial that the  
allegation in relation to the charge of genocide be placed in a  
more general historical context and the precedent, there are a  
variety of pronouncements on this in a variety of international  
cases, the one we have quoted here is the Advisory Opinion  
5 on the Construction of a Wall, but it also appears in the  
International Criminal Tribunal on the Former Yugoslavia as  
well as the Tribunal on Rwanda.

10 As to the mode of proof, we will be relying on a wide area  
of materials, reports, reviews, information from persons and  
international sources, secondary published sources, interviews,  
press reports. And this was allowed in the case of Bosnia, and  
15 in our case management yesterday before the President of  
the Tribunal, it has been agreed that this will be permitted.  
This is consonant with practice at international tribunals.  
Unique to international proceedings is the fact that courts are  
not bound by strict and technical rules of evidence but enjoy  
20 greater flexibility. They are guided, rather than by formal  
standards, by general principles of fairness and the need for  
an expeditious trial. We have quoted the necessary case law  
on the subject. And this is reflected in our own Charter (Part  
25 1: Art 6.7 (drawing own rules of evidence and procedure;  
Part 2, Chap 1, Art 1 (Tribunal of conscience and act on fair,  
transparent and just procedures. So it must be fair, it must be  
transparent, but we are not going to be overburdened with very  
strict adherence to extremely technical rules that sometimes  
apply to criminal jurisprudence actions in domestic court. And  
30 we have Article 2 (k) (where there is a *lacuna*, the tribunal is  
to adopt international standards of fairness and justice), the  
overarching criteria that we have.

35 We will prove the charges through the oral and written  
testimonies of victims, we are allowed to provide although it  
is preferable to have written statements and we have furnished  
bundles of them but we are allowed also in certain situations  
to have oral evidence and that we will be doing especially  
40 the evidence that is going to come through Skype, there are  
4 witnesses who will give evidence through Skype. So we  
will have that oral and written testimonies of victims, and  
we draw a distinction between victims *per se* and witnesses.

These people, in an international tribunal of conscience are entitled to different kind of treatment than pure witnesses who come - there has got to be an understanding of the conditions upon which they arrive to give evidence in this case. We have authorities which suggest that they have to be treated with some element of respect and some empathy, without, of course, detracting from the role of counsel to ascertain the facts through appropriate cross-examination.

And historical records, we will prove books, commentaries, resolutions of the United Nations, and reports of international bodies a list of which we have provided in that document called "Witnesses, ... and Reports",

And also to facilitate a clearer understanding, we will also supplement these with videos, photographs, maps and Power Point slides because sometimes videos are very instructive because when witnesses come here to talk about the inconveniences that are caused, the conditions of life that are compromised when they have to travel from one place to another, when they have to travel from one place to the other and they are confronted with these checkpoints, we will try to illustrate this through videos to illustrate the kind of conditions to which these people are subject.

We want to make 2 clarifications. The first is that we have no purpose to incriminate the whole Israeli people. The Zionist propaganda machine is reputed to be one of the most powerful if not the most powerful in the world. It successfully portrays itself as a helpless nation besieged by a hostile environment and neighbours; using this in a skilfully-engineered pretext to carry out its genocidal acts of wanton destruction, unleashing full scale state of the art killing machinery against some feeble stone-throwing episodes and relatively primitive rockets.

The second point, it is not a question of Muslims against Christians relating to a land where Jesus Christ was born - in Bethlehem. As Gracy Burge, professor of New Testament at Wheaton College Graduate School, notes in his book, "Whose Land? Whose Promise?" - it is really a matter of the domestic policies of the State of Israel. In fact, the author Gracy Burge in a very poignant story talks of John Paul, when he visited

some time in March 2000, he visited the Dheisheh refugee camp outside Bethlehem, that was unexpected. It is home to 10,000 people who lost their homes in 1948 when Israel was born. The camp, according to the author, is a tragic example of squalor and poverty - about 650 buildings are squeezed in 1 square kilometre, that's like 15 people in 1 small room. Unemployment is at a horrendous high of 60-70%. On the Hebron road that leads to the camps, John Paul was greeted by what they call "The March of the Keys." Keys to homes. Hundreds of schoolchildren carrying keys to the homes their grandparents lost so many years ago. These keys are handed down now to a 3rd generation as a reminder of the family's loss and displacement. Most children carried signs, carried names of the ancestral villages.

In conclusion, the significance of this trial before the community of the world court is that a verdict against Israel for the crime of genocide will herald the triumph of good over evil; the restoration of justice to a battered - but as yet unvanquished peoples of Palestine imprisoned in a prostrate occupied land. This then, is the prosecution's ultimate quest: To seek a conviction of the State of Israel and Yaron, and finally, to seek a victory in the verdict for humanity and civilization itself. I thank Your Honours.

We now proceed to call our first witness, and the examination will be aided, assisted, by the statutory declaration, which appear at Tab 8 in your document, and will be conducted by Mr. Nizamuddin Hamid, with your kind leave.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

We call upon our first witness, Chahira Abouardini.

**Ms. Chahira Abouardini (via translator):**

I, Chahira Abouardini hereby solemnly swear and take oath that I shall speak the truth and nothing but the whole truth in this proceeding.

I'm originally from Palestine. My hometown is Haifa. My village is .... I live in Lebanon since 1984 in the Shatilla refugee camp.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

Your Honour, I will refer the witness to the statutory declaration, and the prosecution would like to submit further questions based on the statutory declaration for the benefit of the Tribunal, if it pleases the Tribunal.

Assalamualaikum Chahira. If I may refer you to your statutory declaration, 18 November 2012. Can you inform the Tribunal of your current status, your current citizenship.

**Ms. Chahira Abouardini (via translator):**

I am a refugee since 1948. I live in Shatilla camp in Beirut, Lebanon. I am a witness in Sabra-Shatilla camp massacre.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

I refer to your answer in paragraph 6 of your statutory declaration. If I may read, "*On 30th of August 1982 there was an agreement for Israeli forces and the Palestinian resistance forces to withdraw from Lebanon. One week later I returned to my house. I found that my house was partially destroyed. Nevertheless, our family moved back and we started to reconstruct the damaged part of the house slowly.*"

**Ms. Chahira Abouardini (via translator):**

Yes.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

Can you please inform the Tribunal the composition of your family when you returned back to Shatilla? Your husband, is he around?

*Amicus Curiae Dr. Abbas Hardani:*

Objection. Your Excellency, this is a leading of witness.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

If I may respond Your Honour, we are not leading the witness. It is based on the Statutory Declaration. So there's no leading. The facts are stated clearly in the Statutory Declaration and we are going through the Statutory Declaration together with the witness.

1      **Judge Lamin Yunus (President):**

There's a Statutory Declaration and he is trying to translate that part.

5      **Amicus Curiae Jason Kay:**

We thank you for the order.

Ms. Chahira Abouardini (via translator):

My father, brother, his wife, sister, our children.

10     **Mr. Nizamuddin Abdul Hamid (Prosecution):**

How old were you at the time, your husband and children during the time you moved back to camp Shatilla?

15     **Ms. Chahira Abouardini (via translator):**

I was 23 years old and my husband 37 years old, my children the eldest daughter 3 years old, the other daughter one year and a half, and the boy 15 days.

20     **Mr. Nizamuddin Abdul Hamid (Prosecution):**

I refer you to paragraph 7, when the Lebanese President Bachir Gemayel was assassinated, what was the main reason for you and your family to move from camp Shatilla to your father's house?

25     **Ms. Chahira Abouardini (via translator):**

We heard from the news about the assassination, there were a lot of aircraft flying around Beirut. It was frightening the people in the camp. My husband told her that the situation was getting worse and the house was made from zinc, not well covered, and he asked me to prepare the children to go to his family's house which is inside the camp. That house was partially destroyed.

35     **Mr. Nizamuddin Abdul Hamid (Prosecution):**

To inform Your Honours, she mentioned at paragraph 8 of her Statutory Declaration, if I may read, "*I live in a small zinc house close to the stadium in Camp Shatilla. On the 16th of September 1982 at about noon, my husband, my children and I moved to my father's double-storey brick house which was located on the main street known as Sabra Street.*" To assist the Tribunal, may I present you with

a map to demonstrate the position of each and every detail of  
1 the events?

I am referring to Map 2 Your Honour. Using the map, can  
you please inform the Tribunal of your family house and the  
5 location of your father's house?  
10

**Ms. Chahira Abouardini (via translator):**

My house, to the south of the sports city on the map. And my  
father's house at the Shatilla main street. It's written here.  
15

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

Your Honour, you may refer to number 9 in the map, that's  
the father's house, and also south to the sports city, referred  
to by the witness.  
15

When you moved into father's house, who was in the house  
at that time?

**Ms. Chahira Abouardini (via translator):**

All my other family members. Father, mother, cousins, sister.  
20

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

Can you remember how many of you are there in that house?  
25

**Ms. Chahira Abouardini (via translator):**

My brother and his wife and children, my cousin and his wife  
and their children, and I and my husband and our children.  
More than 10.  
30

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

So as per your statutory declaration, you mentioned that you  
arrived at your father's house on the 16th of September 1982?  
35

**Ms. Chahira Abouardini (via translator):**

Yes.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

Now my questions will be in regard to that specific date. On  
16th September 1982, based on your experience at your father's  
house at that time, what happened?  
40

1      **Ms. Chahira Abouardini (via translator):**

We returned home after the fighting ended. We started to renovate our houses, we organized ourselves. On the 16th, in the evening, we heard a lot of shooting and loud voices and guns shooting until dusk. We start to hear people were running all over the place and the shouting of people and screaming of children. We never thought that there was a massacre going on outside. We were inside the house. When voices come a bit closer, my sister wanted to see what was happening and so she left the home to the main street to see what is going on outside. She was shot dead. When they shoot her, before she was dead, she screamed, "*Oh father!*" so my father run after her to see what's going to her and he also shot dead at the spot.

15     **Mr. Nizamuddin Abdul Hamid (Prosecution):**

This shooting: Your sister was shot, and your father ran outside to save her, when did this happen? Was it on the evening, morning (dawn) of that date?

20     **Ms. Chahira Abouardini (via translator):**

In the evening between 5 to 6 o'clock,

Mr. Nizamuddin Abdul Hamid (Prosecution):

You mentioned to the Tribunal you heard 'shooting sounds'. Can you further explain where did the sound come from? Was it from inside the camp, or outside the camp and it came closer and closer?

Ms. Chahira Abouardini (via translator):

From all around the place we hear shooting, from the south, the east and different ... at the entrance of the camp, we heard a lot of shooting there.

Mr. Nizamuddin Abdul Hamid (Prosecution):

Did you hear shooting sounds from inside the camp?

Ms. Chahira Abouardini (via translator):

No, because inside the camp there were only civilian and people start to run all over the place. There's no shooting inside.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

The day after your father and sister were shot, you mentioned in your Statutory Declaration the remainder of your family members, except your father and your sister, remained inside the house. What happened on the 17th of September 1982,  
which is the next day?

1

5

**Ms. Chahira Abouardini (via translator):**

It was a Friday, about 16 to 17 people with the military uniform entered our house; they come from the front steps to the room at the back, and our children start to scream, and women, they took the men outside and they asked them to line up against the wall, and they shoot them. Before, they too their watches and money, they threw it away on the ground.

10

15

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

You mentioned that all the male family members, adult male, men, were taken and asked to stand against the wall and were shot. Is it in front of you and your children?

20

**Ms. Chahira Abouardini (via translator):**

Yes, in front of me and children in front of them also.

**Judge Shad Saleem Faruqi:**

You must ask her, "*Who did the shooting?*"  
Israelis, Lebanese, Phalangist?

25

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

I'm going into that; much obliged. Can you identify the person responsible in shooting your adult male family members?

30

**Ms. Chahira Abouardini (via translator):**

I cannot identify them as persons.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

As to their nationalities, are they the Lebanese?

35

**Ms. Chahira Abouardini (via translator):**

Yes, from their language you can tell they are Lebanese.

40

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

From their language you can tell that they are Lebanese?

1   **Ms. Chahira Abouardini (via translator):**

Yes.

Mr. Nizamuddin Abdul Hamid (Prosecution):

5       Then what happened to the female children?

Ms. Chahira Abouardini (via translator):

10      Our children, they start to cry and shout, and there were men screaming also. They asked us to move outside the house. We walked over the bodies, bodies of my father and my sister; and they were pointing their guns on our backs and they asked us not to shout or scream.

Mr. Nizamuddin Abdul Hamid (Prosecution):

15      The person responsible in pointing the gun at the women and children's heads: Are they the same Lebanese soldiers or are they different soldiers?

Ms. Chahira Abouardini (via translator):

20      Yes, they were Lebanese.

Mr. Nizamuddin Abdul Hamid (Prosecution):

Do you identify that they were Lebanese?

25   **Ms. Chahira Abouardini (via translator):**

They are the same people who killed the family members.  
They are the same people and they were talking all the time.

Mr. Nizamuddin Abdul Hamid (Prosecution):

30      And they were talking in ...

Ms. Chahira Abouardini (via translator):

In Arabic.

35   **Mr. Nizamuddin Abdul Hamid (Prosecution):**

The men that were shot and were asked to stand against the wall before they were shot: Were they carrying any arms or they are civilians just like you, the women and the children?

40   **Ms. Chahira Abouardini (via translator):**

They were civilians. They have no arms.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

They had no weapon with them? 1

**Ms. Chahira Abouardini (via translator):**

No. If we had guns, I think that would not happen. 5

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

The women and children: Where were you taken after that?

**Ms. Chahira Abouardini (via translator):**

They asked us to stand on the main street and they were like negotiating who will kill them first. But the children were screaming all the time, so one of the soldiers said, "*Just take them away so the others cannot hear those screams.*" 10

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

When you were at the main street, could you identify other soldiers, other than the Lebanese?

**Ms. Chahira Abouardini (via translator):**

At the main street there were Israeli soldiers but few members of them - but they were standing there. 20

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

How do you know that they were Israeli soldiers and not Lebanese? 25

**Ms. Chahira Abouardini (via translator):**

The Lebanese, you can tell; the others, they speak another language that we don't know. 30

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

So you can identify the Israeli soldiers from the distinct language that they are speaking, compared to the Lebanese?

**Ms. Chahira Abouardini (via translator):**

Yes, it's not Lebanese. But they were few in numbers.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

When you were asked to leave your house, you saw the dead bodies of your family members. If I may share with the Tribunal the photographs - for her to identify. 40

1 I refer you to these photographs. Can you please share with  
the Tribunal the details of this photographs?

Ms. Chahira Abouardini (via translator):

5 This is my father, and this is my sister. This is where he was  
killed. But this photo is after they grabbed him out so they  
can picture.

Mr. Nizamuddin Abdul Hamid (Prosecution):

10 So this is her father as well?

Ms. Chahira Abouardini (via translator):

Yes.

15 The other photo is of my family members - husband, sister  
and cousin.

Mr. Nizamuddin Abdul Hamid (Prosecution):

Who gave the photographs to you?

20 Ms. Chahira Abouardini (via translator):  
A Japanese photographer was there.

Mr. Nizamuddin Abdul Hamid (Prosecution):

25 I refer you to paragraph 18, "*It appeared like the militiamen had started the killing from the houses closest to the sports complex where the Israeli forces were based. They killed everyone including women and children, even animals. There were continuous gunshots. They were entering homes and killing people. Anyone who moved was killed.*"

30 Ms. Chahira Abouardini (via translator):

Yes. Correct.

35 Mr. Nizamuddin Abdul Hamid (Prosecution):

Can you please describe the position of the Israeli military camp, which is at the sports complex, and the position of the tents, Shatilla and Sabra camps?

40 Ms. Chahira Abouardini (via translator):

They were stationed at the sporting complex. They were everywhere close to the Kuwaiti embassy and Mohammad Street, Al-Hamra and all over Beirut.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

The presence of Israeli soldiers: Can you describe their presence? Were they present with armed men or were they present with tanks and other equipment inside the camp when the massacre happened?

**Ms. Chahira Abouardini (via translator):**

It was a full occupation of a country so they were there with all their arms and tanks all over the place.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

The killings done by the Lebanese soldiers - it is done in front of these Israeli soldiers?

**Ms. Chahira Abouardini (via translator):**

Definitely, of course. The Lebanese militia, they cannot enter the camp and the Israeli army cannot enter inside the camp, the villages and ...

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

Did the Israeli do anything to prevent the civilians inside from being killed by the Lebanese militia?

**Ms. Chahira Abouardini (via translator):**

No, they didn't. They didn't prevent. However, they are the person who helped the militia in terms of transportation and providing them with logistics.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

You mentioned that the Israeli forces assisted the Lebanese militia in terms of transportation and also logistics. Were there any other assistance given by the Israeli such as the weapons used? Is it similar to the weapons used by the Israeli soldiers? The food ration? The medical aid?

**Ms. Chahira Abouardini (via translator):**

This was called the South Lebanon Army. It was actually founded by the Israeli forces - everybody knows. Their head .... is one of the allies of the Israeli.

1   **Mr. Nizamuddin Abdul Hamid (Prosecution):**

Can we go into details regarding the assistance given by the Israelis to the Lebanese militia? What kind of assistance?

5   **Ms. Chahira Abouardini (via translator):**

The South Lebanese Army were a tool. The main planner is Israeli. They provide everything to this militia.

Mr. Nizamuddin Abdul Hamid (Prosecution):

10   Ok, we go through the items one by one. In terms of weapons, the guns used: Are the Lebanese militia using the same guns used by the Israeli force?

Ms. Chahira Abouardini (via translator):

15   I don't have any knowledge regarding kinds of weapons. We were brought by these militia to the Israeli. We were handed to the Israeli forces, they gathered us in one group - so there is kind of collaboration.

20   **Mr. Nizamuddin Abdul Hamid (Prosecution):**

In regard to the assistance, the militia need to be in the refugee camp for more than 24 hours - they were there for 36 hours at least. What food did they eat?

25   **Ms. Chahira Abouardini (via translator):**

They had all food like a Jew and even the fruits is all written in Hebrew.

Mr. Nizamuddin Abdul Hamid (Prosecution):

30   So all the food eaten by them are written in Hebrew?

Ms. Chahira Abouardini (via translator):

Yes

35   **Mr. Nizamuddin Abdul Hamid (Prosecution):**

Can you describe what you saw along the way to the stadium?

Ms. Chahira Abouardini (via translator):

40   In order to get to the complex, we went between houses and all the way we could see bodies lying on the ground. They took us to the Israeli forces, where they're based.

Mr. Nizamuddin Abdul Hamid (Prosecution):

What happened when you were handed over to the Israeli forces?

Ms. Chahira Abouardini (via translator):

They gathered us in one room and there were Israeli guards surrounding us

Mr. Nizamuddin Abdul Hamid (Prosecution):

The one guard, is it Israeli forces or the Lebanese militia at the time?

Ms. Chahira Abouardini (via translator):

They were Israeli and there was a tank was in front of us. I was standing there also. From 6 o'clock in the morning until noon, 12, afternoon they brought young men with them - the militia - and they were walking to the sporting complex, and some mines exploded; they were planting some explosions there. When they get closer to the sports complex, some mines that were planted there before start to explode and when the Israeli forces hear these explosions, they panicked so they went to their tanks to hide inside. When they hide inside, we took this chance - as we were free - so we run away from that sports complex going to the Arabic University in the camp.

Mr. Nizamuddin Abdul Hamid (Prosecution):

How long did you hide at the Arabic University?

Ms. Chahira Abouardini (via translator):

Just one day. We were at the lobby for one day. At the time we ran from the sporting complex, the massacre was still ongoing that time. The killing was there until the morning of that day - Saturday.

Mr. Nizamuddin Abdul Hamid (Prosecution):

What did you do on Saturday morning, after that?

Ms. Chahira Abouardini (via translator):

In the morning, we started to see some of the media, the Red Cross. They started to come inside the camp. They were trying to get inside the camp to see what is happening. Me and my children tried to go to the camp, but they didn't allow us to enter.

1        We couldn't enter the camp until Sunday - we stayed. We were somehow frightened so some were scared because some of the militia were there. So we didn't dare to go inside the camp.

5        But after 3 days, we went to our house.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

After you went back, after 3 days, can you inform the Tribunal, the detailed description of what you saw inside the camp?

10      **Ms. Chahira Abouardini (via translator):**

Bodies were all over the place. You can see from both side, the right, the left, the whole street, you just see the bodies of people, different ages, different sex, all over the place; and some of them were cut and some of them were mutilated, and the bodies everywhere.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

20      Were there any international organizations who assisted the survivors to deal with the bodies?

**Ms. Chahira Abouardini (via translator):**

25      It took more than one week because most of the bodies decomposed, the smell was around, and some of the organizations would gather the bodies and ask people to identify them. And they buried them collective.

30      The organization were late, so late to bury the bodies. Most of the bodies were decomposed and you can barely identify anybody.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

35      Were there any international, or other countries' soldiers, present during the massacre inside the camp?

**Ms. Chahira Abouardini (via translator):**

Before the massacre or after?

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

40      During the massacre.

**Ms. Chahira Abouardini (via translator):**

Before the massacre, was Italy was present there but with the ambulance was there at the site before the massacre but they disappeared a few hours before the massacre started, and they came later.

1

5

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

They disappeared and they came back later. How later was that?

10

**Ms. Chahira Abouardini (via translator):**

After they clean up the place and remove all bodies.

**Mr. Nizamuddin Abdul Hamid (Prosecution):**

Your Honour, if we may, there are some other questions to be posed by Chief Prosecutor. I have no further questions. Chahira, thank you very much.

15

**Prosecutor Gurdial Singh Nijar:**

At your paragraph 16, you say you were led at gun point after they shot your family members, daughter, father, lined up the men, killed them all; you had to walk over their bodies and then at gun-point they took you, you say here, to the sports complex stadium. That's correct?

20

**Ms. Chahira Abouardini (via translator):**

Yes they took us.

25

**Prosecutor Gurdial Singh Nijar:**

And along the street, as you are walking, broken streets, old streets, you saw bodies of children, houses half destroyed; men, women, children, all over the street, is it?

30

**Ms. Chahira Abouardini (via translator):**

Yes. You can see some open houses you can see inside, the bodies.

35

**Prosecutor Gurdial Singh Nijar:**

So bodies all over?

40

1      **Ms. Chahira Abouardini (via translator):**

Yes. And most of the houses have zinc doors, easily you can open it. Most of the houses were open.

5      **Prosecutor Gurdial Singh Nijar:**

And there were dead bodies. You said here, "*We were not to make any noise or we would be shot.*" So anybody who moved, shot, is that right?

10     **Ms. Chahira Abouardini (via translator):**

Yes. And they asked me to move out, to walk over the bodies of my father and sister, I wanted to cry and scream. One of the armed man put a gun to my back and asked me to not open my mouth.

15

**Prosecutor Gurdial Singh Nijar:**

So you could not even cry over your ...

**Ms. Chahira Abouardini (via translator):**

20     No.

**Prosecutor Gurdial Singh Nijar:**

In paragraph 19, something happened to your cousin's daughter - she was pregnant - as you were walking. Pregnant 25 lying dead

**Ms. Chahira Abouardini (via translator):**

When we were walking along the main street to the area called Duhi, that woman, she was deaf and mute ...

30

**Prosecutor Gurdial Singh Nijar:**

Your cousin's daughter - she was deaf and dumb, is that correct? Yes proceed.

35     **Ms. Chahira Abouardini (via translator):**

Yes. Deaf and dumb. But she was married and living in her own home.

**Prosecutor Gurdial Singh Nijar:**

40     You saw her lying dead. What else did you see as regards her?

Ms. Chahira Abouardini (via translator):

It was so stressful and frightening when you see. They struck out her baby from her stomach and put the baby on her belly.

1  
Prosecutor Gurdial Singh Nijar:

So she was pregnant, they took out the baby from her body, killed her, and laid this body on her?

5  
Ms. Chahira Abouardini (via translator):

Yes, they cut up her belly and to confirm her name is Amal 10  
Abourdena.

15  
Prosecutor Gurdial Singh Nijar:

Your cousin's daughter?

Ms. Chahira Abouardini:

My daughter cousin.

20  
Prosecutor Gurdial Singh Nijar:

I refer you to paragraph 24 and 25. You say Thursday, Friday, Saturday - the killing continued, you say. Now this, we are talking about, is on Sunday. Sunday, you were finally allowed to enter the camp.

25  
Ms. Chahira Abouardini (via translator):

Saturday, noon ...

Prosecutor Gurdial Singh Nijar:

No no. I'm talking about Sunday, she was allowed to enter the camp. Just focus on that. So Sunday, you entered the camp? 30

Ms. Chahira Abouardini (via translator):

No, they were still cleaning and they were telling her there was some shooting and going on still ...

35  
Prosecutor Gurdial Singh Nijar:

No, I know. Then, when she was allowed to enter the camp later.

40  
Ms. Chahira Abouardini (via translator):

I did not enter the camp until 3 days. The next week. 3 days.

1      **Prosecutor Gurdial Singh Nijar:**

So when you entered the camp, you say here, "*I saw bodies all over. Piled up - men, women, children, even animals.*" Is that right?

5      **Ms. Chahira Abouardini (via translator):**

Even horses.

**Prosecutor Gurdial Singh Nijar:**

Even horses. So all life, piled up in the streets? Dead?

10     **Ms. Chahira Abouardini (via translator):**

Everything. Animals, people. Everything ...

**Prosecutor Gurdial Singh Nijar:**

15     And you told us just now that the Red Cross - took them awhile to collect the bodies, people to identify them, alright?

20     **Ms. Chahira Abouardini (via translator):**

First, they were waiting the rest of the militia to get out from the camp. Then they started cleaning.

**Prosecutor Gurdial Singh Nijar:**

Then you say here, "*Foreign journalist then took pictures of the dead.*"

25     **Ms. Chahira Abouardini (via translator):**

Yes. First the foreign media start to enter the camp and took pictures from the scene.

30     **Prosecutor Gurdial Singh Nijar:**

Your Honours, with your kind leave, there is document here marked "Prosecution Documents - Bundle of Photographs."

Now I'm going to show you photographs that have been taken by foreign journalists whose names are identified. I just want to establish whether this was the kind of scene that you saw, other than your own family members that were shot and killed?

35

Can you look at photo one? Just go through that. Your Honours, I'm sorry to have to show this - it's brutal but this is the reality. Photo two. Photo three.

40

**Ms. Chahira Abouardini (via translator):**

Yes, the second photo is Al-Bourgee's house.

1

**Prosecutor Gurdial Singh Nijar:**

Oh, you can identify the house even? So these were the bodies  
in front of ...

5

**Ms. Chahira Abouardini (via translator):**

Al-Bourgee family members

10

**Prosecutor Gurdial Singh Nijar:**

The cousin daughter's family members?

5

**Ms. Chahira Abouardini (via translator):**

Yes

15

**Prosecutor Gurdial Singh Nijar:**

I see. That's the second photograph. Then, the third photograph,  
can you look at that? Bodies lying from one end of the street  
to the other end, the whole width of the street.

20

**Ms. Chahira Abouardini (via translator):**

The man in blue from Ahabsad house. From the zinc houses  
from the western side of the camp. This is Ahabsab, her and  
her father. Not male, she's a female. She has short hair.

25

**Prosecutor Gurdial Singh Nijar:**

Photo 3 on the screen, is that correct?

**Ms. Chahira Abouardini (via translator):**

Yes. She's a female.

30

**Prosecutor Gurdial Singh Nijar:**

And the one at the top, photo 3, the throat is cut - you identify  
that as well?

35

**Ms. Chahira Abouardini (via translator):**

Yes.

**Prosecutor Gurdial Singh Nijar:**

Now look at photo 4. These are also bodies piled up. Can you  
see that? This is the kind of bodies, the massacre that you saw  
- is that right?

40

- 1   **Ms. Chahira Abouardini (via translator):**  
    All these pictures are from the massacre.

- 5   **Prosecutor Gurdial Singh Nijar:**  
    And the one at the bottom, can you look at that? Bodies piled up. I'll go quickly. They're so gruesome.

- 10   Photo 5, can you see? Eyes gouged out, hands chopped, burnt at the bottom. Charred bodies. People lying next to their motorcycles - photo 6, that is, near the house. If you can identify anyone specifically, you let us know.

Photo 7, a child ...

- 15   **Ms. Chahira Abouardini (via translator):**  
    Photo 7, there is a ... that is used to carry vegetables.

- 20   **Prosecutor Gurdial Singh Nijar:**  
    Look at photo 8, heads smashed in, bodies lying dead.

Photo 9 ...

- 25   **Ms. Chahira Abouardini (via translator):**  
    Photo 9 is the rehab area

- 30   **Prosecutor Gurdial Singh Nijar:**  
    So in front of the rehabilitation centre as well, people were massacred. Photo 9 at the bottom, which area is this?

- 35   **Ms. Chahira Abouardini (via translator):**  
    It's a rehab area. You see the horse there?

- 40   **Prosecutor Gurdial Singh Nijar:**  
    In the bottom photograph, or top?

- 35   **Ms. Chahira Abouardini (via translator):**  
    No. It's a body of a person. It's a rehab.

- 40   **Prosecutor Gurdial Singh Nijar:**  
    If you look at Photo 10, these are your family members, are they not?

**Ms. Chahira Abouardini (via translator):**

Yes

1

**Prosecutor Gurdial Singh Nijar:**

And they were left there - nobody could touch them - until 5  
later?

**Ms. Chahira Abouardini (via translator):**

Yes.

10

**Prosecutor Gurdial Singh Nijar:**

Photo 11, in front of his garden, in front of his gas tanks.

**Ms. Chahira Abouardini (via translator):**

Photo 10. This is my husband and cousin. This is my family. 15

**Prosecutor Gurdial Singh Nijar:**

Photo 11?

**Ms. Chahira Abouardini:**

This is my house. 11. In front of my house.

20

**Prosecutor Gurdial Singh Nijar:**

Who is this person in relation to you?

25

**Ms. Chahira Abouardini (via translator):**

My neighbour, killed inside her home. He was selling the gas.  
He has a shop that sells gas. I clean the house of the blood. I  
still have everything from the house.

30

**Prosecutor Gurdial Singh Nijar:**

Who's the one at the top - Photo 11?

**Ms. Chahira Abouardini (via translator):**

I think it's Haidar's house. The bottom picture is my house. 35  
And the neighbour was inside my house.

**Prosecutor Gurdial Singh Nijar:**

Photo 12, you can see an old man with his walking stick?

40

**Ms. Chahira Abouardini (via translator):**

His name is Abu Anan. He's a very old guy.

1      **Prosecutor Gurdial Singh Nijar:**  
At the top there is a child.

5      **Ms. Chahira Abouardini (via translator):**  
This is close to my house.

10     **Prosecutor Gurdial Singh Nijar:**  
Can you look at Photo 13, pile of bodies there, can you see?

15     Photo 14 - the man whose leg has been dismembered; his arms?

20     **Ms. Chahira Abouardini (via translator):**  
His name is Muhammad Duhi. He used, this leg is a plastic leg.

25     **Prosecutor Gurdial Singh Nijar:**  
Photo 15, inside a house, children, babies; children with their mother, father - somebody's house.

30     Photo 16, human beings, houses in rubble.

35     **Ms. Chahira Abouardini (via translator):**  
Photo 15, I guess this is my sister's ... not sure. Because she wore a black t-shirt. 16 is rehab area also.

40     **Prosecutor Gurdial Singh Nijar:**  
At the bottom of 17

45     **Ms. Chahira Abouardini (via translator):**  
Those are Lebanese. They were beside the camp and I recognise the ... and the bottom photo is the place where they gathered the bodies. These are Photo 17 at the bottom. This place is now a memorial. This is where they buried all the bodies. Identify them from ...

50     **Prosecutor Gurdial Singh Nijar:**  
So here they were identifying and now there is a memorial there; and every year, there is a memorial ceremony?

55     **Ms. Chahira Abouardini (via translator):**  
Yes.

**Prosecutor Gurdial Singh Nijar:**

Photo 18, we have much the same thing. Photo 19, 20, 21. Now if you go to Photo 22, this building, we are told is the Israel Command Centre where they were located in relation to the camp. Can you identify? If you can, let us know. If you can't, let us know as well.

**Ms. Chahira Abouardini (via translator):**

This is building is at Deir Hassan. One of the victims saw Ariel Sharon at this building.

**Prosecutor Gurdial Singh Nijar:**

Ariel Sharon was the Minister of Defence - at this building?

**Ms. Chahira Abouardini (via translator):**

Yes.

**Prosecutor Gurdial Singh Nijar:**

Is this where the Israeli - is this their command post? Do you know? Have you been told?

**Ms. Chahira Abouardini (via translator):**

I don't know.

**Prosecutor Gurdial Singh Nijar:**

And you can see from this building, the whole view of Sabra and Shatilla, the camp? From this building you could see the whole of Sabra and Shatilla, is that correct? ... never mind. We'll leave that for another witness.

**Ms. Chahira Abouardini (via translator):**

I don't know.

**Prosecutor Gurdial Singh Nijar:**

We put that to another witness. And Photo 23 is another photograph that ...

**Ms. Chahira Abouardini (via translator):**

This is Al-Aiden's house. The picture is of Muhammad Al-Aiden, and this is his youngest daughter.

- 1   **Prosecutor Gurdial Singh Nijar:**  
     Youngest daughter. And the photograph is of whom?
- 5   **Ms. Chahira Abouardini (via translator):**  
     Muhammad Al-Aiden.
- 10   **Prosecutor Gurdial Singh Nijar:**  
     And how is he related to her? To this child?
- 15   **Ms. Chahira Abouardini (via translator):**  
     His daughter.
- 20   **Prosecutor Gurdial Singh Nijar:**  
     So the father was killed as well?
- 25   **Ms. Chahira Abouardini (via translator):**  
     Yes.
- 30   **Prosecutor Gurdial Singh Nijar:**  
     And this the daughter, holding the father's picture?
- 35   **Ms. Chahira Abouardini (via translator):**  
     One of the twins.
- 40   **Prosecutor Gurdial Singh Nijar:**  
     So he's holding the picture of the, yes ...
- 45   **Ms. Chahira Abouardini (via translator):**  
     And her, yeah, his wife is still in Lebanon.
- 50   **Prosecutor Gurdial Singh Nijar:**  
     We're talking about the father. Is it the father died or living?
- 55   **Ms. Chahira Abouardini (via translator):**  
     Yes. Muhammad Al-Aiden
- 60   **Prosecutor Gurdial Singh Nijar:**  
     Died? Living? ... Died or living? Interpreter, please.
- 65   **Ms. Chahira Abouardini (via translator):**  
     They killed him.

**Prosecutor Gurdial Singh Nijar:**

They killed him. Yes.

1

Thank you very much. Can you tell that I'm sorry to have to take her through these pictures all over again. I apologise for that.

5

That's all from the prosecution as regards this witness, and we offer this witness for cross examination. Thank you.

10

**Amicus Curiae Larissa Cadd:**

May it please this Honourable Court, we have no questions for this witness.

10

**Prosecutor Gurdial Singh Nijar:**

Thank you. May this witness then be released.

15

**Judge John Philpot:**

Mr. Prosecutor, would you clarify with the witness; she mentioned, if I'm not mistaken, "SLA", and in her statement she mentioned Phalangist forces - do you follow my? Would you clarify that please?

20

**Prosecutor Gurdial Singh Nijar:**

You mentioned SLA forces. Just tell us what she understands by "SLA forces", who are they?

25

**Ms. Chahira Abouardini (via translator):**

SLA it's an army actually founded by the Israeli. South Lebanon ... Christians. It was the enemy of Palestinian resistance. So there is a story between them. So they were using this army ...

30

**Prosecutor Gurdial Singh Nijar:**

Who's "they"?

35

**Ms. Chahira Abouardini (via translator):**

The Israeli.

**Prosecutor Gurdial Singh Nijar:**

Yes ...

40

- 1   **Ms. Chahira Abouardini (via translator):**  
Using this army against the Palestinian resistance.

**Prosecutor Gurdial Singh Nijar:**

- 5   Okay. That's on SLA. And then you also talked about Lebanese Phalangist militia. Can you tell us your understanding of what this is?

**Ms. Chahira Abouardini (via translator):**

- 10   Those Phalangist were also a tool, or puppets, for the Israeli forces. They were the enemy of the Palestinian revolution. There was long story of wars between and fightings between those armies.

- 15   **Prosecutor Gurdial Singh Nijar:**  
Between the Phalangist and the Palestinians.

Does that clarify?

- 20   **Judge John Philpot:**  
And in the events she is describing now, which group was it, just to clarify?

**Prosecutor Gurdial Singh Nijar:**

- 25   With regard to the massacres that you have described, who did you see from amongst - SLA, Phalangist, or both?

**Ms. Chahira Abouardini (via translator):**  
It was both.

- 30   **Prosecutor Gurdial Singh Nijar:**  
Both. Yes.

**Judge Lamin Yunus (President):**

- 35   How long more you ... this witness ...

**Prosecutor Gurdial Singh Nijar:**

If there are no further questions from the Bench, then I would ask that this witness be released.

- 40   **Judge Lamin Yunus (President):**  
We have no further questions.

**Prosecutor Gurdial Singh Nijar:**

Yes. Then the witness can be released. Mr. Interpreter, can you please thank her very much for coming.

**Ms. Chahira Abouardini (via translator):**

Thank you.

**Prosecutor Gurdial Singh Nijar:**

Your Honours, our next witness is actually through Skype and we need a little time to ensure that the Skype will work. Maybe a short break to make sure the technical people. She will be from Beirut. A short break because we're going to arrange the logistics for the Skype.

**Judge Lamin Yunus (President):**

This court is adjourned.

**Registrar Musa Ismail:**

All rise.

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1                           20 November 2013  
5                           (Afternoon session 2)

10                          **Prosecutor Gurdial Singh Nijar:**

15                          Your Honours, we're not calling witness number 2, Leila Chahid who's an ambassador to the European Community based in Brussels. She is unable to testify due to a variety of reasons.

20                          We are going on to the third witness on the list who is Bayan Hout, and we are now distributing the CV, a broad description of Ms. Bayan Hout, and I will highlight four or five aspects of this witness. She is born in Jerusalem and she left in 1948 when she was 11 years old when the Nakba occurred; she left with her family to Jordan. She studied in Amman and Ramallah, and she worked as an Arabic teacher in Amman, and she moved with her parents to live in Beirut in 1959 and that's where she is now going to Skype from. She has a PhD in political science from the Lebanese University. She became the Head of the Documentary Section at the Palestine Research Centre in Beirut in 1977 for 2 years, and at the Centre for Arab Unity in 1979, and she also is an expert, a professor of the Palestine Question and Middle Eastern Studies at the Faculty of Law and Political Science of the Lebanese University from 1979 to 2001. She lectures and writes with a focus on the Palestinian question and the Arab historical and political issues. And she has written several books on this, the last named one is the focus of this testimony which is "Sabra & Shatilla, September 1982" in both Arabic and English.

25                          I've provided the relevant copies that we want to address. And the book that is the subject matter - we will leave this book with the Registrar for Your Honours to look at.

30                          We are going to furnish a series of documents, and they are all from the book. With your kind leave, I would like to address the witness.

35                          Ms. Bayan, there is a panel of 7 distinguished persons who are judges in this Tribunal. We have a large team of both prosecution and *Amicus Curiae*, friends of the Court for the State of Israel and Amos Yaron. I have read out parts of

your distinguished CV. I want to focus now on Sabra and Shatilla.

You did a project, a lot of writing, research, study with regard to what we call the Sabra-Shatilla massacre in September 1982. We just want to confirm that you have provided the results of your research in this book. Could you confirm this fact please?

**Ms. Bayan Hout:**

Yes.

**Prosecutor Gurdial Singh Nijar:**

You did long interviews with the victims' relatives ...

**Ms. Bayan Hout:**

... and friends. That was all

10

15

**Prosecutor Gurdial Singh Nijar:**

And this was done between 1982 and 1984?

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**Ms. Bayan Hout:**

Yes. Oral history.

**Prosecutor Gurdial Singh Nijar:**

This was the oral history?

25

**Ms. Bayan Hout:**

Yes.

**Prosecutor Gurdial Singh Nijar:**

And this oral history you consider as being very important to record historical events?

30

**Ms. Bayan Hout:**

Yeah. The book is based mainly on the oral history but there are other also methodologies because when I had to ... the field study there's different methodology and the 2 methodologies met together. When I was conducting the oral history I read the Kahan Report and there were many wrong information and false figures in that report. That made me think of figures. In the beginning, I didn't think of figures at all - meaning I was looking the deaths of the massacre, the deaths of the tragedy.

35

40

1 Now I have something else to do and work for which was also  
I understood the meaning also of figures, which made ... to me  
now because in all the 2 compete with all those wrong figures,  
anyhow, so but I could not compare and make the field study  
5 because it was impossible to enter the camps at that time.

10 But in the spring of 1984, we managed to enter the camps in a  
way and for circumstances the political situation changed in  
Lebanon. And when we entered the camps, we made the field  
study available. But I could not write anything at that time. I  
kept everything. It was too hectic, in fact.

15 At the end of the century, I went back to the book. We made  
new interviews at that time, and I had collected the list of  
names, I managed to gathered them and in the beginning of  
the 21st century, I wrote the book.

**Prosecutor Gurdial Singh Nijar:**

So you have conducted testimonies of victims, relatives, yes?

20 **Ms. Bayan Hout:**

Around 140 testimonies.

**Prosecutor Gurdial Singh Nijar:**

25 140 testimonies?

**Ms. Bayan Hout:**

140.

30 **Prosecutor Gurdial Singh Nijar:**

Who are these people who testified before you?

**Ms. Bayan Hout:**

35 Yes, excuse me, it doesn't mean that everyone I have seen  
myself because it was impossible to do that. There were a few  
testimonies that were done by others and this is mentioned  
in the bibliography. Whenever the testimony is taken by  
somebody else, it's mentioned.

40 **Prosecutor Gurdial Singh Nijar:**

And the bibliography appears at the end of your book?

**Ms. Bayan Hout:**

Yes.

1

**Prosecutor Gurdial Singh Nijar:**

Your Honours, I'm referring to page 435 onwards. That is a very detailed list of the testimonies and the kind of testimonies as well that the witness is referring to.

5

You have provided victims of Sabra and Shatilla massacre based on the field study - this is your document "A", can I invite Your Honours to look at document "A", it is page 359 to page 371. Ms. Bayan, can you look at page 359 of your book, the English book.

10

**Ms. Bayan Hout:**

Yes.

15

**Prosecutor Gurdial Singh Nijar:**

And it goes on, page after page, you have recorded the victims, those who died, who were massacred in Sabra and Shatilla.

20

**Ms. Bayan Hout:**

Yes

**Prosecutor Gurdial Singh Nijar:**

And you have arranged them alphabetically?

25

**Ms. Bayan Hout:**

Yes, of course. But excuse me, it was ... one separate change, for the benefit of the victims and that was whenever there was a family was massacred - which means a father, a mother and seven or eight or three or two children - we start with the eldest - either the father or if the mother is there or the eldest brother - and then we go down to the members of this family according to age and any reader can know that this is a family because in the English book it is in italics and there is one space inside, so obviously it is one family. And that's why I made it like this, because in order to show how many families were killed.

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**Prosecutor Gurdial Singh Nijar:**

Yes. So we have here - I'm looking at page 359 - first let's

40

1 look at the families that are killed. You have on the first page,  
"Abdullah" the father, the daughter, the son, the grand-  
daughter ...

5 **Ms. Bayan Hout:**  
Yes yes yes.

**Prosecutor Gurdial Singh Nijar:**  
So that's one family that has been slaughtered?

10 **Ms. Bayan Hout:**  
Of course, that's one family.

15 **Prosecutor Gurdial Singh Nijar:**  
And then we go down the line, Abu ..., Kasim Mahmoud,  
again we have father, son, son, grand-daughter - massacred,  
one family again, is that right?

20 **Ms. Bayan Hout:**  
Yes.

25 **Prosecutor Gurdial Singh Nijar:**  
And then it goes down, Abu Rodaina, father, son, daughter,  
nephew, grand-niece, son-in-law, grandchild - one family  
slaughtered?

30 **Ms. Bayan Hout:**  
Yes.

35 **Prosecutor Gurdial Singh Nijar:**  
And so on - and you have a huge list, families after families  
killed within 40 hours. And it goes on until 12 pages in small  
print, font size about 8 or 9, 7 maybe.

Can you look at the profession?

40 **Ms. Bayan Hout:**  
Yes, of course.

**Prosecutor Gurdial Singh Nijar:**  
The profession, you have a whole range of profession ... small  
tradesman, doctor, housewife, school-age, old-age, and so on.

Childhood children, son, daughter, children. So you have also 1  
in your third column listed the profession.

In your fourth column you have listed the nationality. 5

**Ms. Bayan Hout:**

Yes, I do see it.

**Prosecutor Gurdial Singh Nijar:**

And we can see a mixed, although predominantly Palestinian, 10  
but there is a whole mix of others. I just want to ask you a  
question: Were these others also living in the camps, Sabra-  
Shatilla?

**Ms. Bayan Hout:**

Of course. The document which I have submitted reveals 15  
exactly the percentages of different nationalities. You see, of  
course there were Palestinians, there were Lebanese, Syrians,  
Egyptians and other such as Jordanian, from Bangladesh, from  
Pakistan, ... as far as I remember now 20

**Prosecutor Gurdial Singh Nijar:**

In fact we have it on the previous page, Your Honours, 344, 25  
which is Table 2.A which shows Palestinians to be the distinct  
majority by far.

And then, you also have their ages, from what I can see, 3  
years old, 1 year old; the age of children from 1 year old till 79  
and beyond. So it's a huge range of victims of this massacre. 30

**Ms. Bayan Hout:**

Of course, according to age because they spared no one, 35  
whether a grandmother or a grandfather, whoever they met.  
When I talk about families, everyone who ... except those  
who happened to be outside studying abroad or happen to  
be outside. That's it. But everyone was killed in the family.

**Prosecutor Gurdial Singh Nijar:**

Now I want to invite your attention to your book page 372, 40  
here you say "abducted". What you mean by "abducted"?

1   **Ms. Bayan Hout:**  
      Kidnapped.

5   **Prosecutor Gurdial Singh Nijar:**  
      What happened to them?

**Ms. Bayan Hout:**

10   According to the field study, those were 100 abducted. We stopped at a figure of 100 for a similar reason because ... always telling us about other ... ones who were abducted or kidnapped in ... or the other checkpoints, not only Sabra and Shatilla. So they were so hopeful that we might help them ... so I didn't want to make it more difficult for them.

15   ... about the abducted and also the missing which was guarded by the 17 other different kinds of list for the martyrs, for the victims and for the abducted or escaped and in that list we have 484 and no one came back. And the number of victims is 906. Here I'm referring to 17 lists which include the International Red Cross, the Lebanese Red Cross, the Lebanese Defence and many many many other noted rescue institutions - many others ... belong to France ...

20   **Prosecutor Gurdial Singh Nijar:**  
      So you are saying out of the 906, there are almost 500 who never came back, and you got the list of this? Almost 480+ kidnapped - did not come back, is that it?

25   **Ms. Bayan Hout:**  
      ... Those 100 who we added in our field study, when I came back to my research by the end of the 20th century, I sent 2-3 guys, a small team, they knocked at every door, they visited the 100 families, and they asked them if they came back or not. Unfortunately, none came back.

30   I couldn't do such a thing for the all missing as they all kidnapped in the other list for the simple reason I don't know their addresses. But those 100 people have addresses. They were, in our view - and no one came back.

35   And also other sources, they also say that, "*we have never heard of someone who came back.*"

**Prosecutor Gurdial Singh Nijar:**

So all those abducted, to the best of your knowledge, never came back?

**Ms. Bayan Hout:**

Yes yes yes, no one. Yes, I'm sure. But I wanted to assure that the 100 we made another checking and that was by the end of the 20th century.

**Prosecutor Gurdial Singh Nijar:**

You've got a Map 3, page 432, which shows Israeli positions: Just to confirm, this shows the Sabra-Shatilla refugee camps, is that correct?

**Ms. Bayan Hout:**

Yes, Ya ya ya.

**Prosecutor Gurdial Singh Nijar:**

You have now identified Israeli ...

**Ms. Bayan Hout:**

This map we ... very much to ... on the basis that were mentioned in other reports and so on. ... the ... Shatilla itself. ... the Shatilla camp is a very small camp and the massacre did not ... 100 metres of Shatilla camp. It was in the greater Shatilla. It was surrounding Shatilla camp. This was actually happened. During the first night, most people managed to escape ... and no one entered actually ... camp itself. But all other Palestinians living around the camp and living in Sabra area - Sabra is not a camp, by the way; it is a district which ... Lebanese and Palestinian and others - so in greater Shatilla, we might call it, the massacre happened. And in Sabra, they reached a very small part of Sabra.

**Prosecutor Gurdial Singh Nijar:**

You have shown the Israeli positions, and you have shown the distances from the Israeli command. On what basis did you show these Israeli positions on your map? What was the basis?

**Ms. Bayan Hout:**

... About this map: My main source was the testimony of the people. People always - when talk to me - I always have a

1 special copy book, special reference, which I also manage  
to date - the date and the days, and when and where this  
happen and so on. Also, why not also to have the help of  
5 other journalists and writers who make very good work. I  
also took help of that and I read all ... of Shatilla. But mainly  
... the testimony of the people of Sabra and Shatilla, and the  
neighbourhood and so on.

10 And, of course, we send a professional who ... measured the  
distances between the Israeli headquarters and the nearby  
places. What I meant, maybe, by this map, I wanted to answer  
the [allegations] that, "*they did not hear, they did not know, they*  
15 *couldn't see anything,*" - NO, they could have seen and they  
could have known - not in the ... places, but in the very near  
places. They saw many things and that was enough to say that  
were massacres. This was proven in many chapters. It was  
proven in the history ... in the beginning and the first and also  
on the second part ... and so on.

20 **Prosecutor Gurdial Singh Nijar:**

So, in other words, from the Israeli command centre, which  
you have shown here, and you have shown the distances,  
there was no question - was there any doubt in your mind  
that from the command centre they could hear the screaming  
25 and shouting, the killing, and see some of the killing as well:  
Is there any doubt in your mind that they could see this?

Ms. Bayan Hout:

Ya. May I say something?

30 **Prosecutor Gurdial Singh Nijar:**

Yes.

**Ms. Bayan Hout:**

35 The Kahan Commission insisted that they could not see ... at all  
from the command headquarters. This was one of 3 buildings  
that was used as houses for the Lebanese Army. Anyhow,  
what happened is not ... this is not the only place for the Israeli  
centre. There were other places. ... everyday, every hour, every  
40 minute, in the military cars, in the military jeeps around the  
area. How couldn't they see what was happening? When the  
Kahan Commission insisted only on proving that they could

not see from this headquarters, my answers were: One, this ...  
and plus there were other Israelis who were ... the time. Thus,  
there were ... people who went to the Israelis and told them  
of what was happening. Some of the Israelis were very nasty.  
They shouted at them and they turned them out. Some of them  
told them, "*We'll try to do, we'll see what we can do.*"

In any case, whether the Israeli was ok or whether ... in both  
cases it means that he know. It means ... he understand and he  
know. No way to say that the Israelis did not know. The proofs  
which I have given in the book are so many. They belong to  
the oral history project and also I have ... this problem, I know,  
studied it and I have written a lot about it.

**Prosecutor Gurdial Singh Nijar:**

Thank you. And I look at your Map 5 which is at page 434 of  
your book. Tell us what you are telling us through this map.

**Ms. Bayan Hout:**

This map, number 5 ... This map is very very ... but I hope we  
manage to succeed ... Also this map, mainly, the source of it  
is the testimonies of the people. Whoever mentioned that his  
family, or who he knows, died or was massacred in that place,  
or in that shelter, I have all the notes and all. So I gather all  
these note. I called a man whose position was building shelters  
inside the camps and the surrounding, in the greater Shatilla.  
This was his job, in fact. And I taken the same map, as a start,  
and I tell him that, "this is the information." And every place  
there was a good description: where it was, what house beside  
it, or beside this school, or beside this ... whatever. He took all  
the information and then he drew the places. And ... by the  
triangle ...

And even after that the military, the army, ... dug people out  
of these pits. So it's very well known that they are here. I am  
sure and I bet, as I can swear, that every single dot in this map  
is correct.

May I prove something, if you allow me here?

**Prosecutor Gurdial Singh Nijar:**

Yes please.

1      **Ms. Bayan Hout:**

This man who do this and who make all this effort, once he came and told me, "there is no shelter in the street." I told, "that is impossible, there is a shelter, because this was given to me through 4 different testimonies."

"*Only I tell you I was living in the area and we did not build a shelter in the street.*"

10     I told him, "go and search." He went again. Twice, for the third time he went, I told him, "ask the people, *'Was there a shelter in the street?'*" The third time he went, he asked the people, they said, "*yes of course, in this school we used to ... a secret shelter.*"

15     It was a small room, underground, and it was ... into a school. It wasn't an ordinary shelter. It wasn't built to be a shelter. But people called it a shelter, which means really that people died there.

20     We worked 2 weeks just to make this spot over this shelter. And I was very happy because this proved that the man was very honest, and he worked very very correctly.

25     I have people, sir, who took my book in Arabic, and went to the area and studied every place. I'm happy even to say that one of the professors, a female - I never knew her - she told, "*I took this book, and I studied the places there. I can tell you that every spot is correct.*"

30     **Prosecutor Gurdial Singh Nijar:**

Thank you. You have also stated in your book, there is a chapter called "Who is Responsible". There's a conclusion, "Who was responsible."

35     Your Honours, this extract at page 297. Can you summarize, because, as you know, we are charging the State of Israel for committing genocide and this is one example, only one of the many examples that we are producing. Can you tell us, what your conclusion was after doing this rather extensive field study?

**Ms. Bayan Hout:**

What I have found I have summarized in this last chapter. I talked not only about the Israelis, also about the Lebanese role, the Israelis' role, and others. And ... many ... which I took from Israelis who are definitely better hundred percent than Sharon and others. There were some people who wrote friendly, with a good manner, and who really confessed what really happened and that it was a very awful massacre. No one of that mentioned the genocide, but as I know sir, when you kill everybody, when you kill the whole family, when you do that, there are 2 points maybe.

Definitely this was done not by the hand of the Israelis, we know that. This was done by the Phalangist. But those who came and entered the camp with help of the Israelis. This is was in the first chapters and everywhere. So without the Israelis, the massacre could have never started, never going on, definitely. So they helped them. They told them to come in. They trained them - definitely - most of them were trained in Israel, by the way.

And all this happened, what I know, that when all these people were killed, all these families, now as I tell you, the first list of names, about three-quarters of the people belong to families. I can tell you even some families: 11 of one family; 10 of one family; 9, 8, 7, and the others are 6 or 5 or 4, something like that. Three-quarters of the field study number of the 430 were killed as families. If this is not a genocide, I don't know what genocide is.

**Prosecutor Gurdial Singh Nijar:**

Thank you. You have identified many many many victims of the massacre. The latest figures of those killed, even conceded elsewhere, even 3,500, is that the figure you have in mind? Is that roughly the figure? What is your view on that?

The number of people killed, how many do you assess? Do you know?

**Ms. Bayan Hout:**

Yes, of course I do. Sir, in our field study, I have 550, 530. The 420 were killed, they were massacred, and the 120 that no one returned.

- 1 In the other list, which includes also the oral history list,  
there we have 906 victims with names. What I see, when I am  
being a witness, I mean that there is a name of the victim and  
beside that also there are all the references that I got all these  
5 names from; which I have initials "A" or "B" or "C" or "D" or  
whatever. And each initial, in the footnote, is mentioned what  
does it mean: It means the Red Cross. It means there is ... the  
Lebanese Civil Defence. It means the Palestinian Red Crescent,  
whatever it mean.
- 10 So in this case, I don't mean that whenever we have more  
sources it makes it more correct. One source is enough. But  
what I meant when I registered and managed to publish all  
15 the sources, I wanted to help the people. So in this case, if they  
have connection with the Red Cross, or they have connection  
with this ... they can ask about the people, they can ask what  
happened. They can asked if the victims were buried or not.
- 20 And there were many questions that no one answered, in fact.  
So each name, definitely, is documented by sources - each  
name, out of the 906. Next, the 484 who were also kidnapped.  
In sum, we have all these now, 1,390, which I have with full  
25 references and I think that all of them are killed.
- 30 I am not talking about the estimated figures which are much  
higher - that's something else.
- Because I am a human being - I am one person - it was  
impossible for me to collect more than this. But, if the Lebanese  
35 government, or if the Palestinian authorities really made an  
effort, that's something else; but they did not.
- No one took care of the victims of Sabra and Shatilla, whether  
40 Palestinians or Lebanese or otherwise. I am sorry to see this  
fact. But what we did, in fact, we tried to do as much we could.  
Definitely there are more names. If a State follows this and tries  
45 to get the names, we can do much better.
- I have something also to tell: Every single list of names,  
50 actually, actually, never exceeded the number of 700. It's  
impossible. Never. And always most of them the names are  
similar - not you have 10 or 15 or 17 different names. That's

what counted the 906 victims, and the 484 kidnapped. Why? Because the authorities here never wanted the figures to be known. Why in the very beginning - also this is mentioned in the book, in the text I read - the Lebanese local newspaper used to publish what was happening, and they told foreign correspondents, "*we found 2,700 bodies and we buried them here or there.*" They talked about this. And many others also they talked about very high numbers. We tried to get the list from those civil defence organization, let's say the Red Cross or ... . We could not get any, sir. Sometimes, the young men used to tell us, "*we collected 2,000 names, or 1,050. Definitely we can give you the names.*" Later, all those listed were survived. No one gave us a list.

At that moment, I had to have the help of somebody, I worked with a very good minister, God rest his soul, his name was Dr. Abdul Rahman bin Laban (?). I told him, "*Dear Dr. Laban, what shall I do? It's impossible. I have to have the list.*" He was the minister at that time. So he helped me and he sent me to the responsible of the civil defence, the Lebanese Civil Defence. And out of record, he handed me the civil defence list, and also the international and the Lebanese [list]. This is also started a good start. And afterwards, when they knew that we entered the camps and we made the history, everyone, by time, by time, gave us many lists after - they were not found at that time. But by the end of the century, I have the ... list. This was the most difficult step in the ...

**Prosecutor Gurdial Singh Nijar:**

Thank you Dr. Bayan for your very useful testimony. I have finished my part, but there may be questions from the Defence and from the judges. I offer the witness for cross examination by the *Amicus Curiae / Defence.*

**Amicus Curiae Jason Kay:**

No questions for this witness.

**Judge Tunku Intan Mainura:**

Counsel, can you please ask your witness: She referred to some people as 'stateless'. What's her definition of 'stateless'? What does she mean by 'stateless'?

**1      Prosecutor Gurdial Singh Nijar:**

Dr. Bayan, some people you refer to in your list here, page 368, last 4 names, under nationality, you refer to as 'stateless'. What do you mean by that?

5

**Ms. Bayan Hout:**

There were many, and there are still many, political problems in Lebanon; and there were many many people, tens and tens of thousands, very poor people, in fact, where they didn't have any nationality. So I call them 'stateless'. And I explained that somewhere that those people are living in Lebanon, they deserve the Lebanese nationality but I cannot call them Lebanese because they don't have the Lebanese nationality. So they do not belong to the Lebanese nationality. That's one.

15

And, in Arabic, "they don't have record." And being poor, ... Sabra and Shatilla. Sabra and Shatilla attracted whoever they were because they were treated well and they lived together, and it's always like that - people attract each other when they belong to the same category. Those stateless are considered, in my opinion they should be Lebanese. Hopefully they will. Some of them, very few of them, became Lebanese, but not all of them.

**25      Prosecutor Gurdial Singh Nijar:**

Dr. Bayan, thank you very much for your testimony.

**Ms. Bayan Hout:**

Please allow me one sentence. I have worked for 6, 7 years, day and night on this project. Half of them after '82 and the other half at the beginning of the 21st century. And all through, I gathered all I could get about Sabra and Shatilla: video tapes, articles, books, whatever. All this time, I never dreamt in my life that we can reach this stage. Thank you very very very much. I thank Malaysia very much. I thank you all for this court. In the name, of course, of the people of Sabra and Shatilla, thank you.

**Prosecutor Gurdial Singh Nijar:**

We thank you very much too for coming forward.

40

Your Honour, that concludes the testimony that we have for today. But we have, just to round up, I would like to show

a 5-minute video - no objections - this is a woman, it is in Arabic, the Secretariat have provided a transcript of the entire conversation.

What this shows is the actual place itself, Sabra and Shatilla, after the event, where there is a witness who is showing the particular areas and identifying who was where.

[Translator's transcript of video]

We were here in the shelter when the Israelis entered, we were at the shelter when they told us to come out, we went out with our hands up.

When someone told you to come out, who said that? Brigades, forces, or who?

They said on the microphone "come out and surrender or we might kill you".

These might be brigades.

There were tanks stationed with the arms forces who were in full Israeli military gear, with some speaking Hebrew. You mean they weren't Israelis?

This is what we want to know.

There were Israelis a hundred percent, and those who were speaking Arabic were few. Only recently reconstruction has started, the city was a big red hill of dust. As we were standing, we saw them running, when I saw them running I ran right away, we got into the shelter. I swear my father held my hand and said "don't surrender yourself daughter, don't surrender they'll kill you" that was the last time I held my father's hand, I ran towards the street and my father wanted to go home but saw armed forces so he followed me, this shelter is a witness to what happened. These houses have been renovated recently, please come in, this shelter is about fifty years old, this ladder leads to two rooms, please come in, no one is concerned about us, we lost our home to war, we became refugees, sleeping in schools, mosques and schools, displaced every time there's a war.

1 There was a red car here, as soon as we went out the armed forces told us to come over, we put our hand over our heads, a car like this, as soon as I went out I saw Israeli tanks, they say they weren't there, but they were, tanks all over the street.

5 Where did they speak Hebrew?

10 My mother left the shelter, and as soon as my father left, they killed him, first bullet here, close to that gas tank my father was shot dead. Where were the Israelis that said not to shoot?

15 Israelis in tanks came from there and said in Hebrew "don't kill the women and child". As my mother was crossing the street she saw my father here where Abu Al-Abd's shop was, my sister told here that's my father but my mother said no, it's someone who looks like him. The armed forces took us this way.

They took you?

20 Yes.

Where?

25 They took us to city where they killed them (the people), there was a big group of us, they took everyone out from the shelter, and there was a lot of us, and there were armed personals in the front and back, I was in the middle, there was a small ally that I escaped through, the soldiers couldn't see me.

30 So you escaped?

I did. Our entire neighbourhood was killed except for me, my sisters and my mother, they took us to the city.

35 They went from there, then what?

There was a Fatah training camp, where they gathered all the people and then took us to the city.

40 Did they us trucks?

No, there were taken by foot to a gathering spot.

Our Egyptian neighbour Fikriya was among them. Israelis from over  
the tanks would order them to clap and they would, they would  
order them to dance and put their heads on the ground, and then  
bulldozers would come and bury them under ground while they  
were still alive, men, women and children, all killed.

1  
5  
Israelis were asking the elders to come out and they won't be harmed,  
they'd mark their identity cards with a David star.

They said so through the microphones?

10  
Yes, a lot of people went out and never came back but some elders  
came back, having an Israeli stamp on their identity cards.

The person on the microphone, what kind of accent was he using?  
15  
Lebanese? Or.....

No, it was not proper Arabic, but it was understood.

**Prosecutor Gurdial Singh Nijar:**

That concludes the witnesses for the day. Tomorrow morning  
we wish to introduce witnesses dealing with Cast Lead, in the  
Gaza Strip - the war that was launched by the Israelis. And  
we have 2 witnesses who cannot come out of Gaza because of  
the conditions there, so they will also be doing Skype, together  
with Paola, the doctor who will talk about the impact of the  
weapons used by the Israelis.

20  
25  
The problem is Gaza is 6 hours behind us. 2 are from Gaza,  
1 from Italy. If we start at 9am, it will be 3.30am, perhaps  
tomorrow we start at 2pm sharp, because it will be 8 in the  
morning there.

**Judge John Philpot:**

Are there any other witnesses who we can hear in the morning?  
30  
35

**Prosecutor Gurdial Singh Nijar:**

None of them are here. We can't confirm. They will arrive  
tonight. We're not sure that they'll be here. There's another  
problem. In Gaza, there's been an Israeli air-strike.

40

1      If we can arrange for the 2 o'clock, we can try ... The way I've  
- scheduled it, we have Mahmoud at 2, Salah at 3, and Paola at  
4. By 5 we should finish.

5      **Judge Lamin Yunus (President):**  
So we start at 2.

**Prosecutor Gurdial Singh Nijar:**  
Thank you very much Your Honours.

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21 November 2013  
(Afternoon session)

1

**Registrar Musa Ismail:**

All rise.

5

**Prosecutor Gurdial Singh Nijar:**

May it please your Honours, We have today ... we will essentially be dealing with particular no. 11 in the charge against the state of Israel, charge Case No. 4, and this deals with the Cast Lead 1 Operation in Gaza, an attack upon Gaza that lasted some 3 weeks in Dec 2008 to Jan 2009 and we will have 2 witnesses to testify as to actually what occurred and 1 expert witness who will show the impact of the weaponry used. All 3 will be proceeding through Skype.

10

15

Yesterday, the documents tended have not been marked and we'll present a list of those documents in tabular form for convenience. Maybe we can tender the documents but the actual marking can be deferred so that it takes place in the sequence in the table if that's agreeable with Your Honours? Thank you. I call now through Skype, Mahmoud Al-Sammouni.

20

Can you hear me, Mahmoud?

25

**Mahmoud Al-Sammouni (via translator):**

Yes.

**Prosecutor Gurdial Singh Nijar:**

30

You can hear me. How are you?

**Mahmoud Al-Sammouni (via translator):**

Fine.

35

**Prosecutor Gurdial Singh Nijar:**

Now I'm going to ask you some questions based on your statutory declaration, your written document and it will be the same as the one you gave the last time you were in Kuala Lumpur. Now, how old are you now?

40

1   **Mahmoud Al-Sammouni (via translator):**  
Sixteen.

5   **Prosecutor Gurdial Singh Nijar:**  
And you lived in Sammouna street in Gaza City, Zeitoun? Is  
that right?

10   **Mahmoud Al-Sammouni (via translator):**  
Yes.

15   **Prosecutor Gurdial Singh Nijar:**  
You remember very well 3rd January, 2009?

20   **Mahmoud Al-Sammouni (via translator):**  
Yes.

25   **Prosecutor Gurdial Singh Nijar:**  
In fact you say you will never forget this incident?

30   **Mahmoud Al-Sammouni (via translator):**  
Yes.

35   **Prosecutor Gurdial Singh Nijar:**  
You were 12 years old at the time?

40   **Mahmoud Al-Sammouni (via translator):**  
Yes.

45   **Prosecutor Gurdial Singh Nijar:**  
Tell us in your own words based on your document here what  
happened. Refer to your document, paragraph 2. Tell us what  
happened.

50   **Mahmoud Al-Sammouni (via translator):**  
We were attacked by Israeli forces on 3rd January, 2009. I will  
never forget the incident.

55   **Prosecutor Gurdial Singh Nijar:**  
Slowly, slowly. You're too fast.

60   **Mahmoud Al-Sammouni (via translator):**  
I was 12 years old at that time and on that fateful day when it

started, I was playing with my cousins and neighbours outside my house along Sammouna Street. There were around 20 of us, playing football and mud balls around a fruit tree. My uncles were sitting outside the house as was the custom.

1

5

**Prosecutor Gurdial Singh Nijar:**

There were around 20 of you children playing football, mud ball around a tree?

10

**Mahmoud Al-Sammouni (via translator):**

Sure, yes.

**Prosecutor Gurdial Singh Nijar:**

Now, suddenly something happened. Tell us in your own words what happened.

15

**Mahmoud Al-Sammouni (via translator):**

Suddenly there were the sound of planes and bombing not far from our house, about 2 km away. I saw planes shooting bombs down. They came in groups ...

20

**Prosecutor Gurdial Singh Nijar:**

Sorry, you saw what? You saw planes shooting what?

25

**Mahmoud Al-Sammouni (via translator):**

Sure I saw them.

**Prosecutor Gurdial Singh Nijar:**

What were the planes doing? Shooting what?

30

**Mahmoud Al-Sammouni (via translator):**

I saw the planes shooting bombs down on buildings away like 2 kilometres so we ran away, me and the neighbours.

35

**Prosecutor Gurdial Singh Nijar:**

This was around Asar prayers – that's around 4pm?

35

**Mahmoud Al-Sammouni (via translator):**

Yes at 4pm around Asar.

40

**Prosecutor Gurdial Singh Nijar:**

Tell us how was the sound of the bombs – loud, frightening?

1   **Mahmoud Al-Sammouni (via translator):**

Sure it was loud - we were scared from the loud bombings.

**Prosecutor Gurdial Singh Nijar:**

5    What did this group of your cousins, neighbours - what did they do then?

**Mahmoud Al-Sammouni (via translator):**

We ran to our houses.

10

**Prosecutor Gurdial Singh Nijar:**

What happened next?

**Mahmoud Al-Sammouni (via translator):**

15   I went to my home and our home was made of bricks and the other part was made of zinc. The family members who were in the zinc [part] went to the brick part of the house. There were about 18 people inside the house including my brothers, sisters and parents.

20

**Prosecutor Gurdial Singh Nijar:**

And one of your sisters was 10 years old only, isn't it?

**Mahmoud Al-Sammouni (via translator):**

25   Yes, my sister was 10 days old.

**Prosecutor Gurdial Singh Nijar:**

Not years, ok. What was the reaction now that you were in the house - what was the feelings of all of you at the time?

30

**Mahmoud Al-Sammouni (via translator):**

The sound of the bombs became louder so we sat in the middle room and we couldn't sleep the whole night because of the bombing.

35

**Prosecutor Gurdial Singh Nijar:**

Were the children crying, screaming or were they calm? How?

**Mahmoud Al-Sammouni (via translator):**

40   Sure, yes.

**Prosecutor Gurdial Singh Nijar:**

From your house could you see anything outside? 1

**Mahmoud Al-Sammouni (via translator):**

We were sitting in the house and we were hearing loud explosions and F-16 planes. The sounds were frightening. 5

**Prosecutor Gurdial Singh Nijar:**

What did you see? Could you see anything? 10

**Mahmoud Al-Sammouni (via translator):**

I'm still at home and still waiting, just hearing the planes. Soldiers came down to my home and they entered my home and started to call my parents or my father and they shot my father in front of our eyes. I start screaming ... 15

**Prosecutor Gurdial Singh Nijar:**

Slowly, slowly. So the father went where when he was shot?

**Mahmoud Al-Sammouni (via translator):**

My father opened the door and they killed him in front of our eyes. 20

**Prosecutor Gurdial Singh Nijar:**

And who were they? Who shot your father? 25

**Mahmoud Al-Sammouni (via translator):**

The soldiers, the Israeli soldiers killed my father.

**Prosecutor Gurdial Singh Nijar:**

You say here in paragraph 6, you said you could see the missiles and shooting going on from where you were? So were there lights? Were there a lot of fires and lights? I don't know, I've never seen bombs been dropped. 30

**Mahmoud Al-Sammouni (via translator):**

At the zinc part there is a hole in the zinc wall and we looked through it and could see the F-16 planes dropping bombs and the missiles and shooting from that hole at that night. 35

**Prosecutor Gurdial Singh Nijar:**

Was there fire - big lights? 40

1   **Mahmoud Al-Sammouni (via translator):**

I can see lights of the fighters and red lights from the bombing.

5   **Prosecutor Gurdial Singh Nijar:**

And this went on for how long – throughout the night?

10   **Mahmoud Al-Sammouni (via translator):**

Yes, sure this happened the whole night and we couldn't sleep from the bombing.

15   **Prosecutor Gurdial Singh Nijar:**

In paragraph 10, you said they were shooting the walls of the houses along the way. What do you mean "along the way"?

Where were they shooting the walls of the houses?

20   **Mahmoud Al-Sammouni (via translator):**

I mean that the door was a little open and my father opened the door they directly shot him. They shot the walls and asked for the man of this home. My father opened the door raising his hands and they shot him directly in front of our eyes.

25   **Prosecutor Gurdial Singh Nijar:**

And then what happened?

30   **Mahmoud Al-Sammouni (via translator):**

After that they kept shooting at the walls and kept shooting.

After that they went to my parents' room and started destroying it.

35   **Prosecutor Gurdial Singh Nijar:**

Just a second, so they entered your house, the soldiers?

40   **Mahmoud Al-Sammouni (via translator):**

Sure, yes. They entered my house.

45   **Prosecutor Gurdial Singh Nijar:**

How many soldiers, roughly?

50   **Mahmoud Al-Sammouni (via translator):**

There were about 50-60 soldiers inside the house - and about another 40 outside. About 100 soldiers.

**Prosecutor Gurdial Singh Nijar:**

Were they shooting inside the house? Were they using guns  
to shoot?

1

**Mahmoud Al-Sammouni (via translator):**

They were shooting at us inside the house and my brother  
Ahmad was injured, two bullets in his chest and one in his  
head and my aunt was injured.

5

**Prosecutor Gurdial Singh Nijar:**

Now we come to the people who were shot. You already told  
us your father was shot. He died on the spot. Then you say  
they also shot your younger brother. How old was he?

10

**Mahmoud Al-Sammouni (via translator):**

Ahmad was 4 years old.

15

**Prosecutor Gurdial Singh Nijar:**

And you told us they shot him in the chest?

20

**Mahmoud Al-Sammouni (via translator):**

3 bullets – 2 in the chest and 1 in the head.

**Prosecutor Gurdial Singh Nijar:**

[shows photo A5]

25

Look at photograph A5.

**Mahmoud Al-Sammouni (via translator):**

Yes, two in the chest and one in the head. This is my brother  
Ahmad.

30

**Prosecutor Gurdial Singh Nijar:**

[shows photo A4]

Who is this?

35

**Mahmoud Al-Sammouni (via translator):**

This is Muhammad Ibrahim Sammouni, my cousin.

**Prosecutor Gurdial Singh Nijar:**

So they shot your cousin too?

40

1   **Mahmoud Al-Sammouni (via translator):**

They shot my cousin in the chest in the house.

Prosecutor Gurdial Singh Nijar:

5   In the chest?

Mahmoud Al-Sammouni (via translator):

Yes.

10   **Prosecutor Gurdial Singh Nijar:**

If the defence has no objection, we will have this exhibits tendered at the end of the testimony. Perhaps the defence can listen to me once in a while and respond whether you have no objections?

15

*Amicus Curiae Jason Kay:*

We will not presume to inform the prosecution on how to present the case.

20   **Prosecutor Gurdial Singh Nijar:**

That is not the issue. The issue is do you object to this or not? No objections? It's not a question of you telling me how to prosecute the case but I'm asking if you object to this so it's a yes or no? That indicates that they have no objection. I propose that this be tendered at the end of the testimony so that we don't interrupt their testimony? Thank you. After that they went to the kitchen and they set fire to the kitchen?

25

**Mahmoud Al-Sammouni (via translator):**

30   Yes, sure they set fire in the room after destroying it.

**Prosecutor Gurdial Singh Nijar:**

And then what happened? There was a lot of smoke in the room?

35

**Mahmoud Al-Sammouni (via translator):**

It's like a black dust from the fire came to our rooms so we can't breathe and we can't see each other.

40   **Prosecutor Gurdial Singh Nijar:**

And then what happened? What did you do when you could not see, when you were suffocating?

Mahmoud Al-Sammouni (via translator):

The soldiers put lights on their guns, on our faces and seeing us after we couldn't see each other. After the soldiers saw us injured they took us from that room to the kitchen.

1

Prosecutor Gurdial Singh Nijar:

And then your younger sister, was she also with you, the one who was 10-days old?

5

Mahmoud Al-Sammouni (via translator):

After the soldiers put us out of the house, my younger sister ran to my cousin's house.

10

Prosecutor Gurdial Singh Nijar:

Look at paragraph 16 and translate.

15

Mahmoud Al-Sammouni (via translator):

The soldiers then asked us to leave the home and go to Netsareem...

20

Prosecutor Gurdial Singh Nijar:

What is Netsareem?

Mahmoud Al-Sammouni (via translator):

It was occupied by the Jews and the Israelis were making fun of us. They asked us to take our father with us but they stepped on his body and they kicked my brother Fuad who was 18 years old, on his back. The soldiers were resting around our house, with their guns. They were all over the house.

25

Prosecutor Gurdial Singh Nijar:

So you wanted to take the body of your father but they really did not let you do that because they stepped on the body of your father. Why did you want to go to the mosque across the house?

30

35

Mahmoud Al-Sammouni (via translator):

The soldiers asked us to go to Netsareem but we said we wanted to go to the mosque and they said no and we saw on its wall a big red "X" on the wall of the mosque.

40

1      **Prosecutor Gurdial Singh Nijar:**

What does it mean, do you know?

**Mahmoud Al-Sammouni (via translator):**

5      I don't know what it means. After 18 days when we went back  
we saw the mosque destroyed, we realized the "X" means to  
destroy this building.

**Prosecutor Gurdial Singh Nijar:**

10     You wanted to go to your uncle's house. Did they allow you  
to go into your uncle's house? Yes or no?

**Mahmoud Al-Sammouni (via translator):**

15     My uncle's wife asked us to come to her house but the soldiers  
refused. But Amel ran and entered into her place. The soldiers  
followed Amel, my sister; but my uncle's wife said it was her  
daughter and she closed the door.

**Prosecutor Gurdial Singh Nijar:**

20     So you walked aimlessly to the end of the street?

**Mahmoud Al-Sammouni (via translator):**

25     Yes, we walked along the road, they did not permit us to enter  
any place, any house and we could see holes from bombing and  
we were so scared and frightened and crying and our father  
was dead and we couldn't bring him along.

**Prosecutor Gurdial Singh Nijar:**

30     Were you also carrying Ahmad, your younger brother who  
was shot?

**Mahmoud Al-Sammouni (via translator):**

Amal, my sister?

35     **Prosecutor Gurdial Singh Nijar:**

Oh, sorry, your sister. So were you carrying her at that time?  
Was she with you at that time?

**Mahmoud Al-Sammouni (via translator):**

40     Yes. My mother was carrying her.

**Prosecutor Gurdial Singh Nijar:**

Your mother was also walking with you? 1

**Mahmoud Al-Sammouni (via translator):**

Yes, sure. She was with me. 5

**Prosecutor Gurdial Singh Nijar:**

You then went to Majid, your uncle's, house?

**Mahmoud Al-Sammouni (via translator):**

Yes, Majid, my father's cousin. 10

**Prosecutor Gurdial Singh Nijar:**

Did you tell them about your father being shot dead? 15

**Mahmoud Al-Sammouni (via translator):**

Yes, I told him that my father was killed and we were injured and he told me don't cry and we stayed at his home.

**Prosecutor Gurdial Singh Nijar:**

That night did the shooting and bombing continue or did it stop? 20

**Mahmoud Al-Sammouni (via translator):**

Sure the shooting continued throughout the night and we can hear the F16. 25

**Prosecutor Gurdial Singh Nijar:**

Did any bullets enter the house? 30

**Mahmoud Al-Sammouni (via translator):**

Yes, it came through the windows, my uncle's house.

**Prosecutor Gurdial Singh Nijar:**

Paragraph 23. Early in the morning around Fajar time, your time for prayers, your younger brother, Ahmad who had been shot, started to sing? Can you tell us about that? 35

**Mahmoud Al-Sammouni (via translator):**

In the morning Ahmad started to sing a song, Tiorjena - paradise birds, and he said the Quran, and he told his mother he would take her and his father to Paradise before he died. 40

1      **Prosecutor Gurdial Singh Nijar:**

Ok, so this is your paragraph 23 which you have just told us, your younger brother who had been shot, 2-3 bullets whom you're carrying along with you, he started to sing the famous song, Tiorjena, is it - the Paradise Birds? Then he recited some Quranic phrases and he told his mother that he would you, her and father to Paradise, and then he died? Is that what you're confirming?

10     **Mahmoud Al-Sammouni (via translator):**

Yes.

15     **Prosecutor Gurdial Singh Nijar:**

And then paragraph 24, can you translate paragraph 24?

20     **Mahmoud Al-Sammouni (via translator):**

In the morning, one of the neighbours, a young girl, ran over and told us that members of the El-Talal family beside the mosque were all killed by missiles; and she was so terrified and afraid and she couldn't breathe. They, all the members of Talal, had been put in the house of Wahil and destroyed them with missiles.

25     **Prosecutor Gurdial Singh Nijar:**

Ok, so the soldiers took the family members to Wahil's house, near the mosque, opposite the apartment, put them into the house and shot three missiles onto the house and killed them – yes?

30     **Mahmoud Al-Sammouni (via translator):**

Yes, and my sister Amal is injured.

35     **Prosecutor Gurdial Singh Nijar:**

Your uncle's wife, Majid asked for an ambulance and the ambulance could not come – why?

40     **Mahmoud Al-Sammouni (via translator):**

Because the area is surrounded and the ambulance came inside and the Israeli forces destroyed it, so no ambulance can enter.

45     **Prosecutor Gurdial Singh Nijar:**

So, they destroyed the ambulance too. In paragraph 26, there

were many people in the house, you wanted to take them to the hospital which was not far away and decided to walk together, you held white cloth above your heads, you saw tanks along Salahuddin Street and drones flying above, it was like a war zone. There were trenches being dug. Can you confirm paragraph 26?

Mahmoud Al-Sammouni (via translator):

Yes.

Prosecutor Gurdial Singh Nijar:

In paragraph 27, third line, the soldiers were shooting randomly all over the place, people were scared?

Mahmoud Al-Sammouni (via translator):

Yes, we all were scared and we all were carrying white clothing and the soldiers were shooting randomly and we kept walking.

Prosecutor Gurdial Singh Nijar:

You say there was a tank that turned around towards your direction, shot over your heads?

Mahmoud Al-Sammouni (via translator):

Yes, we saw a tank and it was facing the other way and then turned in our direction and shot right above our heads.

Prosecutor Gurdial Singh Nijar:

Then you kept walking and came across an ambulance and asked them to take you?

Mahmoud Al-Sammouni (via translator):

We kept walking and after walking and walking we saw the ambulance and we entered the ambulance and we started shouting at them why they took so long to come and they said the Israeli soldiers prevented them from entering the area.

Prosecutor Gurdial Singh Nijar:

So they took you to the hospital, Al-Shifa hospital, and after that where did you go?

Mahmoud Al-Sammouni (via translator):

We went to our father's friend's house – Hisham who came to the hospital and took us to his house.

1      **Prosecutor Gurdial Singh Nijar:**

You stayed there for how long?

5      **Mahmoud Al-Sammouni (via translator):**

In the evening we left the house and went to my grandfather's house.

10     **Prosecutor Gurdial Singh Nijar:**

How long were you at your grandfather's house?

15     **Mahmoud Al-Sammouni (via translator):**

We stayed like 5-6 days and then the bombing reached that area so we were scared and we left for another house.

20     **Prosecutor Gurdial Singh Nijar:**

Finally, did you come back to your neighbourhood?

25     **Mahmoud Al-Sammouni (via translator):**

After 6 months.

30     **Prosecutor Gurdial Singh Nijar:**

What did you see - your house and the area around?

35     **Mahmoud Al-Sammouni (via translator):**

Our house was destroyed, the mosque was destroyed. I thought it was not my neighbourhood because it's all destroyed. I can't understand what happened, everything is destroyed. I thought it's not my neighbourhood.

40     **Prosecutor Gurdial Singh Nijar:**

Yes, couldn't recognize your neighbourhood. In paragraph 34, about your sister who ran to your uncle's house? Look at paragraph 34 and translate that, please.

45     **Mahmoud Al-Sammouni (via translator):**

Yes, sure. After that the rescue workers go to check the place and they search through the bodies and Amal, my sister was still moving and there were other bodies on top of her and there was shrapnel in her head and we didn't know her face until we found her in the hospital and she was hitting her head on the stone and asking for water. There were 15 shrapnel in her head and now she can't concentrate at the school and the doctor advised her not to play because it's dangerous for her.

**Prosecutor Gurdial Singh Nijar:**

So to reconfirm, after four days one of your cousins returned with rescue workers to check the place and they searched through the bodies and they felt somebody move and it was your sister Amal, and you did not know about this until you saw her in the hospital.

**Judge Tunku Intan Mainura:**

Excuse me, counsel, I need some clarification, please. In regards to paragraph 34, she was hitting her head on the stone, what does it mean she was hitting the stone – was the stone on the floor or on the wall?

**Prosecutor Gurdial Singh Nijar:**

One of the judges asking clarification.

**Mahmoud Al-Sammouni (via translator):**

She was hitting her head on the half-destroyed wall.

**Prosecutor Gurdial Singh Nijar:**

Thank you. At that time you were 12 years old, now 16, you said you were the eldest child in the family and now you're the head of the house as your father is dead. And it's a big family. [Shows photo A8] Can you identify who is on the extreme left?

**Mahmoud Al-Sammouni (via translator):**

In the middle is my brother Ahmad, on the right is [... indistinct...], they put a bullet in his chest and in his head and on the left is [...indistinct...].

**Prosecutor Gurdial Singh Nijar:**

Ok, the Sammounis. Now can you please slowly translate paragraph 36?

**Mahmoud Al-Sammouni (via translator):**

Why were the young children killed? They are so young and cannot even hold a stone. Like my brother Ahmad. My cousins who were infants were also killed. I have heard that the soldier who kills more - and younger children - moves up higher in ranks.

1      **Prosecutor Gurdial Singh Nijar:**

And then paragraph 37, what did the children do to die this way? What did the children do to deserve to die this way? What did the women do to become widows and what did the old people do to see all this? Nobody is defending us. It is like we are nothing. We do not have a normal happy life like other children. Where is the human right of the child? Just translate that to confirm. He said it?

10     **Mahmoud Al-Sammouni (via translator):**

Yes.

**Prosecutor Gurdial Singh Nijar:**

Yes, and then can you just read the last, translate, the last paragraph?

**Mahmoud Al-Sammouni (via translator):**

I want the freedom of Palestine. This is not justice for my people. I want Israel to leave.

20     **Prosecutor Gurdial Singh Nijar:**

That concludes his statutory declaration, your Honours and I offer the witness for cross-examination.

25     **Amicus Curiae Jason Kay:**

No questions for the witness.

**Prosecutor Gurdial Singh Nijar:**

Thank you. The 3 photographs, unless there are questions?

30     **Judge Tunku Intan Mainura:**

With regards to the clarification of the Israeli soldiers, can the witness to describe the differences between an Israeli soldier and a non-Israeli soldier?

35     **Prosecutor Gurdial Singh Nijar:**

Mahmoud, you told us there were Israeli soldiers doing this, how do you recognize that they are Israelis?

40     **Mahmoud Al-Sammouni (via translator):**

We know them from their uniforms and my father used to work in Israel and he goes everywhere and we know their language.

**Prosecutor Gurdial Singh Nijar:**

Were the soldiers speaking that language that day? 1

**Mahmoud Al-Sammouni (via translator):**

Most of them speak Hebrew but others spoke Arabic also. 5

**Prosecutor Gurdial Singh Nijar:**

So the witness answers that number 1, from the uniform, secondly he's familiar with Israelis because his father has worked and gone all over and they also speak Hebrew and on that day most of them were speaking Hebrew. 10

**Judge Tunku Intan Mainura:**

Hebrew is only spoken by the soldiers? 15

**Mahmoud Al-Sammouni (via translator):**

It's spoken in Gaza also because the people in Gaza some of them went to Israel and work there but the Israeli soldiers speak it. 20

**Prosecutor Gurdial Singh Nijar:**

Maybe just one more question, how sure are you that they were Israeli soldiers?

**Mahmoud Al-Sammouni (via translator):**

They entered my home and shot my father and they wore uniforms and had weapons and planes and tanks and we don't have such weapons here in Gaza. The weapons are strange and we don't see such weapons here in Gaza and it's different. 25

**Prosecutor Gurdial Singh Nijar:**

Any other questions? If there are none, can the witness be released? Mr. Mahmoud, thank you very much. Your testimony has been very good and useful and we hope one day when you can move freely in and out of Gaza that you will come to Kuala Lumpur again. 35

**Mahmoud Al-Sammouni (via translator):**

Insha-Allah.

**Prosecutor Gurdial Singh Nijar:**

Thank you very much. That concludes the testimony of this witness. 40

1 So we will add the three exhibits to our list that we will provide  
them sometime this evening, to the court.

5 The next witness is SD1, Salah Al-Sammouni.

Judge John Philpot:  
Excuse me, while we're waiting, I have a short note for Mr. Musa  
to provide me with some of the documents you mentioned,  
the Sean McBride Report and the Kahan Commission. If you  
10 can have them given to me, please? Thank you.

Prosecutor Gurdial Singh Nijar:

The Sean McBride report is at 2F, page 2769. The Kahan Report  
is at Volume 3 and 2H.

Judge Shad Saleem Faruqi:  
Mr. Nijar, whether the evidence of Mr. Salah need not be  
entirely repeated, just to confirm the relevant parts. You are  
asking them to translate because I think that takes too much  
20 time.

Prosecutor Gurdial Singh Nijar:

Thank you. So I will focus on the more salient points that I  
want this witness to raise. The rest will be as is stated in the  
25 Statutory Declaration. Mr. Salah, thank you for agreeing to  
testify. Your name is Salah Al-Sammouni?

Salah Al-Sammouni (via translator):

Yes.

Prosecutor Gurdial Singh Nijar:  
And you are a resident of Al-Zeitoun neighbourhood, Gaza  
City?

35 Salah Al-Sammouni (via translator):  
Sure, yes.

Prosecutor Gurdial Singh Nijar:

And you are now 35 years old?

40 Salah Al-Sammouni (via translator):  
34 years old.

**Prosecutor Gurdial Singh Nijar:**

34 still? Last year you were 34, this year still, that's good. I must find out from you how you do that. Now if you look at page 6 of your Statutory Declaration. That is your signature and you confirm that this is your document?

1

5

**Salah Al-Sammouni (via translator):**

Exactly, yes.

**Prosecutor Gurdial Singh Nijar:**

I want you to look at page 4, I'm talking about 4 January 2009. Lots of things happened on that day. There were Israeli soldiers all over shooting and so on, tanks, everything there in that neighbourhood. I just want you to confirm that there were Israeli soldiers in that neighbourhood that day.

10

15

**Salah Al-Sammouni (via translator):**

Exactly, yes.

**Prosecutor Gurdial Singh Nijar:**

There were shooting in that neighbourhood – you know shooting – bang?

20

**Salah Al-Sammouni (via translator):**

Sure, yes.

25

**Prosecutor Gurdial Singh Nijar:**

There were bombs being thrown?

**Salah Al-Sammouni (via translator):**

Yes, sure.

30

**Prosecutor Gurdial Singh Nijar:**

There were jet fighters in the sky?

35

**Salah Al-Sammouni (via translator):**

Yes, F16s.

**Prosecutor Gurdial Singh Nijar:**

You all were afraid, were you not?

40

- 1   **Salah Al-Sammouni (via translator):**  
Yes, we all were afraid.

**Prosecutor Gurdial Singh Nijar:**

- 5   You said your house that morning, page 4, there were about  
61 family members in the house, Sammouni family?

**Salah Al-Sammouni (via translator):**

- 10   Yes, 61 the army put all 61 in our house.

**Prosecutor Gurdial Singh Nijar:**

- Look at page 4 paragraph G. Translate line by line. Just after  
8:15 there was a knock.

- 15   **Salah Al-Sammouni (via translator):**  
Yes, sure.

**Prosecutor Gurdial Singh Nijar:**

- Who opened the door?

- 20   **Salah Al-Sammouni (via translator):**  
The Israeli soldiers.

**Prosecutor Gurdial Singh Nijar:**

- 25   Then what did the soldiers tell all of your family?

**Salah Al-Sammouni (via translator):**

- 30   My father came out and they ask my father to put all the  
members of the family out of the house and they ask for the  
names of everyone in the house.

**Prosecutor Gurdial Singh Nijar:**

- They told them to go to your cousin's house across the road?

- 35   **Salah Al-Sammouni (via translator):**  
Yes, it's nearby, was like 30 metres away from our house.

**Prosecutor Gurdial Singh Nijar:**

- They were pointing guns at you, shouting, screaming – yes?

- 40   **Salah Al-Sammouni (via translator):**  
Exactly, yes. Yes, children and women screaming too.

**Prosecutor Gurdial Singh Nijar:**

And they pushed you all to this house, the cousin's house –  
yes?

**Salah Al-Sammouni (via translator):**

Exactly, for that house, away from ours, 30 metres. And this  
house was not fully constructed.

**Prosecutor Gurdial Singh Nijar:**

And there were also soldiers in your cousin's house?

5

10

**Salah Al-Sammouni (via translator):**

We are 61 members, the army put us in that house and 97  
people were pushed into that.

15

**Prosecutor Gurdial Singh Nijar:**

And you spent the night there?

**Salah Al-Sammouni (via translator):**

Yes, we spent the night there and it was extremely cold.

20

**Prosecutor Gurdial Singh Nijar:**

Were there any blankets?

**Salah Al-Sammouni (via translator):**

No, no blankets. My father said that because the army put us  
there the army would get us blankets but they didn't.

25

**Prosecutor Gurdial Singh Nijar:**

Your father thought they would look after you now that they  
put you in that house?

30

**Salah Al-Sammouni (via translator):**

My father thought that we are civilians but they refused to help.

35

**Prosecutor Gurdial Singh Nijar:**

So the Israelis put you there, you thought you were safe there?

**Salah Al-Sammouni (via translator):**

Exactly.

40

1      **Prosecutor Gurdial Singh Nijar:**

The next day, early morning, what happened to that house where a hundred of you were?

5      **Salah Al-Sammouni (via translator):**

About 7am, me and my cousins we searched for firewood for cooking purposes. One cousin went across and suddenly I hear there was an explosion, and I looked in the direction of my cousin, Muhammad Ibrahim Al-Sammouni, I saw him fall on the ground, lots of blood, and his skin was burnt and realized he was injured. And there was shrapnel in my head and we ran from the explosion.

10     **Prosecutor Gurdial Singh Nijar:**

You entered the house. Then what happened?

15     **Salah Al-Sammouni (via translator):**

After I entered the house, the Apache fired bombs to our house - about 3 bombs. That was the tragedy.

20     **Prosecutor Gurdial Singh Nijar:**

What was the tragedy?

25     **Salah Al-Sammouni (via translator):**

21 of...

30     **Prosecutor Gurdial Singh Nijar:**

Just a second. So what happened to the house? Then what did you hear?

35     **Salah Al-Sammouni (via translator):**

After I entered the house I heard explosion 2 or 3 times and I couldn't see anything at that time.

40     **Prosecutor Gurdial Singh Nijar:**

Ok, so you heard a very loud explosion, 2 or 3 times and you could not see anything in the house. Why?

45     **Salah Al-Sammouni (via translator):**

Because of the dust in the house that covered all over the house, from the bombing. I barely could see at the time. I can't hear

because of the explosion and I can't see because of the dust 1  
and the explosion.

**Prosecutor Gurdial Singh Nijar:**

Later you say you saw one missile came in from the roof, 5  
another from the window – 3 missiles hit the house, is that  
right?

**Salah Al-Sammouni (via translator):**

Yes, I saw 3 missiles, one from the roof, another from the 10  
window and another I don't know from where. I realized that  
most of my family who were killed and I started to scream to  
get out of the house to the rest of my family members who  
were still alive or injured, to get out of the house. 15

**Prosecutor Gurdial Singh Nijar:**

Right. Then you said blood was everywhere, couldn't see. Your  
mother, what happened to her? She was in the house. What  
happened to your mother? 20

**Salah Al-Sammouni (via translator):**

My mother got killed and I can see that half of her face was  
blown away.

**Prosecutor Gurdial Singh Nijar:**

And your only daughter, 2 plus, what happened to her? 25

**Salah Al-Sammouni (via translator):**

I carried my child, my daughter and I saw her dead so I put  
her back. 30

**Prosecutor Gurdial Singh Nijar:**

You said 21 people died of the Sammouni family?

**Salah Al-Sammouni (via translator):**

21 of my members died. More than 50 or 60 injured. 35

**Prosecutor Gurdial Singh Nijar:**

If you look at page 8, these are the names of your family  
members who died? 40

1   **Salah Al-Sammouni (via translator):**

Yes, exactly.

**Prosecutor Gurdial Singh Nijar:**

5       I wish to tender collectively, if they can be marked, these are the death certificates of all 21 deceased family members. They are not translated because it will require some time to translate but the heading is death certificate and the names of the persons are here. So I tender these as exhibits to be marked collectively, 10 with your leave, Your Honours.

You say then you went out of the house, paragraph E, page 5, there were Israeli soldiers, you approached them and asked for help. Did they give you the help?

15     **Salah Al-Sammouni (via translator):**

Yes, I went out of the house and we saw the Israeli soldiers and asked for help but they didn't. I told them we are civilians and they said go back to hell and go and die.

20     **Prosecutor Gurdial Singh Nijar:**

What did they say?

**Salah Al-Sammouni (via translator):**

25     They said go back to your home and die there and they started shooting above our heads. We refused and I asked all family members to walk along the Salahuddin Road to the hospital and the soldiers started to fire warning shots over our heads. We refused to stop and kept walking.

30     **Prosecutor Gurdial Singh Nijar:**

So finally you got to the hospital, Shifa?

**Salah Al-Sammouni (via translator):**

35     We walked like 2 kilometres and we were injured and after 2 kilometres we find ambulances and civilian cars and we got into the civilian cars and got to the hospital.

**Prosecutor Gurdial Singh Nijar:**

40     Ok, now you say here in paragraph F, at the hospital, "*we told the nurses about the incidents. I was later informed by the nurses that the hospital had sent ambulance to my neighbourhood,*

but the Israeli military forces refused entrance of the ambulance to my neighbourhood. Only on 8th January, 3 days after the incident the ambulance managed to get into my neighbourhood." Can you translate that?

1

5

**Salah Al-Sammouni (via translator):**

Yes, even the Red Cross couldn't enter the area. But on 8 or 9 January they could enter that area and get the injured from my neighbourhood.

10

**Prosecutor Gurdial Singh Nijar:**

You stayed in the hospital but then had to leave because the hospital was full of wounded people. Just translate that line.

15

**Salah Al-Sammouni (via translator):**

Yes, exactly and then I went to a relative's house and stayed there for one month.

15

**Prosecutor Gurdial Singh Nijar:**

Why could you not go back to your house?

20

**Salah Al-Sammouni (via translator):**

Because the army was still there. The army got out on 18 January 2000.

25

**Prosecutor Gurdial Singh Nijar:**

Why could you not go back to your house?

**Salah Al-Sammouni (via translator):**

After one month I couldn't go back to my house because my house was destroyed and the whole area was destroyed and the houses were razed to the ground and we went to another neighbourhood, another apartment and stayed there for 2 months.

30

30

**Prosecutor Gurdial Singh Nijar:**

Can you read the last paragraph of the statutory declaration?

35

**Salah Al-Sammouni (via translator):**

I demand that all the people involved in the killing be brought to the court of law and charged as criminals of war. I am seeking justice.

40

1      **Prosecutor Gurdial Singh Nijar:**

I demand that all the people involved in the killing be brought to the court of law and charged as a criminal of war. I am seeking justice.

5      I offer the witness for cross-examination. Thank you very much but just hold on. There might be other questions. Again I offer the witness for cross examination.

10     **Amicus Curiae Jason Kay:**

No question for the witness. However I just wish to point out that from the Charter Article 6.8 at page 8, the official language of Tribunal shall be English. If the death certificates are not translated it might pose a bit of a problem. That's all.

15     **Prosecutor Gurdial Singh Nijar:**

We'll leave it to the Secretariat to have the death certificates translated and certified.

20     **Judge Tunku Intan Mainura:**

Excuse me, counsel. I need to have some clarifications, please. I'd like to bring your attention to paragraph 2 of the statutory declaration, in regards to the family name of the Al-Sammouni family and page 8 of the statutory declaration in regards to the names of the family members, are you referring to the same family? - Because the spelling of the families is not the same.

25     **Prosecutor Gurdial Singh Nijar:**

If you look at paragraph 2, you'll see 21 family members, Al-Sammouni and if you look at page 8, the Al Sammouni is spelled Sammouny. Are you referring to the same people or some other people?

30     **Salah Al-Sammouni (via translator):**

They are all from the same family, my father, my mother – they are members of my family.

35     **Prosecutor Gurdial Singh Nijar:**

I just want to know why is there a difference in the spelling?

40     **Salah Al-Sammouni (via translator):**

They are all my family. Maybe it's the translation. They are the same.

**Prosecutor Gurdial Singh Nijar:**

If there are any other clarifications from the panel? If none, then can I ask that the witness be released? Mr. Salah, thank you very much for your evidence.

**Salah Al-Sammouni (via translator):**

Thank you, thank you.

**Prosecutor Gurdial Singh Nijar:**

And we're sorry we have to make you go through this again, and perhaps one day we shall see you in Gaza or here.

**Salah Al-Sammouni (via translator):**

Insha-Allah. Thank you.

**Prosecutor Gurdial Singh Nijar:**

So again this concludes the testimony except for the certificates which as the defence wants, we shall of course get them translated.

**Amicus Curiae Jason Kay:**

We do not want them translated. We point out that the language of the tribunal is English.

**Prosecutor Gurdial Singh Nijar:**

So they do not want them translated. Let the record show that they do not want it translated. Thank you.

**Amicus Curiae Jason Kay:**

We'd appreciate it if the prosecution does not misrepresent our words to the tribunal.

**Prosecutor Gurdial Singh Nijar:**

Yes. No, I'm just quoting his words that they do not want it translated. There's no interpretation involved in citing the precise words he used.

**Judge Shad Saleem Faruqi:**

The relevant article also says the Tribunal shall, at the request of any party, authorize a language other than English to be used by third parties so I think there's some scope of flexibility here if you make an application to the President.

**1      Prosecutor Gurdial Singh Nijar:**

5      Thank you. Your Honours, in the light of what has been pointed out by Judge Shad Faruqi, there are several documents here and we heard what the defence has said but we won't quote his words for fear of misrepresenting by citing his exact words.

10     So, we ask therefore that the facts of the deaths have not been contested because there are no questions on that. So it's clear that 21 died. In fact, this is a very famous Sammouni incident, very widely canvassed - talked about. These certificates we will try to get them death certificates translated but if we cannot do it before Saturday because we have a time constrain then we will ask that the members of the panel accept that there have been these deaths. We will try to get them translated depending on the resources of the Secretariat but if we can't then maybe we will renew our application. Thank you.

15     In that case, we will have the final witness for this afternoon who's doctor ... I do not know whether we want a short recess or shall we proceed? We'll try to shorten it because she's going to speak in English, Italian English. I don't think that needs translation. I think the Charter is quite clear, as long as some parts are English.

**20     25    Judge Lamin Yunus (President):**

Which witness are you talking about?

**Prosecutor Gurdial Singh Nijar:**

30     Dr Paola Manduca. She did a study in relation to the use of weaponry. She's a doctor who's done a study and we'll also be tendering an abstract of an article that is to be published in the Lancet which is a very prestigious Medical Journal.

**35     Judge Lamin Yunus (President):**

We were asking how long you would take for this last witness of the day?

**Prosecutor Gurdial Singh Nijar:**

40     I think we will take, she's in English, statutory declaration 7 and it's 8 pages, I think about half an hour to 40 minutes and she's also going to make a PowerPoint presentation which we hope will facilitate. What I think we will do, we will tender her

statutory declaration, consider that as read, we will produce  
an abstract from that Lancet magazine and we also have a  
PowerPoint presentation. So I think there are not that many  
slides. So I think she'll take about 30-40 minutes. So maybe we  
can pause for a while.

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**Judge Lamin Yunus (President):**

If that will be the case, we might as well take a short break for  
20 minutes or so.

10

**Prosecutor Gurdial Singh Nijar:**

Yes, and just to inform, I've just been informed as we were  
giving testimonies, there've been 3 air strikes while we were  
giving testimonies by the Israelis. Not a happy note on which  
to adjourn for tea, I think.

15

**Registrar Musa Ismail:**

All rise. [4.30pm]

20

\*\*\*\*\*

**Registrar Musa Ismail:**

All rise. [4.50pm]

25

**Prosecutor Gurdial Singh Nijar:**

May it please your Honours, I wish to call the next witness,  
Dr Paola Manduca.

When she comes on I'll be tendering her CV, copies of her  
Power Point slide and finally an abstract of an article she  
has written for the Lancet which will be published online in  
December. With your kind leave, your Honours, Dr Paola  
Manduca can you hear me?

30

35

**Dr. Paola Manduca:**

Yes, I can hear you.

**Prosecutor Gurdial Singh Nijar:**

Dr. Paola, you have given us your CV which I've just give to  
the Judges and the *Amicus Curiae*. So you confirm that the CV  
that you sent is your CV?

40

1      **Dr. Paola Manduca:**

This is my CV, yes – exactly.

**Prosecutor Gurdial Singh Nijar:**

5      We'll have it marked as an exhibit as well, Your Honours. There's also a statutory declaration, Paola Manduca, and we have your signature here at the end, so you confirm this is your statutory declaration?

10     **Dr. Paola Manduca:**

I affirm, yes.

**Prosecutor Gurdial Singh Nijar:**

15     Yes, affirmed on 18 November 2012 at Kuala Lumpur. Dr Paola, just to say one or two words before we accept, I propose to tender your statutory declaration to be entered into record as your evidence. Do you prefer to then provide your presentation through the PowerPoint? Is that your preference?

20     **Dr. Paola Manduca:**

Yes, that's all right for me.

**Prosecutor Gurdial Singh Nijar:**

25     Your Honours, in the light of that, what I propose to do, I've had advance intimation from the *Amicus* that they have no objections. I'll tender this statutory declaration without taking the witness through the statutory declaration and then she'll give her explanation which broadly deals with that through PowerPoint. With your leave, then that statutory declaration is considered as read and entered into the records.

30     Dr Paola, maybe you can then start your presentation. Go slowly and explain to us the PowerPoint slides as briefly as you possibly can. We'll leave you now to explain little bit by little bit. If there's anything that requires clarification I'll rise to intervene but otherwise we'll let you do your PowerPoint presentation. Is that ok?

**Dr. Paola Manduca:**

35     Yeah that is ok. Technically, you show the slides and I talk.

Essentially what I present here is scientific work we did in order to find out what were the risks to health brought in by the use of weaponry and it's a sequence of different approaches with different proofs that we managed to provide. That brought us eventually to the five different dimensions of the [indistinct] deriving from the use on population of certain kinds of weaponry.

Our target and point to understand the effects was chosen to be reproductive health. It's not the only possible one but it is the most important of course. You could study tumours of other victims as well. The one thing I want to underline with the next slide is the contact of the attacks - the lack of possibility to displace for the population.

The population of Gaza is composed by about 50% of underage people and was encased within the perimeter of Gaza by the same entity that bombed them. There is no way of escaping from Gaza whether by air, sea or ground. These people were composedly under the attacks. They've composedly been enclosed in the same enclave where war remains [indistinct] were accumulated by the attacks.

Now - into the data. It's the next slide. The data initially obtained, we started initially to document the presence of one of the most dangerous toxicant and teratogen that is bringing to birth defects. Such substances may be present in weaponry which is metals. So the first thing we did was to document the presence of these metals with carcinogenic and teratogenic activity in the wounds of the people that were under attack in [indistinct]. This was done looking at different kinds of wounds. In that [indistinct] position where the wound occurred all these wounds were produced by weapons without fragments, did not leave shrapnel into the body. So they were candidates for being metal powder; effective through metal powder. And we found different signatures, different teratogenic and carcinogenic are called into the kinds of wounds we examined.

I go just for a moment in the next slide and you see the different kinds of wounds we have examined where we found the real proofs of the presence of [indistinct] metals. So

1 there were burns by white phosphorus [...indistinct...]. There  
were amputation wounds like in A and B and C. There were  
superficial burns like in B and burns so evident they destroyed  
the body, people were dead or carbonized like E and F.

5 In all these wounds we found the list – next slide – of metals  
which I can read: lead, uranium, titanium, copper, strontium,  
barium, cobalt, mercury, vanadium, caesium and tin which  
are found embedded in the tissue of wounds with specific  
10 signature in the kind of metal that we find and the amount  
according to the kind of wound.

15 All of them are toxicants. Some are teratogens or carcinogens.  
We found some of these metals also when examining soil  
from ground craters – we examined 4 craters – 2 craters [...  
indistinct...] and they [...indistinct...]. So these metals are  
present. The proof, I go back to the data obtained in the other  
20 slide – number 4 – so we have the proof of the presence of these  
metals. Then it was important to know if it persisted in the  
environment. So we were looking for proof of assumption by  
human beings in the environment, looking to the accumulation  
of these metals within the air, over 95 children all along the strip  
of Gaza, one year to 10 months after the attack of Cast Lead.

25 Now, what did we find then was – I go now to the slide of  
direct presence of assumption which is slide number 7 – we  
found that measuring the metal load in the children in 57 cases  
there was contamination by toxication and teratogens in the  
air of these children. This reflects the fact that they assumed  
30 the metals from the environment over the last few months  
implying that the metals, the teratogens and carcinogens resist  
in the environment at least through these 10 months after  
delivery in the environment.

35 So this produces a long-term effect of the delivery of metals by  
weaponry because they're introduced in the environment it's  
well known that metals in the environment are not disposed  
of easily and they persist. It's also that when they're consumed  
by the organisms they accumulate within the organisms. So  
40 this was the first set of direct proofs.

Now I go to slide number 8 where I just mentioned that one of

the most serious health effects of metal contamination is due to their capability to promote malformations. They can also act as carcinogens.

Now slide 9, [indistinct]. I want you to understand that these studies are not out of the sky there is [indistinct] inside, a line of studies that is interested in determining the effects of environmental contaminants. Whether they're due to weaponry or industrial waste or solid waste or any kind of industrial and anthropogenic activity, there is a good line and a lot of literature studies. And in our study [...] that says the effect of metal is a cause of deformation and reproductive damage and environmental effect on public health.

They also are related to another line of studies which is the one of [indistinct] effects the [indistinct] the health of the people which says that you don't need to cause mutation but you can affect the health of the people also through different mechanisms.

So I mention this to say that it's not just some esoteric kind of approach.

Now, on this basis, now I go to the next slide which is slide number 10 which says the data additionally presented document the correlation in time between the use of weapons and the prevalence of birth defects in the strip of Gaza which is detected as an increase in congenital malformation since 2005 and continuing until 2010. And then I will present the correlation of parental exposure to weaponry and the delivery of malformed children and exposure in this case is documented in U.N. [indistinct] action maps – we worked with them to compare the declaration of exposure of the families. This data eventually will lead to the showing that there is a long term effect on the prevalence of birth defects correlated with exposure to weapons.

The next slide, 11, shows you the people who are affected. I go rapidly through 3 slides of 3 cases of birth defect children registered in [indistinct] Shifa Hospital in Gaza. So these are existing, they're real. I have many more of them, more or less 40 of them.

1 To the first point, showing the correlation in time between the  
use of weapons and the prevalence of birth defects was done  
analyzing the [indistinct] of people and in a way to determine  
when the malformation presented in families that have normal  
5 children in 2011 and one or more previous cases of birth defects.

10 I want you to focus on this one particular slide that is slide  
15 which is the graph. In blue is the increase in time of birth  
defects, in red is the increase in number of those birth defects  
which cannot be [indistinct] to family history or genetic  
deformities. So there are new events which we call sporadic  
events and these are the group of events that increase mostly  
and they are the group of defects that as geneticists we know  
are [...indistinct...].

15 The increase is starting in the period 2005-2006. The  
displacement of their weaponry and possibly [indistinct] are  
around 2002 in the strip of Gaza but increased in intensity in  
20 the following [indistinct] years and I have a chronology of the  
use of this weaponry along those few years. The phenomenon  
of increase is not of course stopped.

25 Another point, so with that point we say increase in time,  
there is a correlation between certain kinds of weaponry.  
Going to something that is, in scientific approach leads to  
some important points as well is the correlation of parental  
exposure to this weaponry adding a child with birth defect  
in 2011. We registered births in Shifa Hospital and among the  
30 40,000 children who were born, was a number of children, of  
course, with birth defects which were registered. Anybody  
was asked if they were exposed to weaponry. The families of  
children with birth defects in most of the cases which is shown  
in slide number 17 were exposed to white phosphorus, bombs  
35 or white phosphorus and bombs. That is what they told us.  
[Indistinct] more often exposed to white phosphorus than  
parents of normal children. That is what they told us but that is  
what we went to the [indistinct] asking for confirmation. So we  
worked with them for 10 days, putting all the residents of these  
40 people on a map that is not the usual map that you can get on  
your computer. It's a map of [indistinct] that only they have. If  
we can we put pins on the map to show that these events have  
actually occurred. You can see a picture of the [indistinct] maps

in slide 18. So we are sure of the correspondence of declaration of people. We brought events that were [...indistinct...].

And what did that say is essentially that if you were exposed to any bombing or white phosphorus in 2008 or 2009 then you have a much higher probability to get a birth defect child in 2011 that is a child that is conceived 20 or 25 months after exposure so it's conceived a certain amount of time after exposure which are used again for long term effect of this kind of exposure.

In summary, we have proof of fact of toxicant teratogen and carcinogen metals present in weaponry and in craters and white phosphorus ammunition. Presence of toxicants accumulating in the hair of children 10 months after Cast Lead, therefore persistence in the environment, correlation in time between the production of weapons that bring metal powder and the increase of malformation in the population. Correlation of parental exposure to weaponry – documented – with malformation in their progeny conceived up to two years later. Therefore long term effects of war remnants.

In conclusion, we can say that there was delivery of toxicants, metal toxicants that are capable to induce birth defects. The population consumed them entirely. The parental exposure to the war events is significantly correlated having a child with birth defect. The increase of use of these weapons is correlated with increase of prevalence of birth defects [indistinct] which make us to suggest that permanent contamination of long term effects on reproductive health by war remnants have been documented to an extent previously unknown but all this work has been published, peer-reviewed scientific journals. So I'm not telling anything that has not already been evaluated by the scientific community as a whole. And then I have other [indistinct].

Please, if you want to ask anything, I am here.

**Prosecutor Gurdial Singh Nijar:**

That is the sum of the testimony. We have here an abstract, in relation to this study, which will be published online on 5 December Lancet.

1      **Dr. Paola Manduca:**

I have already included the results of that in this presentation because I knew that [indistinct]. I can send you the text of that abstract now that it has been edited in the form to be published.

5      **Prosecutor Gurdial Singh Nijar:**

At the moment we've got an abstract so we'd be grateful if you could send us the whole text for the panel and the defence.

10     **Dr. Paola Manduca:**

[Indistinct] only presented [indistinct] because [indistinct] back of the proceedings is the oral presentation given to the Lancet meeting in, last March in Cairo and they published a special issue for [indistinct].

15     **Prosecutor Gurdial Singh Nijar:**

Yes, thank you. Now you may be asked some questions. So thank you very much for the moment but remain there for the moment. We offer this witness for cross-examination. Thank you.

20     **Amicus Curiae Dr. Abbas Hardani:**

We have no questions.

25     **Prosecutor Gurdial Singh Nijar:**

Thank you, no questions. Any from the... yes?

30     **Judge Tunku Intan Mainura:**

Yes, hello Professor, do I speak to her directly?

35     **Prosecutor Gurdial Singh Nijar:**

You can actually speak directly but you've got to speak a bit closer and louder so that she can hear. Dr Paola, this is one of the judges who wants to address some queries to you so she's going to talk to you now.

40     **Dr. Paola Manduca:**

Please speak slowly because the audio is so-so. Yes, go ahead, thank you.

45     **Judge Tunku Intan Mainura:**

Professor, I would like to ask on the methodology of this

research in particular to slides 16, 17 & 18 of your presentation.  
May I know the place or laboratory where the experiment was  
conducted? Which country was it conducted?

**Dr. Paola Manduca:**

These experiments were conducted in Gaza with a team of  
doctors [...indistinct...].

**Judge Tunku Intan Mainura:**

Ok, thank you.

**Prosecutor Gurdial Singh Nijar:**

If there are no further questions, can the witness be then  
released? Dr. Paola, thank you very much for your evidence  
and I must say the PowerPoint slides have been most  
instructive and really to the point. We thank you very much  
for your presentation.

**Dr. Paola Manduca:**

Thank you.

**Prosecutor Gurdial Singh Nijar:**

Thank you and we will keep you informed. See you sometime.

**Dr. Paola Manduca:**

Thank you very much and salaam to everybody.

**Judge Shad Saleem Faruqi:**

Gurdial, the expert has clearly demonstrated that there were  
birth defects and cancer in using effects of metal contaminants  
through the bombing and use of weaponry. Now, you have to  
fill us in. In what way is this a violation of international law?

**Prosecutor Gurdial Singh Nijar:**

Actually, we are addressing the question of genocide and  
we are showing how these weaponry that were being used  
have such a disastrous effect even in the long term. And  
our conclusion taking the whole of the rest of the evidence  
cumulatively suggest that it is not only affecting the present  
Palestinian population but as well children who are being  
born – malformations, congenital defects, carcinogenic, long  
term consequences for children and newborns and so on. So  
that is the point that we are raising.

1    **Judge Shad Saleem Faruqi:**

Will you be addressing later on also if these are war crimes?

5    **Prosecutor Gurdial Singh Nijar:**

The use of the particular weapons?

10    **Judge Shad Saleem Faruqi:**

Yes, the use of phosphorus.

15    **Prosecutor Gurdial Singh Nijar:**

We might but it's not critical to our argument about genocide because even the white phosphorus... white phosphorus, strictly, I think is not banned.

20    **Judge Shad Saleem Faruqi:**

I wanted to hear that from you.

25    **Prosecutor Gurdial Singh Nijar:**

But then the effect of white phosphorus is really quite incredulous. We'll try to bring some literature on that to show that white phosphorus then falls to the ground and it's just very innocuous and then you touch it, it has an effect, it tears the insides of human beings, children and so on who even come into contact – that's very, very lethal.

30    If there are no questions then that is our testimony that we had prepared scheduled for today and I'm glad that we have been able to stick to the time. So tomorrow, we start off with a person who is in a position, who's going to be here – Dr Ang and she's going to be present in person. She was a doctor who was in the Gaza hospital, sorry the hospital in Sabra & Shatilla when the massacred occurred and she'll be coming in person to give her testimony.

35    I ask that the proceedings start at 9.30 tomorrow – this is the only reason - as our 2nd witness is going to be on Skype. So we're trying to accommodate that witness such that we finish the first and the second. Then we'll have that Skype witness at 2 o'clock. He's a historian from ... based in the U.K. formerly from Israel, the Hebrew University and now in the U.K. and just to accommodate his time because there's an eight-hour difference. We have Dr Ang followed by our next witness from

the West Bank then we will go back to Skype in the afternoon because of the timing. So if we can start at 9.30 because we're kind of timing it. Thank you very much.

Registrar Musa Ismail:

All rise.

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1                   **22 November 2013**  
                      (Morning session)

**Prosecutor Gurdial Singh Nijar:**

5                   May it please Your Honours, yesterday I undertook to provide  
a list of exhibits and in consultation to the Registrar, we have  
made a list and numbering of the list.

10                  [Registrar distributes]

15                  With your kind leaves Your Honours, can I invite the sixth  
witness, Dr. Ang Swee Chai to the witness stand.

20                  This is the Statutory Declaration...

**Dr. Ang Swee Chai:**

I, Ang Swee Chai, hereby solemnly and sincerely affirm and  
swear that I shall speak the truth and nothing but the truth in  
giving evidence ...

25                  **Prosecutor Gurdial Singh Nijar:**

Dr. Ang will be giving testimony in form of a witness statement  
which we wish to tender now.

30                  **Amicus Curiae Larissa Cadd:**

Your Honours, we would object to the tender of the witness  
statement in this particular instance. The witness is here and  
she can give evidence in person and in the circumstances it  
would be an improvement on the reading of the statement.

35                  **Judge John Philpot:**

We will decide on whether how you can proceed but I would  
like to see the statement. It's a form of disclosure. I presume  
that you have copies? You can give copies to us, and we can  
decide how to deal with it.

**Prosecutor Gurdial Singh Nijar:**

40                  May I approach the witness to just ascertain on the question  
whether ... because she was given the impression that it will  
be in the form of a witness statement. But I just want to find  
out whether she will be in a position to proceed without the  
witness statement.

Will you be in a position to proceed without a written statement? 1

**Dr. Ang Swee Chai:**

I am happy either way. But what I have written is the truth, 5 and I cannot not refer to the truth.

**Judge Shad Saleem Faruqi:**

Mr. President, I don't see any difference between the video presentation yesterday along with the witness statement. I 10 think we should allow both.

**Prosecutor Gurdial Singh Nijar:**

I am in your hands completely. The witness is prepared to proceed with or without the statement. We abide by the ruling 15 of Your Honours.

**Judge Salleh Buang:**

Let her give her oral statement.

20

**Prosecutor Gurdial Singh Nijar:**

Okay, in that case we will not refer to statement, and we will go through the evidence with you. Now, for the record, can you give us your full name.

25

**Dr. Ang Swee Chai:**

My family name, my father's name is Ang, my given name is Swee Chai. The Palestinians call me Dr. Swee.

**Prosecutor Gurdial Singh Nijar:**

So, Dr Ang Swee Chai. And you are a consultant orthopaedic and trauma surgeon?

30

**Dr. Ang Swee Chai:**

Yes, in the Royal London Hospital and Saint Bartholomew, 35 in London.

**Prosecutor Gurdial Singh Nijar:**

And how long have you been working there?

40

**Dr. Ang Swee Chai:**

I've been working there since 1996, but before that I've been

1 a consultant in other hospital in the UK as well, and also in  
the Middle East.

**Prosecutor Gurdial Singh Nijar:**

5 So your total of work experience in this area is for how long?  
Roughly - I know it's a long long time.

**Dr. Ang Swee Chai:**

10 Since probably 1978. 1980 I became a fellow of the Royal  
College of Surgeons in England, and from then on my surgical  
career began.

**Prosecutor Gurdial Singh Nijar:**

15 It's a long, long time. Now, you attended the Kahan  
Commission that was held in Israel, did you not?

**Dr. Ang Swee Chai:**

Yes, I did.

20 **Prosecutor Gurdial Singh Nijar:**

And as we have heard, the Kahan Commission's report was  
with regard to events that happened in Sabra and Shatilla in  
September 1982.

25 **Dr. Ang Swee Chai:**

Yes

**Prosecutor Gurdial Singh Nijar:**

30 You also give evidence in another commission. Can you tell  
us which commission this was?

**Amicus Curiae Larissa Cadd:**

35 Your Honour, I object to this evidence being led. This is  
evidence which relate to other proceedings, another inquiry  
and it should not heard by this Court. This witness should be  
limited to the evidence which supports the charges.

**Prosecutor Gurdial Singh Nijar:**

40 Well, we have no problem with that. But I'm just establishing  
that she gave evidence in these two inquires - to show that  
she's a witness that has been accepted in both Israel as well as  
in other Commission. Therefore, it establishes the credibility

of the witness. And the opinion in these rules requires within this with this 2 inquiries. This is to show that she is a witness of a...that she is a witness that has been accepted in both Israel as well as another commission. Therefore, it establishes the credibility of the witness and I think evidence that leads to the credibility should be - and that's all that I'm going to ask her, that she has given evidence in these 2 commissions.

*Amicus Curiae Larissa Cadd:*

Your Honours, the issue of credibility is on for this Tribunal in this room. The fact, or not, of whether this witness has given evidence in other proceedings is completely irrelevant and it is an attempt to bolster this witness' credibility beyond this room. And we would suggest that it is extremely improper in the circumstances and, frankly, unacceptable in term of evidence.

*Judge Lamin Yunus (President):*

Mr. Prosecutor, I don't think you need to confuse with the Kahan Commission and other commissions where she did not testify or anything. She just gives evidence in respect of the inquiry of this Tribunal.

*Prosecutor Gurdial Singh Nijar:*

Yes. That's correct. I am just saying that she had given evidence with regards to this inquiry elsewhere. That's all. But I abide by your ruling. If that is inadmissible, then, that's fine.

So, we will go by your ruling. I think it is of value to understand that this witness has given evidence in regard to this kind of identical events previously before both in Israel and elsewhere. That is the only point that is being made.

*Judge Lamin Yunus (President):*

Alright, proceed.

*Prosecutor Gurdial Singh Nijar:*

Right now, you were in Beirut. You went to Beirut. In what year was that?

*Dr. Ang Swee Chai:*

1982 was the first time I visited the Middle East, and that was to go to Beirut.

1      **Prosecutor Gurdial Singh Nijar:**

And in what capacity did you go to Beirut?

Dr. Ang Swee Chai:

5      I was a volunteer surgeon with the Christian Aid, and at that time, it was towards the tail end of a continuous bombardment of Lebanon by the IDF and Israeli airplanes in a process called "Peace For Galilee" where a lot of people were killed and a lot of homes were destroyed.

10     I was watching the television footage of the destruction and killing of civilians; and at that time I was a very devout supporter of Israel, a born-again Christian who thought that Israel has a right to do whatever they like. So, when I saw those footage of children being killed, homes being destroyed, people being burned by phosphorous, my conscience would not allowed me to sit still.

15     I resigned from my work in St. Thomas as a surgeon, joined the Christian Aid and flew out to Lebanon to help the people who were wounded by Israel. I did not know who those people were until I landed in Lebanon itself.

20     Towards the time when I arrived, I was working - I was put first to work in a field hospital because at that time there was air-raids and it was not safe for the hospital - because the hospitals was also a target of Israeli bombs.

25     I was put in a hospital called the Theological College. The field hospital was three floors underground, and we work there because it was safe for the patients. About a week after my arrival ...

30     **Prosecutor Gurdial Singh Nijar:**

35     I'm sorry, where was that?

Dr. Ang Swee Chai:

40     It was in Beirut, in Hamra. It was a Christian outfit. And I worked in the basement three floors below looking after people burned by phosphorus, destroyed by cluster. I was operating on many people and looking after them.

A week after my arrival, the PLO agreed to evacuate. Of course at that time I only saw the PLO as terrorist and I was very happy that they were evacuating. I was told by the International Red Cross ...

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*Amicus Curiae Larissa Cadd:*

I have an objection Your Honour. This is going well beyond the question that was put to the witness. I would request that the witness answer precisely the questions which are being asked by the Prosecution.

10

Prosecutor Gurdial Singh Nijar:

This is well within the question that I asked. But if you want it to be broken up, maybe you take it phase by phase. You can say the same thing. But we can take it step by step.

15

**Dr. Ang Swee Chai:**

Alright.

**Prosecutor Gurdial Singh Nijar:**

Okay, so then did you continue to work in Hamra Hospital after that?

20

**Dr. Ang Swee Chai:**

No, I did not. Because with the evacuation of PLO, there was an agreement for ceasefire where the civilian population was supposed to be protected and the hospitals were allowed to be function. I was asked whether I'm prepared to work in a place called Gaza Hospital, and I agreed to go there and treat patients. It was run by the Palestine Red Crescent Society ...

25

**Prosecutor Gurdial Singh Nijar:**

Alright, let me take you step by step. So with your agreement, you went to Gaza Hospital?

30

**Dr. Ang Swee Chai:**

Yes, I did.

**Prosecutor Gurdial Singh Nijar:**

Were there any other hospitals that were functioning at that time to the best of your knowledge?

40

1      **Dr. Ang Swee Chai:**

American University was functioning. Because we are a huge multinational team, the American doctors and nurses went to the American University Hospital and I was told that and orthopaedic surgeon was badly needed in Gaza hospital, and I was deployed there.

5      **Prosecutor Gurdial Singh Nijar:**

Can you briefly describe Gaza Hospital itself?

10     **Dr. Ang Swee Chai:**

Gaza Hospital was 11-storey as I found it in 1982. It was run by the Palestine Red Crescent Society. Found on the outside of Gaza hospital was the emblem of the International Red Cross. With the ceasefire agreement, it was understood that it was safe ...

15     **Prosecutor Gurdial Singh Nijar:**

Where is it the Gaza Hospital in relation to the two camps, Sabra and Shatilla?

20     **Dr. Ang Swee Chai:**

Gaza Hospital is at the beginning of route Sabra, Sabra Road, also called Shatilla Street, and it is actually right at the Sabra edge of Sabra-Shatilla. And it overlooked the whole of Sabra and Shatilla.

25     **Prosecutor Gurdial Singh Nijar:**

Your Honours, just before I proceed, could we ask for the return of the witness statement that was given to the Defence because now it is not being relied upon.

30     **Amicus Curiae Larissa Cadd:**

Your Honours, we would object to the return of the witness statement. The thing is it may contain prior inconsistent statements which we would be, quite rightly, able to put to this witness.

35     **Prosecutor Gurdial Singh Nijar:**

You can't have it both ways. You do not want the witness statement, but you want the witness statement. And unless and until it is shown that there is a prior inconsistency - can I, can I? I think only one of us should stand.

**Amicus Curiae Larissa Cadd:**

Yes.

If my Learned colleague wishes for the Defence-Amicus to hand the witness statement back, I would request that all the judges also do so.

**Amicus Curiae Jason Kay:**

And may I add that the Prosecution should also not at all times during questioning of the witness refer to the witness statement. The witness should be in the custody of the Registrar during the examination-in-chief of this witness.

**Judge Lamin Yunus (President):**

What actually do you want?

**Amicus Curiae Jason Kay:**

If the witness is to be examined-in-chief orally, then she should be examined-in-chief orally.

**Judge Lamin Yunus (President):**

You want examination-in-chief just that? ... Throw it into the paper basket, or what?

**Amicus Curiae Larissa Cadd:**

Your Honours, if it would assist - Once the witness has given her oral statement and evidence, it may then be appropriate to tender the written witness statement. But it is not appropriate, in these circumstances, to tender it before hand, and it is certainly not inappropriate for the Prosecution to ask that the Defence-Amicus not have the statement while the Bench does have the statement. That would be putting us at a significant disadvantage.

**Prosecutor Gurdial Singh Nijar:**

Your Honour, I wish to make two points with regard to the witness statement. I think there should be a ruling on the witness statement.

First, under our rules Article 9(b) at Page 36 of the Charter,

*"The evidence of witnesses shall preferably be in the form of a written*

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1 *testimony/affidavit with exhibits of the relevant documentary and photographic evidence.”*

5 So this is the form of the written testimony that we are talking about.

Article 10 says,

10 “The evidence of witnesses shall be by way of Witness Statements in the form of an affidavit. The witnesses are required to file Witness Statements ...” and so on so forth.

15 So, as to the form, there are clear rules on this. And there were provisions at the beginning saying that we can draw up our own rules - both *Amicus* and us - that rule.

20 The second point is: it has also been the practice of this Tribunal itself previously where we have had the witness ... in the case number 2, Chief Prosecutor of the Kuala Lumpur War Crimes Commission v. George Walker Bush & others, which is reported in the reports of judgments, I read that the witnesses, Abbas Abid - I will make this available - he read the statement, and this statement was confirmed, and then it was dated before the Court in the presence of the judges and signed by the witnesses 25 in the presence of Your Honours. And Abbas Abid signed the witness statement. This is in case number 2 at page 83. So in other words, it is the practice of this Tribunal before to follow exactly the process we are talking about.

30 So we ask for a ruling on this, Your Honours.

Judge Shad Saleem Faruqi:

Mr. President will rule, but I'm looking at Article 10,

35 “*The filing of such witness statements shall not preclude a witness from making further oral testimony ...”*

Judge Lamin Yunus (President):

Hold on. Under Article 9(b),

40 “*The evidence of witnesses shall preferably be in the form of a written testimony/affidavit with exhibits of the relevant documentary and photographic evidence.”*

So, we accept the written testimony, and on that, we want to 1  
go on on the basis of the written statement.

**Prosecutor Gurdial Singh Nijar:**

Yes. I accept the ruling, Your Honour, thank you. 5

**Judge Lamin Yunus (President):**

Yes?!

**Amicus Curiae Larissa Cadd:**

Your Honours, if I could refer you to Article 10, it says, 10

*"The evidence of witnesses shall be by way of Witness Statements  
in the form of an affidavit."*

What this witness statement is, is not an affidavit. Currently, 15  
it is unsworn, and it is not in the form of an affidavit. It has  
no jurat and ...

**Judge Lamin Yunus (President):**

*"...shall preferably be in the form of a written testimony/affidavit ..."* 20

**Amicus Curiae Larissa Cadd:**

*"in the form of an affidavit"* - Witness statements in the form of 25  
an affidavit. This particular witness statement does not comply  
with this. It is unsigned and unsworn at this state.

**Judge Lamin Yunus (President):**

We had written testimony, no?

**Prosecutor Gurdial Singh Nijar:**

Yes. We had written before and we have followed this practice 30  
also before. And 9(b) very clearly states "*written testimony /  
affidavit*". The fact is that this witness is here. This witness has  
a written statement. She's gonna read the written statement,  
and she will sign in the presence of Your Honours. So what is  
the objection to that?

**Judge John Philpot:**

The court has ruled. So let's move on. 40

1      **Prosecutor Gurdial Singh Nijar:**

Thank you. Of course we accept the ruling. Now you can refer to your witness statement. And I think we can short circuit everything. We can go on to page 3 of the witness statement.

5      **Dr. Ang Swee Chai:**

Yes. Page 3.

10     **Prosecutor Gurdial Singh Nijar:**

In fact we can go on to paragraph 13 of the witness statement. Can you tell us in your own words, or what you said here in 13, about Gaza Hospital.

15     **Dr. Ang Swee Chai:**

Gaza Hospital officially opened on 31st August 1982, and the wounded from all over Beirut and South Lebanon were brought into the hospital and treated. Many of these had not received proper medical attention for many weeks. I worked with my expatriate colleagues, the Christian Aid team, as well as the doctors and the nurses of the Palestine Red Crescent Society. From them I learned how they lost their ancestral home in Palestine and their parents and grandparents became refugees in Lebanon since 1948.

20     **Prosecutor Gurdial Singh Nijar:**

Yes. Paragraph 14.

25     **Dr. Ang Swee Chai:**

As Gaza Hospital overlooked Sabra and Shatilla camp, I also saw families broken up by the invasion come back to live in the bombed out buildings. I learned from the returning families how they had lost their family members through the bombs. Many of them wounded, especially their children - but were also traumatized by the evacuation of 14,000 PLO members. Each evacuee left behind wives, sisters, elderly parents and children, undertaking to go into exile never to return back to their families in Lebanon.

30     I was invited to their homes and they generously shared whatever meager possession they had with me. I learned many things from the people of Sabra and Shatilla. These include the truth of why and how Palestine disappeared in 1948 and how

they remained refugees ever since then with no right of return. They showed me faded pictures of their ancestral homes in Palestine, the keys to their front door, title deeds to homes now taken over by Israelis. This is what they told me, in brief. Many of them came from Galilee, in northern Palestine, where their families had lived for generations. They were forced out by armed Jewish soldiers from their homes at gunpoint in 1948. Many of them could only leave with whatever they could physically carry and walked into Lebanon and became refugees. Some died along the way. They became refugees in Lebanon and were never allowed to return to their homes by Israel.

The United Nations gave them tents and temporary shelters in refugee camps where they lived and brought up children. When I met them in 1982, the third and fourth generation of refugee were growing up. They spoke of their homes and villages as a kind of paradise where oranges, lemons and olives grew freely. They told me that Israel called Palestine an empty land but the Palestinian lived there for generations cultivating Jaffa oranges, olives and all kinds of flowers. It was never an empty land.

750,000 Palestinians, representing about 50% of the population of Palestine, were forced out in 1948. There were massacres of defenseless villagers, dynamiting of homes, wells cemented up, and animals killed and confiscated. Many of the towns and villages were destroyed so that new houses could be built over them.

*Amicus Curiae Larissa Cadd:*

Objection Your Honour. This is evidence that is not within this witness' personal experience. It is going to the history of the matter it is probably something for an expert witness to provide. We would request that this statement is only limited to the matters which this witness has personal experience of.

**Prosecutor Gurdial Singh Nijar:**

Your Honours, if you look at paragraph 15, this is what the witness was told. And she has summed it up because paragraph 15, line 5, "this is what they told me in brief," so she is just narrating what she was told in brief.

1 Now of course as to whether or not it is true that the villages  
were dynamited and so on, it is indeed hearsay evidence. But  
we must not forget that in an international tribunal, there  
are express provisions that allow for secondary and hearsay  
evidence because the nature of the charges that relate back to  
5 a long time ago.

If you look at Article 27 of the Charter, page 43, it says here  
very clearly,

10 "Secondary and hearsay evidence may be admissible in the interest  
of justice in particular circumstances but the Tribunal shall accord  
secondary and hearsay evidence less cogency and shall decide finally  
on the total weight of the evidence with due regard being given to  
15 primary evidence."

So as regards admissibility, there can be no objection. But as to  
the weight, it is left to Your Honours to decide on what kind  
of weight to give this. Thank you.

20 **Judge Lamin Yunus (President):**

Alright, you may proceed please.

**Prosecutor Gurdial Singh Nijar:**

25 Thank you Your Honour. Paragraph 17, yes.

**Dr. Ang Swee Chai:**

Their lives as refugees in Lebanon were also regularly  
threatened by Israeli bomb raids which targeted the refugee  
camps, killing children in the playground and destroying  
30 homes and schools. Although the June 1982 invasion was of a  
massive scale, the bombing and shelling of Palestinian refugees  
and the camps were regular event. Several Palestinians told  
me, "*Israel just will not let us live in peace until they kill us all.*" For  
35 instance, the Mohammad family were bombed out of a refugee  
camp in South Lebanon and fled to Tarunta Refugee camp in  
East Beirut, and when that was flattened, fled to Shatilla.

40 These people of Sabra-Shatilla also introduced me to Arabic  
coffee, and Palestinian embroidery, but on top of all, I witnessed  
their resilience, kindness and generosity in the face of such  
injustice and destruction. I will never forget the 10 women

sitting on the floor in their bombed-out home embroidering pieces of material. They sold colourful and artistic motifs, each design typical of the village they came from.

***Amicus Curiae Jason Kay:***

Objection. Embroidery is irrelevant to a charge of war crimes, crimes against humanity and genocide.

**Prosecutor Gurdial Singh Nijar:**

We are not giving evidence of embroidery, we are giving evidence of the position of what she witnessed This is not about embroidery.

**Dr. Ang Swee Chai:**

I haven't finish.

**Prosecutor Gurdial Singh Nijar:**

Yes, please go on.

**Dr. Ang Swee Chai:**

In a few days, I begin to be able identify the Star of Bethlehem, the Rose of Jerusalem, the olive, the Seder, the bright orange and the red colour of the Bedouins, which is the setting sun, and the bright blue of the Mediterranean. Through being with these dispossessed people, I learned of what a wealth of cultural heritage they must have come from.

The three weeks of peace ...

**Prosecutor Gurdial Singh Nijar:**

If you can proceed to paragraph 21?

**Dr. Ang Swee Chai:**

On the evening of 14 September 1982, I left Gaza hospital to go to the volunteer's residence in Hamra, West Beirut, away from the camp to shower and also to have a meal. While in Hamra, a massive explosion with the buildings vibrating, the Arabic news announced that the President-elect Bachir Gemayal was assassinated by a massive bomb that blew up the his residence. I slept in Habra on the night of 14 September ...

1   **Amicus Curiae Jason Kay:**

May I have a ruling as to whether the Prosecution is dispensing with paragraphs 19 and 20 at this point?

5   **Prosecutor Gurdial Singh Nijar:**

No, I am not abandoning it. But I'm just ...

Judge Lamin Yunus (President):

You say you are not abandoning it, then you ask her to read - 17, 10 18, 19 - so that we know what is being read is being taken. If you keep on skipping, I'm not sure which way you are going.

15   **Prosecutor Gurdial Singh Nijar:**

Yes, I am sorry for that.

Judge Lamin Yunus (President):

No, no. You got to be strict.

20   **Prosecutor Gurdial Singh Nijar:**

I'm grateful Your Honour. Paragraph 19.

Dr. Ang Swee Chai:

The three weeks of peace enjoyed by the Lebanese and Palestinians were abruptly interrupted by the Israelis land invasion. Several hundred Israeli tanks drove into Beirut and many headed for the refugee camps of Sabra and Shatilla. The BBC World Service announced that Israel was invading Beirut on land to flush out 2,500 PLO terrorist left. Eyewitnesses saw the tank columns and there was also television footage, though I did not see newspaper pictures of the tank columns until I left Sabra and Shatilla on 18 September 1982.

35   I did not expect that to happen as I truly believed that since the PLO had evacuated and there was no Palestinian fighters left and with the ceasefire agreement that after the evacuation the Western power would protect the civilians, people could at least rebuild their homes and broken lives. In retrospect, I found out, and as common knowledge now, that the multinational peace-keeping force withdrew from the positions around the camps well ahead of the Israeli land invasion. I'm unable to find out the reason for them abandoning their post a few days before the invasion.

[Paragraph] 21 I've already read, so I will go on to 22.

**Prosecutor Gurdial Singh Nijar:**

No, read 21 again.

**Dr. Ang Swee Chai:**

On the evening of 14 September 1982, I left Gaza Hospital to go to the volunteers' residence in Hamra, West Beirut, away from the camp to shower and also to have a meal. While in Hamra, we heard a massive explosion with the buildings vibrating. The Arabic news announced that President-elect Bachir Gemayal was assassinated by a massive bomb that blew up his residence.

I slept in Hamra on the night of 14 September but was woken up by planes flying low, breaking the sound barrier, at 5 to 5.30 am on 15 September 2013. I immediately left for the camp.

The following account is a record of the events from 15 September to 22 September on a day-by-day basis. I sent it out by telex from Beirut to my husband, Francis, in London on the 22 September, and also his signed copy of it to Sean MacBride Commission and the Israeli Kahan Commission. It was published in full on 22 November 1982 in South magazine, which is a week before I gave evidence to the Israeli Kahan Commission in Jerusalem.

This is verbatim account save for some editorial adjustments made for greater clarity which is based, as earlier stated on my personal knowledge as well as from reliable sources which I have no reason to doubt.

Day-by-day account from 15 to 22 September.

15 September, Wednesday.

5 to 5.30 am: Flights of Israeli planes flew from the sea towards the direction of the camp.

8am: The first explosive noises, shells. The shelling was first in one but continuous. By midday, the shelling was completed in all direction. All around in a radius of about 5km from Gaza

1 Hospital as witnessed from the 10th floor, which is nearly  
the rooftop of Gaza Hospital. Only ambulance casualty were  
treated that day as all roads leading to Gaza Hospital were  
closed to ambulances.

5 3.30 to 4pm: The zone of shelling explosive was estimated to  
be half to 1km away from the hospital. News arrived at the  
hospital that Israeli troops have surrounded and were getting  
passed at Akka Hospital.

10 **Judge Shad Saleem Faruqi:**

Counsel, may I please I seek clarification? "All roads leading  
to Gaza Hospital were closed." By whom?

15 **Dr. Ang Swee Chai:**  
Israeli tanks.

20 **Judge Shad Saleem Faruqi:**  
Thank you.

25 **Dr. Ang Swee Chai:**  
3.30 to 4pm: The zone of shelling explosive was estimated  
to be half to 1km away from the hospital. News arrived at  
the hospital that Israeli troops have surrounded and were  
getting passed at Akka Hospital. Akka Hospital is just outside  
Shatilla, the other end of the camp. By nightfall, the shelling  
gradually diminished, but it was clear to us that we were  
entirely surrounded.

30 16th September, Thursday.

35 5-5.30am: We were woken by aircraft flying across us at low  
height. Shelling explosion continued after that. In addition,  
there were distinct gunshot noises, rifle. Casualties poured into  
the hospital arriving mid-morning, the bulk of which were the  
result of high-velocity gunshot wounds. The casualties told us  
that the gunmen had gone into the homes of the people of Sabra  
and Shatilla camps and started shooting them in their homes.  
It was evident from their injuries that they were shot at close  
range. We were told by the casualties that these gunmen were  
not Israelis but Lebanese with a Baalbek accent. The surgical  
team then ...

**Prosecutor Gurdial Singh Nijar:**  
What is a Baalbek accent?

1

**Dr. Ang Swee Chai:**

Baalbek is a region in Lebanon which is near the Beqaa Valley.  
It is also close to the Christian villages. So Baalbek is a region,  
it can either be Shia or it can be Christian.

5

**Prosecutor Gurdial Singh Nijar:**

Yes. Proceed.

10

**Dr. Ang Swee Chai:**

The surgical team then comprising 2 surgeons, 2 anaesthetists  
and 5 residents worked non-stop. An estimate of 30 very  
seriously wounded were brought in and died while still  
receiving individual treatment. About 25 to 30 patients were  
in good enough condition to be operated on. About 80 to 100  
wounded were treated in a casualty ward. Another 30 or so  
patients were transferred out of Gaza Hospital to Makassad  
Hospital which is half a kilometer away as the workload  
became unmanageable.

15

20

Meanwhile, I could not hear the shootings and shelling  
continuing outside because the operating theatre is in the  
basement. By nightfall we estimated 2,000 refugees and more  
had flocked into the hospital hoping to seek refuge, sleeping  
all over the hospital staircase and floor. The in-patient number  
had increased from about 45 to 82 by the early morning hours.  
About 8 were critically ill.

25

Throughout the night, the camps were lit by Israeli military  
flares. This is by admission of the Israeli themselves so that  
they fired flares to light up the camps so that they thought the  
Kataebs, which is a Christian militia, would arrest terrorists.  
And the shootings continued.

30

17 September, Friday.

People wounded by gunshot continued to be brought in.

41

10am: The hospital administrator left the hospital in attempt to  
make contact with the International Red Cross, ICRC, asking

1 for more medical workers and relief for the refugees and get  
the foreign medical workers registered, as well as to try to ask the IRC, International Red Cross, to make contact with  
5 the Israeli Defence Force to protect the foreign medical staff and to control those carrying out the shooting now rampant in the refugee camp.

10 She returned about midday and told the foreign medical workers that something very terrible was about to happen. She then proceeded to instruct the refugees already present in the hospital - that's the 2,000 I was talking about - that the hospital was no longer a safe area, and that at any time the Phalangists, Kateab, or even worse, the Haddads, which is the South Lebanese Army - South Lebanese Army were under direct Israeli control (as admitted by Israel, the South Lebanese Army were on their payroll) - might move in.

15 The 2,000 or so refugees evacuated rapidly. She then proceeded to instruct the remaining handful of Palestinian personnel, 20 residents, some nurses, technician, et cetera to leave while there was still time.

25 4.30pm: She came to the foreign medical team and told them that she too had to leave and that although she was officially Lebanese she was in personal danger as the hospital was infiltrated. The International Red Cross then arrived and brought some food and first aid equipment. They left with six very ill children and the hospital administrator and promised to return the following day.

30 The hospital quietened down that night although shootings were still taking place outside in the camps. Patients were now beginning to take their own discharge - some carried out by their own families. We continued to operate through the 35 night. The last person I operated on was an 11-year-old boy shot with 27 members of his family. All 27 died but he survived to be brought to the hospital for treatment. As the bodies fell on him he lay quietly and heard the women being raped and pleading to be spared.

40 18 September, Saturday

6.45am: An American nurse spotted some soldiers outside Gaza Hospital and a doctor was sent down to negotiate the situation. I was on the first floor of the hospital and saw the soldiers and we agreed to send the American to talk to them thinking that if the soldiers were Israeli they would be more respectful to an American male nurse than a small Chinese woman like me.

The soldiers identified themselves as Lebanese Forces and their officers requested that all foreign medical personnel be assembled to be taken away for interrogation. A nurse and a medical student were left behind to look after the intensive care. The rest of the team was soon passed on to other troops who escorted them down Rue Sabra, also called Shatilla Street, the main road of the camps, to the courtyard of the UNICEF building, about 10 minutes walk, to be interrogated.

On both sides of Rue Sabra, the road down which the twenty of us were forcefully marched down at machine gun point by the soldiers, groups of women and children were rounded up by soldiers not wearing Lebanese uniforms, but just green military clothes with green baseball type caps. Some of these soldiers did not look Lebanese, as there were African looking ones, as well as those with blond hair, which led me to suspect they were mercenaries for the Israelis, in retrospect. We estimated that there might well be 800-1,000 women and children rounded up along Rue Sabra.

Large bulldozers were seen to be at work tearing down partly shelled buildings and burying bodies from within these buildings into the rubble.

A woman tried to pass her baby into a foreign doctor's arm - that's me, actually, she was trying to give it to me - but was forced to take the baby back by soldiers.

We were held in the courtyard of the UNICEF building where our papers were checked and questioned regarding our political affiliations. Most of the soldiers identified themselves as Christians.

We were held in the courtyard for more than an hour and it was

1       about 9.15 to 9.30 am when we were taken out of the courtyard  
to the Israeli headquarters on a road parallel to Rue Sabra.

**Prosecutor Gurdial Singh Nijar:**

5       Can I just stop you there. Israeli headquarters - where was this?

**Dr. Ang Swee Chai:**

It's the Kuwaiti Embassy.

10      **Prosecutor Gurdial Singh Nijar:**

Ok, thank you.

**Dr. Ang Swee Chai:**

15      (The Israelis had taken over the Kuwaiti Embassy, a five-storey building and used it as their forward command post.) I put this in brackets. It was on high ground and overlooked the camps. After the Israelis left, some of the American nurses and I walked to the abandoned Kuwaiti Embassy and verified that we could see much of the camps especially from the higher floors without binoculars.

20      One of the nurses looked towards the direction of the Kuwaiti Embassy from the sixth floor of Gaza Hospital on 16 September 1982 and was shot looking out of the window. We had to operate on him.

25      When Gaza Hospital re-opened after the massacre I went up to the spot where he said he was standing and shot, and I could see the Kuwaiti Embassy, which means that a soldier from inside the Embassy can see us.

30      When we were under detention we saw Israeli soldiers looking into the camps with binoculars. I have not measured the distance from Gaza Hospital at the edge of the camps to the Kuwaiti Embassy at the other end, but it is probably one kilometre - within sniper range.

Now produce exhibit, or not?

40      **Prosecutor Gurdial Singh Nijar:**

Yes.

**Dr. Ang Swee Chai:**

This is the exhibit from Sean MacBride. It's the map and it shows Gaza Hospital and the Kuwaiti Embassy. Sabra and Shatilla is extremely tiny.

Prosecutor Gurdial Singh Nijar:

You can proceed to read, "which shows ..."

**Dr. Ang Swee Chai:**

... which shows the layout of the camp and the surrounding landmarks, including the Kuwaiti Embassy, the Israeli command post, and the Gaza Hospital. Sabra and Shatilla camps were less than one square mile in area. In the presence of an Israeli film crew, we were given assurances that everything would be done to keep our patients safe and to help get us out.

Food and water were given. Two male doctors and one male nurse were allowed to go back to Gaza Hospital to help out but the rest of our team was taken by two Israeli jeeps to the American Embassy and dropped there.

When more of us wanted to go back to Gaza Hospital, the Israeli officers warned us that it was highly unsafe, and hence only three were escorted back to Gaza. (The doctors were issued a Hebrew pass).

7.30-8am: The nurse who was left in Gaza Hospital told the rest of the medical team when we met up in West Beirut, that half an hour after the bulk of us left, continuous machine gun firing lasting 20 minutes to half an hour was heard, accompanied by screaming of women and children. After that everything quietened down.

9.30 am: A BBC correspondent who arrived at that time said to Dr Pier - who is my colleague from Norway - and me later that day that heaps of dead bodies piled on top of each other - in groups of ten or more - lined Rue Sabra. Many of the dead were women and young children.

10 am: A Canadian film crew filmed Rue Sabra around 10am with numerous dead bodies piled on top of each other on either side of the road. When we were shown the video in the press

1 room of Commodore Hotel in West Beirut, we could identify some of them as the people who were rounded up by the troops on either side of Rue Sabra which we passed at 10am.

5 Later, pressmen who arrived on the scene saw bulldozers at work tearing down buildings and burying bodies in the rubble. They told this to the media but said they were not allowed to film it. The patients and doctors, nurses (foreign) were evacuated by the IRC later on.

10 19 September, Sunday

15 Members of the medical team were able to return to Sabra and Shatilla camps in the morning. They could see dead bodies everywhere: whole families obviously shot together, and in one particular instance, there was the body of a man (presumably the father) lying on top in a posture that suggested he was trying to use himself to shield his wife and children from being shot and killed.

20 25 The total number of dead people as enumerated by the IRC at that point in time was 1,500.

We tried to return to Sabra and Shatilla camps in the afternoon but found the whole camp sealed off by Lebanese tanks and troops. We also witnessed 10-15 Israeli tanks driving away from the scene.

30 35 20 September, Monday

Dr Pier [Miehlumshagen] and some Norwegian doctors had tried to leave West Beirut; by evening we still had no information as to whether they had successfully left the country.

On discussion with members of the foreign medical team, further information became obvious.

40 On the evening of 17 September, after the departure of the Palestinian hospital staff and the hospital administrator, a group of young men, not previously known to the hospital workers, entered Gaza Hospital. They were well-dressed and not distressed. They conducted conversation with the foreign

medical staff first in Arabic but having been unable to get across in Arabic switched to German. They asked for the whereabouts of the children "*whose throats were to be slit by the Kataeb in the morning*". The type of German spoken was Klar Deutsche as testified by the German medical workers later on.

A little child well known to some of the foreign medical team who was last seen alive between 10am and 11am in the hospital on the morning of Friday 17 September was found dead in the stadium (which is located on the edge of the camps) with other children.

I took a photograph of the thoroughfare which the tanks drove towards the camps. This road was pointed out to me by the inhabitants of the camps next to the stadium. During the foreign medical workers' detention in the Israeli headquarters on 18 September 1982 (Saturday) it was made very clear to us by an Israeli General that the stadium was under Israeli protection and that they had set up some clinic there.

This little child was killed after 10-11am on 17 September 1982 (Friday) in a place supposedly under Israeli protection. It might be possible to determine when the body was first found which would be important as according to Israeli sources the Phalange left before dawn on Friday.

From the Israeli headquarters in the Kuwait Embassy most of the area of the massacre in the Sabra and Shatilla camps can be clearly seen. The Kuwaiti Embassy was built on raised grounds and 5-storeys high, as stated earlier. Some of us had actually gone back later on to verify that the camps could be seen.

Pressmen were allowed to enter freely (after the foreign medical team were taken out on 18 September 1982) into the scene of the massacre to document the events - the roads to the Sabra-Shatilla camps being entirely in the control of the Israelis. The entrances and exits of the camps were guarded by Israeli soldiers and their tanks.

When my three medical colleagues went back into the camps they were escorted by Israelis and given a Hebrew pass. Palestinian survivors told us they could not escape during

1 the massacre as the Israelis had sealed off the camps. When  
the Norwegian Ambassador came in to try to evacuate  
the Norwegian medics, he told us he had to get the Israeli  
authorities to agree.

5 There were many attempts to give the foreign medical workers  
the impression that the Israelis had actually tried to save us  
foreign medical workers from the "Haddads". There were at  
10 least 3 particular instances where they were obviously talking  
to the "Haddads" in English to let us hear that they (Israelis)  
were negotiating for our safety.

15 The impression created to us was that the soldiers rounding  
up the camps that day were Haddads, with the presence of  
some Kataeb. There is much doubt that these soldiers were  
what they appeared to be.

20 As we the foreign medical team are now releasing evidence  
pointing towards Israeli awareness of the massacre of the  
inhabitants of Sabra and Shatilla camps, we feel in an extremely  
vulnerable situation - of course, this was written in 1982.

25 The above facts could be verified by the testimony of the  
entire foreign medical team, but at this juncture, this is my  
preliminary statement

22 September 1982

30 These are the relevant facts recorded to this stage. The death  
toll as enumerated by the Lebanese Red Cross is 2,400 on 22  
September 1982.

35 I have read recent declassified release from the British National  
Archives which put the death toll of the massacre at 3,500 - this  
was in Summer 2013.

40 When the Israelis surrounded and invaded Akka Hospital  
on Friday, 15 September 1982, they killed patients, nurses  
and medical doctors. This was told to me by the doctors and  
nurses of Akka Hospital who managed to escape the massacre  
in Akka Hospital. Among the doctors killed were Dr Sami and  
Dr Othman. Dr. Othman was the brother of the President of  
the PRCS in Lebanon, who is still residing in Beirut.

Many of the Palestinians who escaped the massacre were arrested and disappeared. In fact the number "disappeared" was said to be double or triple of those killed.

Since 1982, the Palestinian population in Lebanon remained static. According to some sources, such as the United Nations, the Palestinian population in 1982 was 350,000 and in 2012 it was 250,000. So it had in fact decreased over the past 31 years as compared to the rest of the Diaspora Palestinian population in the Middle East which actually more than doubled. That is because the means of subsistence for the Palestinians in Lebanon were very much destroyed and never rebuilt since 1982.

In retrospect the events of 1982 were clearly responsible for the destruction of the Palestinians in Lebanon. It destroyed homes and the infrastructures for community survival and cohesion. Able-bodied men were forced to evacuate leaving their family to the mercy of international protection. Three weeks after the Palestinian fighters left through the evacuation, the defenseless civilians were murdered in a massacre said to be conducted by "Lebanese". Even after Israel withdrew, there is still fear, since the "Lebanese" are still there and can return anytime to kill again.

The following paragraphs clarify the situation as seen through my eyes and reliable sources which I verily believe.

The 10 weeks of intense bombing of Lebanon and Beirut from 6 June to mid-August 1982 destroyed homes, schools, factories, hospitals.

I arrived at the tail end of the bombing, and Beirut was still under siege with no water and electricity.

The PLO evacuated in exchange for a ceasefire. The evacuation resulted in the deportation of 14,000 employees of the PLO. Some of them were fighters, but many of the evacuees were simply civil servants, journalists, health personnel, teachers and lecturers as the PLO was the single largest employer of the Palestinians in Lebanon at that time.

With the evacuation, 14,000 families were broken up. They lost their main breadwinners. The families were not only physically destroyed through their homes being bombed and their members killed and wounded, they were also split up through the evacuation - fathers to Tunis, sons to Algeria, Libya, Iraq and wife and children and elderly parents left in Lebanon defenseless.

The Multinational peacekeeping force was supposed to protect the civilians left behind but abruptly withdrew. The Israeli land invasion thus advanced with no obstruction of any kind.

This culminated in the murder of 3,500 unsuspecting and defenseless people in Sabra and Shatilla camps. These were people who had lost their homes in 1948, survived other massacres like that of Tel-a-Zatar in the seventies, the invasion of June-August 1982 with all its atrocities, and were finally butchered because they dared to believe in the peace guarantee given by the Western powers.

I discovered what happened to the mother and child by Rue Sabra on the morning of Saturday 18 September 1982. The desperate mother gave me her baby despite my being under arrest. Perhaps she thought her child was safer with me. She was one of the numerous rounded up by militiamen on the roadside. At gun-point I was forced to return the child to the young mother.

Subsequently I returned, wanting to find out what happened to her and her baby and no one wanted to tell me. Last year I read in Bayan's book, *Sabra and Shatilla*, September 1982, published 2004, London: Pluto Press, that eye-witnesses told her after the baby was forced to be returned from the "Chinese doctor" and once the medical team was led away, the mother begged the gunmen to spare her child's life. Her words were "*please kill me and spare my child, God will take care of him*". They killed both. This portion was not in my original statement as I only found out after reading Bayan's book last year. Bayan al-Hout is a Lebanese intellectual and an established and well-respected historian.

I since learnt that following 1982, the Palestinians once again

returned to live in Sabra and Shatilla camps after the massacre.  
They rebuilt their broken homes, and children grew up. Gaza  
Hospital re-opened.

But unfortunately the camps were again attacked during  
the camp war of 1985-1988 which killed more and destroyed  
whatever the Palestinians managed to rebuilt.

In early 2000 the Lebanese Parliament passed a law prohibiting  
Palestinians from pursuing 72 professions and inheriting  
properties, thus condemning the younger generation to be  
manual labourers forever. The Palestine Research Centre in  
Beirut which housed the archives of Palestine was looted by  
the IDF - that was in 1982 - and everything taken away and  
then the building was bombed. This implies the intent to erase  
the collective memory of the Palestinian people.

Through my 31 years working with the Palestinians in different  
parts of the Middle East, the fate of those in Lebanon was the  
worst. Palestinians in Lebanon have lost everything, and are  
now battling to retain their last bit of human dignity.

In 1982, I worked in an impressive Palestinian hospital - Gaza  
Hospital. It was an eleven-floor tertiary hospital carrying out  
complex operations and teaching young doctors and nurses. It  
was attacked, burnt, re-opened and finally from 1985 onwards  
closed for good.

After the civil war, the homeless Palestinians from Sabra and  
Shatilla camps were able to seek shelter and "squat" in the  
hospital. From an impressive Arab Institute, it now is a multi-  
storey vertical dilapidated building with many homeless  
families living in it - a sorrowful vertical refugee camp.

When the Palestinians came to Lebanon as refugees in 1948,  
they managed to destroy their tents and built in their place,  
towns with schools, hospitals, and factories and in exile recover  
their identity as a people.

They built fine hospitals and called them Gaza, Haifa,  
Ramallah, Akka after places in their homeland. Now all that  
is left of the Gaza Hospital is a broken building sheltering her

1 people whose dreams have died, and whose memories are of destruction, death, pain and humiliation; and whose future is one of despair and hopelessness.

5 **Prosecutor Gurdial Singh Nijar:**

I just want to clarify one part, page 5. Paragraph 22, line 2, you say, *"I slept in Hamra on the night of 14 September but was woken up by planes flying low, breaking the sound barrier, at 5 to 5.30 am on 15 September 2013."*

10 **Dr. Ang Swee Chai:**  
Oh, 1982.

15 **Prosecutor Gurdial Singh Nijar:**

Can that be corrected? It's an obvious typo error.

With that, I ask the witness, with your kind permission and direction, to sign the statement that she has just read, in accordance with our established practice in previous Tribunal hearings.

20 Can you sign the statement at page 14?

I offer the witness for cross-examination.

25 **Amicus Curiae Larissa Cadd:**

Dr. Ang, at paragraph 35, you said that Palestinians came to Lebanon as refugees in 1948. It wasn't long after that that Palestinians started to band together and tried to regain their homeland.

30 **Dr. Ang Swee Chai:**  
No.

35 **Amicus Curiae Larissa Cadd:**

It didn't take long for them to want to do that and establish the PLO?

40 **Dr. Ang Swee Chai:**  
No. It was much much later.

*Amicus Curiae Larissa Cadd:*

When was that?

1

**Dr. Ang Swee Chai:**

I will probably get the dates wrong.

5

*Amicus Curiae Larissa Cadd:*

Approximately?

**Dr. Ang Swee Chai:**

Maybe in the late 70s.

10

*Amicus Curiae Larissa Cadd:*

The late 70s?

15

**Dr. Ang Swee Chai:**

Yes.

*Amicus Curiae Larissa Cadd:*

And so the PLO have a Charter, don't they?

20

**Dr. Ang Swee Chai:**

I have not read the Charter. I don't know what it says.

*Amicus Curiae Larissa Cadd:*

If I were to say to you that the PLO's Charter....

25

**Judge Lamin Yunus (President):**

Could you please refer to particular pages of her evidence?

30

*Amicus Curiae Larissa Cadd:*

It is the last page at paragraph 35, page 14. There was a very short reference to Palestinians coming to Lebanon as refugees in 1948.

35

**Judge Lamin Yunus (President):**

Alright.

*Amicus Curiae Larissa Cadd:*

Would it surprise you if I said to you that Article 9 of the Palestinian Liberation Organization's Charter say that "*armed struggle is the only way to liberate Palestine*".

40

1   **Dr. Ang Swee Chai:**

When did they say that?

*Amicus Curiae Larissa Cadd:*

5       It is in the Palestinian charter. The PLO Charter.

**Dr. Ang Swee Chai:**

I have not read the charter.

10      *Amicus Curiae Larissa Cadd:*

I said, *would it surprise you ...*

**Dr. Ang Swee Chai:**

I would.

15

*Amicus Curiae Larissa Cadd:*

... if it said armed struggle is the only way to liberate Palestine.

**Dr. Ang Swee Chai:**

20       In the modern day context, I would be surprised because they are thick in a peace negotiation.

*Amicus Curiae Larissa Cadd:*

25       But when the Charter was established in approximately, let's say the 70s, would it surprise you that it said "*armed struggle is the only way to liberate Palestine*"?

**Dr. Ang Swee Chai:**

30       Can I say to you at that time, I was supporting Israel.

35

*Amicus Curiae Larissa Cadd:*

That's not the question. The question is: would it surprise you if that was contained, that statement, was contained in the Charter?

35

**Dr. Ang Swee Chai:**

If you show me the Charter, then I will read it.

*Amicus Curiae Larissa Cadd:*

40       May the Secretariat bring out Bundle No. 5 of the Defence Bundles, at page 159, please. I apologize for the delay in getting the bundle to the judges.

Judge Lamin Yunus (President):

You could have gotten it ready earlier.

1

Amicus Curiae Jason Kay:

5

These bundles were specific for the defence case, if defence was called. We found it necessary to use it to address this witness during cross-examination.

Amicus Curiae Larissa Cadd:

10

At page 159. If we look at page 158 that is the beginning of the charter.

Judge John Philpot:

I think there is a problem with the bundle.

15

Amicus Curiae Larissa Cadd:

I believe that you have been given the wrong bundle. Your Honours, perhaps if we could have a short adjournment it might be quicker. That is the incorrect bundle, Your Honour.

20

Judge Salleh Buang:

Can't you skip that part?

Amicus Curiae Larissa Cadd:

25

Unfortunately it is important to the direction that I am going. Perhaps, a 5-minute adjournment?

Judge Lamin Yunus (President):

Alright, adjourn for 10 minutes.

30

Registrar Musa Ismail:

All rise.

[10.50am]

35

\*\*\*\*\*

40

1    **Registrar Musa Ismail:**

All rise.

*Amicus Curiae Larissa Cadd:*

5    I understand that Your Honours have the correct bundle, as well as Dr Ang?

**Dr. Ang Swee Chai:**

Yes.

10

*Amicus Curiae Larissa Cadd:*

You will see in 158, the Palestinian National Charter - Resolutions of the Palestine National Council July 1-17, 1968. If you could refer to Article 9 at page 159. If your can see the first sentence there, do you concede that it states that, "*Armed struggle is the only way to liberate Palestine.*" Does that surprise you?

**Dr. Ang Swee Chai:**

10    I am not aware of the Charter, but if what is said there then it is said there. That is what they say. It is not what I say.

*Amicus Curiae Larissa Cadd:*

5    Yes, but you have given a lot of evidence of people who told you things ...

**Dr. Ang Swee Chai:**

They have not told me this.

0    *Amicus Curiae Larissa Cadd:*

Ah, interesting ...

**Dr. Ang Swee Chai:**

5    And the interesting thing is that after my arrival, the PLO had left.

*Amicus Curiae Larissa Cadd:*

I'll get to that.

0    You will see further down, at Article 10, "*Commando action constitutes the nucleus of the Palestinian popular liberation war.*" The first sentence of Article 10.

**Dr. Ang Swee Chai:**

May I ask a question?

1

**Judge Lamin Yunus (President):**

Yes. What is it?

5

**Dr. Ang Swee Chai:**

Which year was this Charter published?

10

**Amicus Curiae Larissa Cadd:**

It says 1968.

**Dr. Ang Swee Chai:**

So, has that Charter altered, or is it still the same?

1

**Amicus Curiae Larissa Cadd:**

As I am aware, it has not been altered.

So it's quite clear that the Palestinian Liberation Organization  
has, at various times, has orchestrated a campaign against  
Israel to regain its homeland.

2

**Dr. Ang Swee Chai:**

I won't be surprised. I think if you're asking me whether I  
am surprised that they did that - the truth is, if I were in their  
position, I might do the same thing.

2

**Amicus Curiae Larissa Cadd:**

That wasn't the question.

3

**Dr. Ang Swee Chai:**

You asked me whether I'm surprised?

4

**Amicus Curiae Larissa Cadd:**

Yes

5

**Dr. Ang Swee Chai:**

My answer is: Given what they've suffered, if from time to time  
they felt that they want to do something, I'm not surprised -  
although I personally do not condone it.

4

1      **Amicus Curiae Larissa Cadd:**

But you're aware that the PLO operated a campaign which included war and attacks on the State of Israel.

5      **Dr. Ang Swee Chai:**

Ever since my involvement with the Palestinian people, I am not aware of that. Maybe before 1982, it could be the case.

**Amicus Curiae Larissa Cadd:**

10     You were aware that the Palestinian Liberation Organization included people who were fighters for that purpose?

**Dr. Ang Swee Chai:**

Yes I do.

15

**Amicus Curiae Larissa Cadd:**

And you were aware they are going from Sabra Shatilla into Israel?

20     **Dr. Ang Swee Chai:**

I've not met any or ...

**Amicus Curiae Larissa Cadd:**

25     That's not the question. You were aware that people from PLO who were fighters were going from Sabra Shatilla into Israel?

**Dr. Ang Swee Chai:**

No.

30     **Amicus Curiae Larissa Cadd:**

You are aware now?

**Dr. Ang Swee Chai:**

If I believe you, yes.

35

**Amicus Curiae Larissa Cadd:**

You are aware that the reason why the Israelis went into the Lebanon was because fighters from the PLO were entering Israel from the Lebanon to carry out attacks.

40

**Dr. Ang Swee Chai:**

No. That was what they said, and...

**Amicus Curiae Larissa Cadd:**

You were aware that that is what they said? 1

**Dr. Ang Swee Chai:**

Yes, because up to 1982 I believed what they said. 5

**Amicus Curiae Larissa Cadd:**

Would it surprise you if the international community knew  
of those attacks? 10

**Dr. Ang Swee Chai:**

Hearsay evidence, yes.

**Amicus Curiae Larissa Cadd:**

But you've given a lot of hearsay evidence today, so why is 15  
that not good enough?

**Dr. Ang Swee Chai:**

My hearsay evidence is from directly being in touch with  
the Palestinian refugees. But the hearsay evidence that the  
international community referred to is from the press - because  
they also called me a terrorist, because I support the Palestinian  
people, so I am not a terrorist. 20

**Amicus Curiae Larissa Cadd:**

I wasn't suggesting that Dr. Ang. 25

**Dr. Ang Swee Chai:**

There's hearsay evidence and there is *hearsay* evidence. There  
are hearsay evidence which because you meet people and find  
out from them. In fact, I was ... 30

**Amicus Curiae Larissa Cadd:**

But you cannot be sure that everything they have told you is  
accurate. 35

**Dr. Ang Swee Chai:**

I can be sure of one thing ...

**Amicus Curiae Larissa Cadd:**

Can you please answer my question. You cannot be sure that  
everything they have told you is accurate. 40

1      **Dr. Ang Swee Chai:**

I can be sure - 90% sure.

*Amicus Curiae Larissa Cadd:*

5      So these people are telling you stories after being in a very extreme situations, aren't they?

**Dr. Ang Swee Chai:**

They are still in extreme situations.

10

*Amicus Curiae Larissa Cadd:*

At that time, they are referring to the massacre that they say occurred - they are telling you stories that are extreme and have just occurred, aren't they?

15

**Dr. Ang Swee Chai:**

I will answer your question this way,...

*Amicus Curiae Larissa Cadd:*

20

Yes or no?

**Dr. Ang Swee Chai:**

It cannot be a yes or no.

25

*Amicus Curiae Larissa Cadd:*

Well I am entitled to have a yes or no question - answer to my question.

**Judge John Philpot:**

30

Counsel, please don't interrupt the witness.

**Dr. Ang Swee Chai:**

When I first met them, they told me they were refugees. They told me about losing their homes. I still reserved my doubts there. But after the massacre, when I saw how they died, I know it was not a lie because in their death they have proved that what they said is true - because I actually thought that after the evacuation of the PLO, which to my mind at that time were bad people, that they should be given a chance. It's only when they died then I realized that they have been the victims of injustice. On every dead body on the streets of Sabra and Shatilla, there will be a Palestinian refugee identity card saying

35

40

that they come from Haifa, from Jaffa, from Galilee, from Northern Palestine, and those identity card do not tell a lie.

1

**Amicus Curiae Larissa Cadd:**

That is not a response to the question, Your Honour. It has gone well beyond the question that was asked.

5

**Dr. Ang Swee Chai:**

I've answered your question.

10

**Amicus Curiae Larissa Cadd:**

If people are in shock, it is the case that sometimes their recollections are not as clear as they would be in a normal situation?

15

**Dr. Ang Swee Chai:**

Probably.

**Amicus Curiae Larissa Cadd:**

And sometimes their memories will be fragmented?

20

**Dr. Ang Swee Chai:**

Sometimes, if they're deranged. I'm a doctor. I know well.

**Amicus Curiae Larissa Cadd:**

25

And sometimes those fragmented memories are then later, through the conversation with others, pieced together to make a story which may not be entirely accurate?

**Dr. Ang Swee Chai:**

30

I'm sorry. Before I answer that question, I'm going to ask you whether the whole of the Palestinian people are suffering from mass hysteria?

**Amicus Curiae Larissa Cadd:**

35

I am not here to be questioned by the witness, Your Honours.

**Dr. Ang Swee Chai:**

40

Then I cannot answer your question, Your Honour, because this is not the kind of question I can answer. First of all, I don't feel that I need to defend the PLO Charter or condemn it. Secondly, the Palestinians people have got a voice and it's unfortunate

1 that I got to speak on their behalf. I'm a non-Palestinian. I can only tell you what I discover myself.

Amicus Curiae Larissa Cadd:

5 This is the reason why I would like the witness to be responsive to the questions that I ask rather than giving her own particular take on things. I will confine my questions and I hope that Your Honour will respect the answers being given as unresponsive.

10 Again, it is possible, isn't it, that when people have fragmented memories as a result of extreme circumstances, and when they are in the place of talking to other people who have experienced those same memories or same experiences, sometimes they reconstruct those memories. I'm not say the Palestinian people - generally.

15 Dr. Ang Swee Chai:

As a medical doctor, that sometimes happen.

20 Amicus Curiae Larissa Cadd:

So when that happens, a person cannot be entirely sure of what the person is telling them as being accurate?

Dr. Ang Swee Chai:

25 But there are objective evidence that you can rely on, for instance, the keys to their houses, the identity cards, ...

Amicus Curiae Larissa Cadd:

That is beyond the question, Your Honour. Again, I would ask that that be struck.

Prosecutor Gurdial Singh Nijar:

30 I object to the interruption of the witness. The question asked is: whether that can happen or not - that people will lose their memories being in a state of shock not be able to ... . The witness is saying in this situation that's not possible because there was objective evidence, "*they showed me the keys to their houses in Palestine that they left long ago,*" and so on. She should be allowed to clarify. The truth must be out.

40 Amicus Curiae Larissa Cadd:

There is a misconception that my questions at the moment

relate to the Palestinian people. At the moment, my questions are couched in the general. They will soon get to the Palestinian question. But at the moment, I have not asked a question about Palestinian memories - Palestinian reconstruction of memories. So I would expect the answer that I am being given to be responsive to those questions in the general sense.

I request Your Honours' ruling on this.

**Judge Salleh Buang:**

I think the problem is because your first question to the witness was her response to a particular provision in this Charter of 1968. And then from this specific question you moved on to a hypothetical situation asking her view as a medical professional when there is this condition of trauma - and I understand that - and perhaps in her thought she was being asked to respond to that kind of medical situation affecting the Palestinians there. So I can understand her and I hope - we have, I think understood the questions on this point; could you please move on to another point? Thank you.

**Amicus Curiae Larissa Cadd:**

You were aware that after Israel invaded the Lebanon, there was an agreement that was reached where the PLO would leave Sabra and Shatilla.

**Dr. Ang Swee Chai:**

Yes, of course.

**Amicus Curiae Larissa Cadd:**

And the agreement was that the Palestinian Liberation fighters would leave Sabra and Shatilla?

**Dr. Ang Swee Chai:**

Yes.

**Amicus Curiae Larissa Cadd:**

And they were leaving because, in fact, they had been carrying out attacks against Israelis as part of their obligations under the Charter?

W6: No I am not aware. I think I would like to clarify to Your

1 Honours that it's very difficult for Palestinians living in a refugee to travel all the way down south and then to launch into Israel. It's almost impossible.

5 **Amicus Curiae Larissa Cadd:**  
Today?

Dr. Ang Swee Chai:  
Yeah, probably.

10 **Amicus Curiae Larissa Cadd:**  
1982?

15 W6: Yeah, I suppose if Israel welcomed them to go in and do military operation, then that's a different story. But I don't think Israel welcomed them.

20 **Amicus Curiae Larissa Cadd:**  
But if they were going out to carry out an attack, they wouldn't exactly be turning up and say, "*Please let me in,*" would they?

Dr. Ang Swee Chai:  
No, of course they won't.

25 **Amicus Curiae Larissa Cadd:**  
That would be entering surreptitiously, wouldn't they?

30 **Dr. Ang Swee Chai:**  
I don't know. I've not been on such a mission and I don't like to hypothesize.

35 **Amicus Curiae Larissa Cadd:**  
If I can turn to the time of about 15 September onwards - I am looking at that period just before and during the massacre.  
You had woken up at 4 o'clock in the morning to the come to the hospital to be prepared.

40 **Dr. Ang Swee Chai:**  
5.30.

**Amicus Curiae Larissa Cadd:**  
What time did you arrive at the hospital?

**Dr. Ang Swee Chai:**

Probably about 6 or maybe 7.

1

**Amicus Curiae Larissa Cadd:**

And the first thing that was done when you arrived there was  
that the elective surgery had been cancelled for that day?

5

**Dr. Ang Swee Chai:**

Absolutely.

10

**Amicus Curiae Larissa Cadd:**

That was in the expectation that something was going to  
happen?

**Dr. Ang Swee Chai:**

Because we hear air-raids. Because we know that Israel is in the  
habit of bombing. They have just ceased bombing a few weeks  
ago; they might just start bombing again and the casualties will  
come in, and we want to be able to treat the casualties. In fact  
... that is no different from what we do in London: whenever  
we expect something to be wrong, we ask the elective patients  
to go home, clear the beds so that we can receive casualties.  
It is universal.

15

20

**Amicus Curiae Larissa Cadd:**

And in fact not long after that, you had to begin operating on  
people who were entering the hospital who were emergency  
cases?

25

**Dr. Ang Swee Chai:**

On the 15th of September, the casualty load was light. On the  
16th of September, the casualty load heavy, and from then on  
it was very very heavy.

30

**Amicus Curiae Larissa Cadd:**

And you spent a very large number of hours continuously  
operating on people who were entering the hospital?

35

**Dr. Ang Swee Chai:**

Yes. Something like that. Not only me, but my team.

40

1      ***Amicus Curiae Larissa Cadd:***

And you didn't have a break during that period. It was just one person after another, wasn't it?

5      **Dr. Ang Swee Chai:**

Yes. But as a surgeon I am well trained for that.

***Amicus Curiae Larissa Cadd:***

10     I'm not criticizing that. I am sure that you're an excellent surgeon Dr. Ang.

So for some 2 to 3 days, you operated non-stop in very difficult conditions?

15     **Dr. Ang Swee Chai:**

Yes. And fearing for my patients too.

***Amicus Curiae Larissa Cadd:***

And you didn't have a break?

20

**Dr. Ang Swee Chai:**

Probably not.

***Amicus Curiae Larissa Cadd:***

25     And you didn't leave the hospital operating theatre because it was so intense?

**Dr. Ang Swee Chai:**

Yes.

30

***Amicus Curiae Larissa Cadd:***

And, in fact - so during that period, from the 15th to the 18th of [September] 1982, you didn't go outside the hospital, did you?

35     **Dr. Ang Swee Chai:**

Erm ... on the 15th I actually went by at the hospital door, but that was about all.

***Amicus Curiae Larissa Cadd:***

40     So you didn't leave the building?

**Dr. Ang Swee Chai:**

No.

1

**Amicus Curiae Larissa Cadd:**

So, you didn't see any of the events that happened?

5

**Dr. Ang Swee Chai:**

I only saw the people who were brought in and who were wounded. And as a doctor I know how they were wounded.

10

**Amicus Curiae Larissa Cadd:**

But you didn't see who shot any of these patients?

**Dr. Ang Swee Chai:**

No.

15

**Amicus Curiae Larissa Cadd:**

And you didn't see what was happening outside the hospital?

**Dr. Ang Swee Chai:**

No.

20

**Amicus Curiae Larissa Cadd:**

And you didn't see if there was a blockade?

25

**Dr. Ang Swee Chai:**

There was a blockade because when the hospital administrator went out and Norwegian ambassador came in and they couldn't get in and they couldn't get out. And we sent ambulances out to help the wounded and the ambulances never returned and we know they were destroyed as well.

30

**Amicus Curiae Larissa Cadd:**

But you didn't see the blockade?

35

**Dr. Ang Swee Chai:**

No. I did not see the blockage. But I knew there was a blockage.

**Amicus Curiae Larissa Cadd:**

But that was from secondary sources - not of your own knowledge.

40

1 Dr. Ang Swee Chai:

From people who tried to flee and they were turned back to be killed - yes, that was the secondary source.

5 Amicus Curiae Larissa Cadd:

You had a friend called Azziza during that period?

Dr. Ang Swee Chai:

That's right. She was the hospital administrator. I didn't put her name in my statement at that time because it was difficult and I don't want her to be subjected to personal harm. Years later of course when I wrote I put her name in.

Amicus Curiae Larissa Cadd:

5 So, the statement that you referred to just then was the statement you read out today?

Dr. Ang Swee Chai:

Oh no no, this whole statement most of it were my own.

0 Amicus Curiae Larissa Cadd:

When did you write that?

Dr. Ang Swee Chai:

5 Before the 22nd of September because it was published on the 22nd September 1982. And that's why it was strange because in 2013 - reading back - it is ... I tried not to alter anything except to put in paragraph, clarifying because now, in retrospect, there many things I understood which at the time I did not.

7 At that time, all I wanted to was put everything on paper, as far as I could recollect, the incidents. Because honestly, I just thought that I might die too and perhaps it is reasonable to record the truth so that if anything happens to me there will be a statement of how I perceived it, and how the Palestinians told me, and how they died.

1 You see, it is not a question of dying; but it's a question of letting the truth come out before we die. And that's why I wrote it. And that's why I telexed it out and had it published. I was still in Beirut then. It was dangerous to do that because it's drawing attention to everything especially myself. In fact,

that statement were compiled with the permission of all the medical team. Many of them refused to put their name to it. So I put my name to it. And Pier put his name to it. So there were only two signatories.

*Amicus Curiae Larissa Cadd:*

You mentioned that when you read this, your mistook some things at the time that you have reviewed now as being different. Can you give us an example of one of those things?

**Dr. Ang Swee Chai:**

Like for instance, the Kuwaiti embassy was 7 storeys and not 5.

*Amicus Curiae Larissa Cadd:*

So the only things that you mistook were technical issues?

**Dr. Ang Swee Chai:**

Yes.

*Amicus Curiae Larissa Cadd:*

Just to return to Azziza, because we were speaking about Azziza. At some stage she returned to the hospital after leaving. Do you recall that?

**Dr. Ang Swee Chai:**

Yes, I've returned to the hospital many times. In fact I went to work there after the massacre when they reopened.

*Amicus Curiae Larissa Cadd:*

I am talking about the 17 September 1982 now. At about midday, Azziza left the hospital, didn't she?

**Dr. Ang Swee Chai:**

Yes, she did.

*Amicus Curiae Larissa Cadd:*

I'm sorry, she returned at about midday.

**Dr. Ang Swee Chai:**

Yes, she did. She left at 10 and came back at midday.

1      ***Amicus Curiae Larissa Cadd:***

And she indicated to you that something terrible was going to happen at that stage?

5      **Dr. Ang Swee Chai:**

Yes, she did.

***Amicus Curiae Larissa Cadd:***

And it wasn't long after that she said that she had to leave?

10     **Dr. Ang Swee Chai:**

Yes.

***Amicus Curiae Larissa Cadd:***

15     Because she was in danger?

**Dr. Ang Swee Chai:**

Yes.

20     ***Amicus Curiae Larissa Cadd:***

And she indicated that the hospital might not be safe because at any moment Kataebs or Haddads might come?

**Dr. Ang Swee Chai:**

25     Yes, she did

***Amicus Curiae Larissa Cadd:***

And that might possibly include the Phalangist?

30     **Dr. Ang Swee Chai:**

The Kataebs are the Phalangist.

***Amicus Curiae Larissa Cadd:***

They just have a different name?

35     **Dr. Ang Swee Chai:**

Yeah. Arabic for Phalangist [is] Kataeb.

***Amicus Curiae Larissa Cadd:***

40     So many people were evacuated from the hospital at that point?

**Dr. Ang Swee Chai:**

Yes.

1

**Amicus Curiae Larissa Cadd:**

So it wasn't a great secret that something was about to happen?

5

**Dr. Ang Swee Chai:**

In fact, in retrospect it was already happening outside the hospital. That I was naïve and stupid is beside the point.

10

**Amicus Curiae Larissa Cadd:**

This is at 17th of September before 5pm.

**Dr. Ang Swee Chai:**

Exactly.

15

**Amicus Curiae Larissa Cadd:**

And you managed to get all of the people out of the hospital safely?

20

**Dr. Ang Swee Chai:**

No. They ran away because I think what Azziza was saying to them is that when gunmen or whatever it is come into the hospital, they will just shoot everybody out, as is the case of Akka Hospital.

25

**Amicus Curiae Larissa Cadd:**

But this is when Azziza has returned at midday before there's any firing at the hospital.

30

**Dr. Ang Swee Chai:**

Oh no no no no ... okay, maybe with your permission Your Honour I can explain the situation?

16th September was when we started receiving a lot of casualties - civilians shot at gun point. And we were working non-stop. And Azziza on the morning, the following morning, which was 17th, and remember everybody flocked into hospital because of the presence of foreigners thinking that at least, you know, they had some safety.

35

40

Azziza actually managed to arrange with the International Red

1 Cross to leave the hospital to get help like blood transfusion,  
medical supplies and food because 2,000 people were a lot to  
feed. And while she was out, she made contact through the  
5 ICRC and spoke to people who survived the massacre at Akka  
hospital. And she got information that the Israelis brought in  
certain gunmen to Akka Hospital and patients were killed,  
women were raped and doctors were killed.

10 And that's when she formed the conclusion that if these people  
came to Gaza Hospital, the patients would be killed, the nurses  
would be killed and the 2,000 refugees, in her own words,  
"were sitting ducks."

15 So she told them that they should leave while there's time and  
go and hide. And that's why they all fled leaving only those  
who cannot flee to stay in the hospital. That was when she  
came back at midday. She intended to stay to the bitter end  
but then she realised she could not.

20 I will tell you a little bit about Azziza since the subject is  
raised. Azziza is a Palestinian from Jerusalem, of the family  
of Khalidi, among whom are Ahmed Khalidi and Rashid  
Khalidi, two prominent Palestinian intellectuals. She grew up  
25 in Beirut and carried a Lebanese passport. Initially she was  
under the impression that because she had a Lebanese passport  
she would not be killed. She was under the impression that  
whoever were killing only wants to kill Palestinians. But then  
she was - she realised that because of her origins and working  
30 for the PLCS that her life was in danger because people will tell  
the gunmen that she's actually Palestinian. And that's why she  
made the decision to evacuate with IRC. And she took with her  
the 6 children who were critically ill, for which I'm grateful.

***Amicus Curiae Larissa Cadd:***

35 And they all safely escaped Sabra and Shatilla?

***Dr. Ang Swee Chai:***

With the International Red Cross and also with the Norwegian  
ambassador.

40

***Amicus Curiae Larissa Cadd:***

So they were able to get through ...

**Dr. Ang Swee Chai:**

By negotiation with the IDF

1

**Amicus Curiae Larissa Cadd:**

So the Israelis didn't keep them in there, did they?

5

**Dr. Ang Swee Chai:**

The Israelis at that point did not want to kill anybody which is from the diplomatic service or the International Red Cross.

10

**Amicus Curiae Larissa Cadd:**

Well, in fact, the Israelis didn't want to kill anybody.

**Dr. Ang Swee Chai:**

I'm not sure about that.

15

**Amicus Curiae Larissa Cadd:**

You don't know?

**Dr. Ang Swee Chai:**

I suspect they want to kill Palestinians.

20

**Amicus Curiae Larissa Cadd:**

But you don't know.

25

**Dr. Ang Swee Chai:**

Well, if we want to go into that, that would take 3 days.

**Amicus Curiae Larissa Cadd:**

You personally don't know what their intention was, do you? 30

**Dr. Ang Swee Chai:**

In retrospect or at that point?

**Amicus Curiae Larissa Cadd:**

Either.

35

**Dr. Ang Swee Chai:**

At that point I actually believed that the Israelis just wanted to clean up the camps from PLO. In retrospect, I thought I was wrong. 40

1   **Amicus Curiae Larissa Cadd:**

And that's because other people told you things, not because  
you actually know.

2   **Dr. Ang Swee Chai:**

The Palestinians told me, and I think they have a right to tell  
me, and I have a right to believe them.

3   **Amicus Curiae Larissa Cadd:**

4   I'm not suggesting you don't. But I'm saying you have come  
to this conclusion from what other people have told you.

5   **Dr. Ang Swee Chai:**

Let's put it this way: The Israelis had, in their power, to save  
the lives of certain people, and that includes mine.

6   **Amicus Curiae Larissa Cadd:**

I don't dispute that. I would like to answer the question.

7   **Dr. Ang Swee Chai:**

But they also had the power to allow other people to be killed.  
And that were the lives of many Palestinians and Lebanese,  
including women and children, including the little boy,  
including the baby and the people by the side of Route Sabra.

8   **Judge Lamin Yunus (President):**

Are all these material to go on Israel?

9   **Amicus Curiae Larissa Cadd:**

I won't take much longer. I have only a very short period.  
However, my friend did take considerable amount of time  
with the other witnesses which we, out of efficiency for the  
Court, chosen not to cross-examine. So I would like a little bit  
of leeway, if that is possible, Your Honour?

10   **Judge Lamin Yunus (President):**

I suggest if you don't have anything else to say, I suggest you  
go on, on other points; otherwise you stop there.

11   **Amicus Curiae Larissa Cadd:**

May it please the Court.

At the time, in 1982 when these events are occurring, you were fairly sure that it was actually not the Israelis who were causing the massacre, weren't you?

**Dr. Ang Swee Chai:**

No, I wasn't. I thought it was the Israelis.

***Amicus Curiae Larissa Cadd:***

But you also thought it was also the Kataebs and the Haddads

...

**Dr. Ang Swee Chai:**

All three of them.

***Amicus Curiae Larissa Cadd:***

And you thought it was people who spoke ... what's the dialect, starts with a "B"?

**Dr. Ang Swee Chai:**

Gunmen with a Baalbek accent.

***Amicus Curiae Larissa Cadd:***

Yes, with a Baalbek accent.

**Dr. Ang Swee Chai:**

They were Kataebs.

***Amicus Curiae Larissa Cadd:***

Yes. And you were fairly sure at the time that it wasn't the Israelis.

**Dr. Ang Swee Chai:**

No. I thought it was the Israelis as well.

***Amicus Curiae Larissa Cadd:***

Well ...

**Dr. Ang Swee Chai:**

The Israelis spoke Hebrew. The Kataebs speak Arabic.

***Amicus Curiae Larissa Cadd:***

In your book, Dr. Ang ...

1     **Dr. Ang Swee Chai:**

Of which I don't have a copy in front of me.

5     **Amicus Curiae Larissa Cadd:**

I'm more than happy for Dr. Ang to be provided a copy of her book.

10    **Judge John Philpot:**

Mr. Registrar, would you provide a copy to the Bench?

15    **Amicus Curiae Larissa Cadd:**

I'm referring to page 69.

20    **Judge Lamin Yunus (President):**

15    Page 69

25    **Amicus Curiae Larissa Cadd:**

Page 69 Your Honour. At the bottom of that page, it says,

20    *"Some of us wanted to work out exactly what we had witnessed. In our anger, it was easy to blame the Israelis for the deaths, but the truth was that the murderers had not been wearing Israeli uniforms."*

30    **Dr. Ang Swee Chai:**

25    That's correct.

35    **Amicus Curiae Larissa Cadd:**

And in fact the people who had been doing the shooting and the killing were not Israelis.

30    **Dr. Ang Swee Chai:**

Where did I say that?

35    **Amicus Curiae Larissa Cadd:**

I'm putting that to you.

40    **Dr. Ang Swee Chai:**

Oh, I didn't say that.

45    **Amicus Curiae Larissa Cadd:**

No. I'm putting it to you. They were not Israelis.

**Dr. Ang Swee Chai:**

Alright. I concede, if you want to press me - because I didn't see the Israelis shooting them. I wasn't in the houses when people were killed.

1

**Amicus Curiae Larissa Cadd:**

And you said, a bit further, higher on the same page 69,

*"... it was not obvious that the individuals who had walked into the camps to slaughter their defenceless people were Israelis."*

5  
10

**Dr. Ang Swee Chai:**

True.

**Amicus Curiae Larissa Cadd:**

And a little higher up again,

15

*"Who was responsible for all this? It mattered little to me who pulled the trigger."*

20

**Dr. Ang Swee Chai:**

Correct.

**Amicus Curiae Larissa Cadd:**

You didn't care as to the people who were doing it. You wanted to blame the Israelis.

25

**Dr. Ang Swee Chai:**

That's not true.

30

**Amicus Curiae Larissa Cadd:**

Well, why did you say it doesn't matter who pulled the trigger?

**Dr. Ang Swee Chai:**

If I want somebody killed, I can hire a gunman. I can seal the door so he cannot escape. I send the gunman in and shoot them. I think in any court, I will be guilty.

35

**Amicus Curiae Larissa Cadd:**

Do you think the people who pulled the trigger should be punished?

40

1      **Dr. Ang Swee Chai:**

Of course they should be punished.

*Amicus Curiae Larissa Cadd:*

5      So it does matter.

**Dr. Ang Swee Chai:**

It does matter. But then, both are responsible. In fact, the one who organised it is responsible more than the one who was hired to kill. Both are murderers. One is a big murderer, because they organise killing so many people; the others are small, maybe they kill five.

*Amicus Curiae Larissa Cadd:*

15     But you don't know that the Israelis organised it. You don't know that.

**Dr. Ang Swee Chai:**

20     This book was written in 1988. By that time, I know. At that time, 1988, I pieced - put things together. In 1982, of course I didn't.

*Amicus Curiae Larissa Cadd:*

25     You suspected. But you don't know it.

**Dr. Ang Swee Chai:**

30     It's up to the court to decide whether the Israelis are responsible or not. In the Kahan Commission, the Israelis were found to be indirectly responsible because they didn't pull the trigger. My point is: if someone organised it, the organisers should be directly responsible as well.

*Amicus Curiae Larissa Cadd:*

35     Do you think - assuming that this is a successful trial and outcome for the Palestinian people - do you think that the people who pulled the trigger should also be pursued?

**Dr. Ang Swee Chai:**

40     I would love them to be pursued, but it's beyond me.

*Amicus Curiae Larissa Cadd:*

And do you think that if you had the opportunity to find out who those people were you would take that?

**Dr. Ang Swee Chai:**

If I got the opportunity, I will.

1

**Amicus Curiae Larissa Cadd:**

Do you recall - I'm not sure exactly how long after these events -  
but do you recall treating a Baalbek man who had been injured.

5

**Dr. Ang Swee Chai:**

Yes I did.

10

**Amicus Curiae Larissa Cadd:**

And do you recall what your reaction was to that?

**Dr. Ang Swee Chai:**

Yes.

15

**Amicus Curiae Larissa Cadd:**

You shuddered at the very mention of "Baalbek", didn't you?

**Dr. Ang Swee Chai:**

Yes I did.

20

**Amicus Curiae Larissa Cadd:**

Your Honours, I'm referring to page 92 of Dr. Ang's book.

25

**Dr. Ang Swee Chai:**

Yes I did.

**Amicus Curiae Larissa Cadd:**

You may refer to the book if you wish.

30

**Dr. Ang Swee Chai:**

I don't think I called them Baalbek men.

**Amicus Curiae Larissa Cadd:**

"He said he was, and that he was from Baalbek" (page 91)

35

**Dr. Ang Swee Chai:**

Yes yes yes. Thank you for reminding me.

40

**Amicus Curiae Larissa Cadd:**

You said during the massacre the wounded had told you that

1       soldiers had broken into their homes were not Israelis but  
          gunmen with a Baalbek accent.

5       **Dr. Ang Swee Chai:**  
          Exactly.

*Amicus Curiae Larissa Cadd:*  
And you wondered whether it was the same person?

10      **Dr. Ang Swee Chai:**  
          True. Or the same lot of people because ...

*Amicus Curiae Larissa Cadd:*  
And you said a little bit later on, "It's time to get even."

15      **Dr. Ang Swee Chai:**  
          True.

20      **Amicus Curiae Larissa Cadd:**  
          And it was only when Azziza ...

**Dr. Ang Swee Chai:**  
Pleaded

25      **Amicus Curiae Larissa Cadd:**  
          Pleaded that you must treat all people, that you treated the  
          person.

30      **Dr. Ang Swee Chai:**  
          Yes. That's the humanity of the Palestinians.

35      **Amicus Curiae Larissa Cadd:**  
          And you were so sure that it was a Baalbek person, not an  
          Israeli, that committed the massacre that you were almost  
          prepared to go against your Hippocratic oath.

40      **Dr. Ang Swee Chai:**  
I would answer your question in two ways. The Baalbek men  
were part of the people brought in by Israelis. So there were  
Israelis who had brought in Haddad and Baalbek people.  
Secondly, that was my moment of weakness, and I was wrong.  
And I thank God that Azziza was there to guide me, otherwise

I would not be able to live with my conscience for refusing 1  
treatment.

*Amicus Curiae Larissa Cadd:*

Please understand I'm not being personally critical of you. I'm 5  
just asking you questions to ascertain certain things.

But you were fairly sure at that stage it was not the Israelis, it  
was the Baalbeks who pulled the trigger. 10

**Dr. Ang Swee Chai:**

My thinking at that time was that the Israelis brought in  
Baalbek and Haddads.

*Amicus Curiae Larissa Cadd:*

Can you listen to my question very carefully. You knew it was  
not the Israelis but the Baalbek who had pulled the trigger. 15

**Dr. Ang Swee Chai:**

I believe that it was the Baalbek people as well as the Haddads. 20

*Amicus Curiae Larissa Cadd:*

When you treated this person, did you ask him his name?

**Dr. Ang Swee Chai:**

No. The PRCS would not allow us to be personal. 25

*Amicus Curiae Larissa Cadd:*

Even though you suspected this might be a person who  
committed a crime against humanity? 30

**Dr. Ang Swee Chai:**

To start of with, I can't speak Arabic. So it's entirely up to  
Azziza. If Azziza forgive, then I'll forgive. And she has  
forgiven. 35

*Amicus Curiae Larissa Cadd:*

So you, however, did not ask the identity of the person who  
could have been a potential war criminal when you had the  
chance? 40

1      **Dr. Ang Swee Chai:**

Well, are you suggesting that I should arrest him then? He has guns and he's got patrol cars. And here was I sitting in the casualty of Gaza Hospital.

5

**Amicus Curiae Larissa Cadd:**

I'm asking why you didn't ask his name so you could record it as part of your memorial so that later justice could be taken?

10     **Dr. Ang Swee Chai:**

Are you trying to say that I should take action against this one soldier?

**Amicus Curiae Larissa Cadd:**

15     I'm asking why you didn't ask his name if you suspected he was a war criminal?

**Prosecutor Gurdial Singh Nijar:**

20     Your Honours, she never said he was a war criminal. So I think, should paraphrase it - this question.

**Dr. Ang Swee Chai:**

It's just my thought that he might have, but might not have. What am I going to do? Maybe it wasn't, because a lot of people live in Baalbek.

25

**Amicus Curiae Larissa Cadd:**

But it enough to almost break your Hippocratic Oath. So you must have had a strong suspicion: he was one of the people.

30

**Dr. Ang Swee Chai:**

Perhaps. Perhaps not. But I treated him.

**Amicus Curiae Larissa Cadd:**

35     I have no further questions for this witness Your Honour.

**Prosecutor Gurdial Singh Nijar:**

I've just have a few question in re-examination before ... unless Your Honour wants to go first?

40

**Judge John Philpot:**

I have a couple of short questions. Your re-examination may

be even better after my questions, if they are not enough, or  
inadequate.

Dr. Ang, I have a couple of questions for you concerning the,  
to clarify the power or not, or the control of the area by the  
Israelis. How did you know that, I think you said, "*they could  
see into the camps with flares or with lights.*" Could you explain  
that please? When I say "they" I mean Israeli soldiers.

**Dr. Ang Swee Chai:**

The Kuwaiti embassy was on high ground and from there  
they could oversee the whole area. After the massacre my  
colleagues and I actually climbed up the Kuwaiti Embassy to  
look at what we can see. And we can see Gaza Hospital, we  
can see Shatilla camp. And we can see the surroundings. And  
from where they were, they would know who moved in, who  
moved out, and what was being done.

Secondly, at least one was shot by the Israelis, and that was  
Muhammad my nurse, who was shot on the 6th floor of Gaza  
Hospital from the Kuwaiti embassy. And since the Kuwaiti  
embassy was the forward command post of the Israelis, only  
the Israeli could have shot him.

**Judge John Philpot:**

There was another place, was there not, where there were  
headquarters, with a point of view?

**Dr. Ang Swee Chai:**

There was a stadium, high level but I think I did not climb up  
the stadium, so I don't know. And there was a golf course and  
turf club where the soldiers, Israeli soldiers, had trained. But  
I've not been there so I'm not quite sure whether they could or  
could not see the camp. But from Kuwaiti Embassy they could.

**Judge John Philpot:**

We received a document stating the Israeli command center  
is opposite Sabra and Shatilla and apparently the evidence  
would seem that they could see in there but I don't know  
whether that's true.

1      **Dr. Ang Swee Chai:**

Yes, that was true. And that's how I suspect, against suspicions, that when they saw the Haddads and the Kataebs marching us down the road, the Israelis intervened and saved our lives.

5

**Judge John Philpot:**

You mentioned this lasted for 3 days: 16th, 17th and 18th.

10     **Dr. Ang Swee Chai:**

Yes.

**Judge John Philpot:**

What was the general knowledge about what was going on? I will follow that up with another question in a minute.

15

**Dr. Ang Swee Chai:**

The general knowledge was that Israel had launched a full-scale invasion of Beirut. They had air cover, and that's true because I heard the planes flying in, and there was a land invasion where they came in on tanks.

20

The tanks came into West Beirut, and at least a major detachment went to Sabra Shatilla and sealed off the entrance. There are many entrances to the camp - there was Fakani, there was Medena, there was the stadium entrance and Akka entrance, at least - and all these were controlled by Israeli tanks and armoured car.

25

So, initially, people thought, because at the same time an Israeli spokesman released a news that Israel is coming in to get the 2,000 fighters left in Lebanon. It didn't say Sabra and Shatilla. So we thought, initially, that's on the 15th itself, that Israel is coming in to get the PLO. But when no PLO fighter were killed or wounded and then it turned out more and more hideous in the form that women and children and old people were shot and that nobody could escape, and from the stories told to us, then we realized that they were just going in and killing people.

30

**Judge John Philpot:**

Now I'm gonna go day by day. On the 16th, was it known by your circles that women and children were being killed?

35

**Dr. Ang Swee Chai:**

Yes, my circle because the first person that I operated on the 16th was a woman. And with her came many women. Because, as a custom in those days, Palestinian women seem to believe - because they're obviously women - that they won't be harmed because they are civilians. So even in the height of conflict they would go and get bread, get water, and also make representations to whatever authority. So they thought they were immune. So it is when I saw and treated women shot by machine gun - it's very easy to identify as a doctor, I know whether it was shot by a machine gun or not - that I was really surprised.

And more and more women came in, an old man was killed and it's tragic because he was the one who made me my first cup of Arabic coffee; and babies were brought in. Then I actually summoned Azziza to come to the operating theatre and, "*Azziza, you better go and tell all these people that there's something horrible going on and ask them not to leave their homes because if they leave their homes they get caught in cross-fires.*" When Azziza told me that these were not caught in cross-fires but they were actually killed in their own homes. That was actually on 16th when I discovered that it was not cross-fire.

**Judge John Philpot:**

And at that time, was it possible that the Israelis who had blockaded the area and were observing, that they did not know that these people were being killed?

**Dr. Ang Swee Chai:**

In 1982, I actually believed that story. But ... 2013, I've just been back for the memorial of the massacre and I managed to interview Leila Khalife who actually said the Israeli came to her doorstep in Shatilla camp and that shook me up because up to then we were just guessing whether they did or did not come into the camps. But since they came into the camp, they must have known.

**Judge John Philpot:**

My question first about the 16th. On the 17th.

1      **Dr. Ang Swee Chai:**

Same, more people coming in. More being shot. And that was punctuated by Azziza going in and out trying to help us.

5      **Judge John Philpot:**

And how would the Israeli have known this was happening?

Dr. Ang Swee Chai:

At that point, I never even thought. I remember Muneer, the  
10     little boy who was shot with 27 members of his family and he came in, he was shot 3 times - I operated on him. Before he passed out, I managed to ask him, "Muneer, who did this?" And he said Israeli, Haddads and Kataebs.

15     **Judge John Philpot:**

On the third day,

Dr. Ang Swee Chai:

18th?

20     **Judge John Philpot:**

Yes.

Dr. Ang Swee Chai:

25     On the 18th, we were first taken out of the hospital by people who called themselves Lebanese. But as we passed on the road, there were people without insignia, and that lot of people were not typical of Lebanese, and they lined the roadside, they have walkie-talkies. Israeli bulldozers were tearing up buildings, and as we walked on, it looked more and more not typical of Lebanese because the Kataebs who came in to the hospital were very proud of being Kataebs. They just said that, "*we are Lebanese forces.*"

35     But later on, it was no longer Lebanese forces. They were

people without insignia - we won't know who they are. There were blacks, there were blondes, there were women - soldiers, I mean. And certainly, by the time they interrogated, the UNICEF courtyard were filled with newspapers brought in from Israel with Hebrew on it and tin food brought in Israel with Hebrew on it. And newspapers actually were pertinent because the dates were 15th, 16th, 17th and 18th. So I don't

know why the Kataebs were reading Hebrew newspaper. Of course it had to be Israelis. But, of course, the Israeli argument to me was that Haddads also read Hebrew. So, but I think, since it was brought in from Israel, it is Israeli army rations.

1

Judge John Philpot:

Thank you very much.

*Amicus Curiae Jason Kay:*

May I just ask some follow-up questions from what was answered, specifically on the identify of Leila?

10

Judge John Philpot:

Sure.

15

*Amicus Curiae Jason Kay:*

Thank you. Dr. Ang, you mentioned you talked to Leila and she said ...

Dr. Ang Swee Chai:

Khalife.

20

*Amicus Curiae Jason Kay:*

Khalife. Could you spell her name?

25

Dr. Ang Swee Chai:

I think it's LEILA KHALIFE.

*Amicus Curiae Jason Kay:*

And she said she saw the Israelis come to her door?

30

Dr. Ang Swee Chai:

Yes.

*Amicus Curiae Jason Kay:*

When did she tell you this?

35

Dr. Ang Swee Chai:

She told me that in September 2013.

40

*Amicus Curiae Jason Kay:*

Just two months ago?

1      **Dr. Ang Swee Chai:**

Yes. That's why it was - I'm just discovering things by the minute.

5      **Amicus Curiae Jason Kay:**

Is Leila still alive?

**Dr. Ang Swee Chai:**

Yes. In fact, there was no time, because it was September.

10     Otherwise she could have given evidence on Skype.

**Amicus Curiae Jason Kay:**

Where is she now?

15     **Dr. Ang Swee Chai:**

She is in Shatilla camp. She lives there. She's a refugee from Haifa.

**Amicus Curiae Jason Kay:**

So Skype would be impossible?

**Dr. Ang Swee Chai:**

I don't know. It's up to the court.

25     **Amicus Curiae Jason Kay:**

Thank you.

**Prosecutor Gurdial Singh Nijar:**

You were asked some questions on blockade - how do you know that the place was blockaded, sieged, as it were, by the Israelis.

30     On the 20th of September, according to your statement, your three medical colleagues who went back into the camps?

35     **Dr. Ang Swee Chai:**

Yes.

**Prosecutor Gurdial Singh Nijar:**

40     Who escorted them?

**Dr. Ang Swee Chai:**

Oh no no no. The three medical colleagues was 18th.

1

**Prosecutor Gurdial Singh Nijar:**

If you look at your statement, page 11. Are you there referring to the 18th? If you look at page 11, paragraph 3, line 5. Earlier on you said, "*September 18 after the foreign medical team were taken out. When my three medical colleagues went back,*" you're referring to what date?

5

**Dr. Ang Swee Chai:**

18th

10

**Prosecutor Gurdial Singh Nijar:**

On 18th when your three medical colleagues went back into the camp, who escorted them?

15

**Dr. Ang Swee Chai:**

Israeli.

20

**Prosecutor Gurdial Singh Nijar:**

Okay. What kind of pass were they given?

**Dr. Ang Swee Chai:**

Hebrew.

25

**Prosecutor Gurdial Singh Nijar:**

That's an Israeli pass?

**Dr. Ang Swee Chai:**

Yeah.

30

**Prosecutor Gurdial Singh Nijar:**

Palestinian survivors we're told they could not escape the massacre, why?

35

**Dr. Ang Swee Chai:**

Because the Israelis will not allow them to escape.

**Prosecutor Gurdial Singh Nijar:**

Israelis. So Israelis had sealed the camps?

40

1      Dr. Ang Swee Chai:

Yes.

Prosecutor Gurdial Singh Nijar:

5      When the Norwegian ambassador came in to try to evacuate the Norwegian medics, what did he tell you? Whose authority did he have to get?

Dr. Ang Swee Chai:

10     Israeli authority.

Prosecutor Gurdial Singh Nijar:

15     Israeli authority. So, all the while Israeli, Israeli, Israeli. To your mind, were you in any doubt that the Israelis were in complete control of that area?

Dr. Ang Swee Chai:

Yes.

20     Prosecutor Gurdial Singh Nijar:

Did you have any doubt?

Dr. Ang Swee Chai:

No.

25     Prosecutor Gurdial Singh Nijar:

No doubt. Thank you. Now, on the question of whether there were PLO fighters. The people who you treated and you brought in - children?

30     Dr. Ang Swee Chai:

Yes.

Prosecutor Gurdial Singh Nijar:

35     Women?

Dr. Ang Swee Chai:

Yes.

40     Prosecutor Gurdial Singh Nijar:

Young babies?

- Dr. Ang Swee Chai: 1  
Yes.
- Prosecutor Gurdial Singh Nijar: 5  
Fighters?
- Dr. Ang Swee Chai: 10  
No.
- Prosecutor Gurdial Singh Nijar: Thank you.
- Dr. Ang Swee Chai: 15  
In fact, may I say something?
- Prosecutor Gurdial Singh Nijar: Yes.
- Dr. Ang Swee Chai: 20  
As we were taken out, I was genuinely upset. I just wished the PLO did not leave because they could have defended their people.
- Prosecutor Gurdial Singh Nijar: 25  
Yes. So in your testimony, the PLO had left, evacuated. Who was supposed to guard these people there?
- Dr. Ang Swee Chai: 30  
The multinational peacekeepers.
- Prosecutor Gurdial Singh Nijar: 35  
So the multinational peacekeepers were intended to remain there to guard the defenceless?
- Dr. Ang Swee Chai: 40  
Yes.
- Prosecutor Gurdial Singh Nijar: 45  
Not to guard the PLO?
- Dr. Ang Swee Chai:  
No, there were no PLO left.

1      **Prosecutor Gurdial Singh Nijar:**

Thank you.

5      Now this PLO Charter that has been spoken about, 1968. They talk about liberation of their people. They talk about restoring dignity of their people. This was '68, 20 years after they had been thrown out of their land?

10     **Dr. Ang Swee Chai:**

True.

15     **Prosecutor Gurdial Singh Nijar:**

Had they up to that point succeeded in getting their land back?

20     W6: No. They succeeded in getting themselves killed.

25     **Prosecutor Gurdial Singh Nijar:**

Their homes back? The keys that they were holding, that they showed you - could they go back and open the doors to their houses?

W6: No.

30     **Prosecutor Gurdial Singh Nijar:**

So are you surprised that 20 years later they are looking at other ways of restoring their dignity and their land when they say armed struggle? Are you surprised? Can you understand that?

W6: Yes.

35     **Prosecutor Gurdial Singh Nijar:**

And now, to your knowledge, over the years, has the PLO participated in various peace negotiations?

40     **Dr. Ang Swee Chai:**

Yes.

**Prosecutor Gurdial Singh Nijar:**

Many, more than one?

45     **Dr. Ang Swee Chai:**

Yes.

**Prosecutor Gurdial Singh Nijar:**  
Have they succeeded?

1

**Dr. Ang Swee Chai:**  
No.

5

**Prosecutor Gurdial Singh Nijar:**  
They are still out there?

**Dr. Ang Swee Chai:**  
Yes.

16

**Prosecutor Gurdial Singh Nijar:**  
Sabra is there?

15

**Dr. Ang Swee Chai:**  
Yes.

**Prosecutor Gurdial Singh Nijar:**  
Shatilla is there?

20

**Dr. Ang Swee Chai:**  
Yes.

**Prosecutor Gurdial Singh Nijar:**  
So armed struggle. I've no further questions. Thank you.

24

If there are no further questions, can this witness be released,  
Your Honours?

30

Dr. Ang, thank you.

**Dr. Ang Swee Chai:**  
Thank you very much.

35

**Prosecutor Gurdial Singh Nijar:**  
Our next witness is Mr. Nabil Alissawi from the West Bank.  
This witness will be very short. His SD is only 2 pages.

**Amicus Curiae Jason Kay:**  
To save the Tribunal's time, we will not be cross-examining  
this witness.

41

1      **Prosecutor Gurdial Singh Nijar:**

Thank you. So I can get him to say anything I want?

*Amicus Curiae Larissa Cadd:*

5      Providing it's the truth.

**Prosecutor Gurdial Singh Nijar:**

This is SD 3 in the bundle of statutory declarations. This is prosecution witness 7.

10     Mr. Nabil, can you please give your name and where you reside.

**Nabil Alissawi (via translator):**

15     Nabil Alissawi, I live in Bethlehem.

**Prosecutor Gurdial Singh Nijar:**

Can you go through the witness statement with him, starting with number 1.

20     **Nabil Alissawi (via translator):**  
I am 22 years old.

25     I, Nabil N. M. Alissawi, hereby solemnly and sincerely affirm and swear that I shall speak the truth and nothing but the truth in giving evidence in this Tribunal.

**Prosecutor Gurdial Singh Nijar:**

Paragraph 1, "I'm 22 years old."

30     In paragraph 2, you want to put in record incident on 3rd March 2008. You were a student in Ahliya University in Bethlehem?

**Nabil Alissawi (via translator):**

35     That's correct. At the time of the incident, I was at school at this school in particular.

**Prosecutor Gurdial Singh Nijar:**

What was he studying?

40     **Nabil Alissawi (via translator):**  
Business.

**Prosecutor Gurdial Singh Nijar:**  
Did he graduate?

1

**Nabil Alissawi (via translator):**  
Yes.

5

**Prosecutor Gurdial Singh Nijar:**

On 3rd March, a few of my schoolmates and I organized a peaceful demonstration on the street near Azah Refugee Camp and Paradise Hotel.

10

**Nabil Alissawi (via translator):**  
Yes.

**Prosecutor Gurdial Singh Nijar:**

The purpose of this demonstration was to express our dissatisfaction over the attacks launched by the Israeli troops against Gaza City during the previous weeks.

15

**Nabil Alissawi (via translator):**  
That's correct. Yes.

20

**Prosecutor Gurdial Singh Nijar:**

At about 12.30pm, the demonstration took place and about 30 students joined the demonstration?

25

**Nabil Alissawi (via translator):**  
Yes.

**Prosecutor Gurdial Singh Nijar:**

While we were proceeding on the street in front of the Azah Refugee Camp, I heard a gunshot sound.

30

**Nabil Alissawi (via translator):**  
That's correct. Yes.

35

**Prosecutor Gurdial Singh Nijar:**

I then felt pain. Blood was flowing from the right hand side of my stomach.

40

**Nabil Alissawi (via translator):**  
That's correct.

1      **Prosecutor Gurdial Singh Nijar:**

I realized I had been shot

Nabil Alissawi (via translator):

5      That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**

I was later informed that a sniper located at the top of the Paradise Hotel fired into the crowd and hit me using the dum dum bullet.

10

Nabil Alissawi (via translator):

That's correct. Yes.

15     **Prosecutor Gurdial Singh Nijar:**

After the incident, my friends carried me through an allergy near the Azah Refugee Camp.

20     **Nabil Alissawi (via translator):**

That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**

Immediately, 5 Israeli soldiers jumped out of the 2 military tanks stationed nearby and chased after us.

25

Nabil Alissawi (via translator):

That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**

30     The soldiers fired warning shots.

Nabil Alissawi (via translator):

That's correct. Yes.

35     **Prosecutor Gurdial Singh Nijar:**

Being terrified, my friends dropped me on the ground and ran away.

Nabil Alissawi (via translator):

40     That's correct. Yes.

- Prosecutor Gurdial Singh Nijar:** 1  
The soldiers then reached me and dragged me to the place where I got shot.
- Nabil Alissawi (via translator):** 5  
That's correct. Yes.
- Prosecutor Gurdial Singh Nijar:** 10  
The soldiers took picture of me and made fun of me.
- Nabil Alissawi (via translator):**  
That's correct. Yes.
- Prosecutor Gurdial Singh Nijar:** 15  
They refused me any medical aid and let me continue bleeding.
- Nabil Alissawi (via translator):**  
That's correct. Yes.
- Prosecutor Gurdial Singh Nijar:** 20  
And I passed out.
- Nabil Alissawi (via translator):**  
Yes, I did.
- Prosecutor Gurdial Singh Nijar:** 25  
When I regained consciousness, I realized I was put on the ambulance bed on the way to the hospital.
- Nabil Alissawi (via translator):** 30  
That's correct. Yes.
- Prosecutor Gurdial Singh Nijar:** 35  
I was informed by the doctors that the dum dum bullet went into my stomach, broke into 3 pieces going into 3 different directions.
- Nabil Alissawi (via translator):**  
That's correct. Yes.
- Prosecutor Gurdial Singh Nijar:** 40  
2 went out of my body through my back and my rectum.

1   **Nabil Alissawi (via translator):**

That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**

5       and the other one stayed inside my bladder locating near the lower spine.

**Nabil Alissawi (via translator):**

That's correct. Yes.

10

**Prosecutor Gurdial Singh Nijar:**

This is set out in 2 medical reports - and you have shown the medical reports, page 4. That's correct?

15   **Nabil Alissawi (via translator):**

That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**

20       If you look at page 5, there is a discharge note talking about the operation before you were released.

**Nabil Alissawi (via translator):**

That's correct. Yes. That was the last operation.

25   **Prosecutor Gurdial Singh Nijar:**

You were hospitalized for 2½ months?

**Nabil Alissawi (via translator):**

That's correct. Yes.

30

**Prosecutor Gurdial Singh Nijar:**

First 3 weeks from 03rd March to 25th March?

**Nabil Alissawi (via translator):**

35       That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**

And this is show in your medical report?

40   **Nabil Alissawi (via translator):**

Yes.

**Prosecutor Gurdial Singh Nijar:**

During this time, you underwent 3 operations? 1

**Nabil Alissawi (via translator):**

That's correct. Yes. 5

**Prosecutor Gurdial Singh Nijar:**

One, to remove the bullet from my bladder?

**Nabil Alissawi (via translator):**

That's correct. Yes. 10

**Prosecutor Gurdial Singh Nijar:**

Another one to remove my damaged intestines? 15

**Nabil Alissawi (via translator):**

That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**

And the third one to repair the nerves in your bladder? 20

**Nabil Alissawi (via translator):**

That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**

I then received treatment at hospital for another 2½ months. 25

**Nabil Alissawi (via translator):**

That's correct. Yes. 30

**Prosecutor Gurdial Singh Nijar:**

During this time, I underwent one more operation to repair my intestines and to remove a bag for human waste.

**Nabil Alissawi (via translator):**

That's correct. Yes. 35

**Prosecutor Gurdial Singh Nijar:**

As a result I missed my last semester in the school 40

**Nabil Alissawi (via translator):**

That's correct. Yes.

1      **Prosecutor Gurdial Singh Nijar:**  
From January to Jun 2008

5      **Nabil Alissawi (via translator):**  
That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**  
This affected my academic performance

10     **Nabil Alissawi (via translator):**  
Of course

**Prosecutor Gurdial Singh Nijar:**  
And I scored poorly in the CGPA

15     **Nabil Alissawi (via translator):**  
Yes. That's correct.

**Prosecutor Gurdial Singh Nijar:**  
As a result, I was precluded from pursuing the university  
course of my choice, namely law.

20     **Nabil Alissawi (via translator):**  
That's correct. Yes.

25     **Prosecutor Gurdial Singh Nijar:**  
My course of life has been altered dramatically.

30     **Nabil Alissawi (via translator):**  
That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**  
As of now, I have abdominal scars for life

35     **Nabil Alissawi (via translator):**  
That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**  
and discomfort in sitting upright.

40     **Nabil Alissawi (via translator):**  
Yes. That's correct.

**Prosecutor Gurdial Singh Nijar:**

I cannot swim competitively as I used to. 1

**Nabil Alissawi (via translator):**

That's correct. Yes. 5

**Prosecutor Gurdial Singh Nijar:**

Apart from this, my family members and I have been prohibited from going to Israel. 10

**Nabil Alissawi (via translator):**

That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**

Further, whenever I go through the Israeli military checkpoints, 15 I am always harassed.

**Nabil Alissawi (via translator):**

That's correct. Yes. 20

**Prosecutor Gurdial Singh Nijar:**

I have been traumatized by the incident.

**Nabil Alissawi (via translator):**

That's correct. Yes. 25

**Prosecutor Gurdial Singh Nijar:**

Whenever I am about to go through the checkpoint, I am in the constant state of anxiety and fear. 30

**Nabil Alissawi (via translator):**

That's correct. Yes.

**Prosecutor Gurdial Singh Nijar:**

Just tell me. We are talking about Israeli checkpoints in the West Bank. How many are there? Roughly, in this small area of the West Bank. 35

**Nabil Alissawi (via translator):**

Between each city and city. 40

1      **Prosecutor Gurdial Singh Nijar:**

Many checkpoint? Are you saying for you to travel in the West Bank in your place, your country - although it is occupied - you have to go through Israeli checkpoints?

5      **Nabil Alissawi (via translator):**

That's correct. Yes.

10     **Prosecutor Gurdial Singh Nijar:**

And you say, "*I am in the constant state of anxiety and fear*" when you go through checkpoints. Why?

15     **Nabil Alissawi (via translator):**

Shortly after the incident, every time I would go through a checkpoint I would be stopped and left there for hours, and sometimes I would be asked to go back to Bethlehem.

20     **Prosecutor Gurdial Singh Nijar:**

You mean in your own place, even though it is occupied, you have to wait at an Israeli checkpoint? Be made to wait long hours, sometimes not allowed through? Is that what you are saying?

25     **Nabil Alissawi (via translator):**

Yes. That's correct.

30     **Prosecutor Gurdial Singh Nijar:**

And is this only happening to you or to all other Palestinians who want to travel in the West Bank?

35     **Nabil Alissawi (via translator):**

Not all of them, but most of them.

40     **Prosecutor Gurdial Singh Nijar:**

Most of the Palestinians are subjected to this?

45     **Nabil Alissawi (via translator):**

That's correct. Yes.

50     **Prosecutor Gurdial Singh Nijar:**

Finally, can you translate page 3 of his statement?

1  
**Nabil Alissawi (via translator):**

I am a victim with no freedom in my own country. I demand freedom in my own country.

5  
**Prosecutor Gurdial Singh Nijar:**

Thank you. I have no further question. May this witness be released?

10  
**Judge John Philpot:**

With respect to the defendant Yaron, the issue of the mental state or the *mens rea*, with respect to either genocide or complicity in genocide; we've heard some testimony and bundles of information, but when you make your pleadings I think it's very important to address that issue with considerable care.

15  
**Judge Lamin Yunus (President):**

We come back at 3pm.

[12.13pm]

20  
**Registrar Musa Ismail:**

All rise.

\*\*\*\*\*

21

30

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40

1                   **22 November 2013**  
                      **(Afternoon session)**

5                   **Registrar Musa Ismail:**

                     All rise. [3.30pm]

10                  **Prosecutor Gurdial Singh Nijar:**

                     Your Honours, our next witness..

15                  **Judge Lamin Yunus (President):**

                     We want to say something on this application to appeal<sup>65</sup> against our ruling. It seems that there is no provision to appeal in the statute. So we therefore reject it.

20                  **Amicus Curiae Jason Kay:**

                     Thank you.

25                  **Prosecutor Gurdial Singh Nijar:**

                     The next witness is standing by, Ilan Pappé, from the United Kingdom. I request for his CV to be distributed to the Judges and to Defence Counsel. Also could you make available the book I'll be referring to - Ethnic Cleansing. And I will be also referring to extracts of another book which appears in Volume 2G.

30                  **Judge Lamin Yunus (President):**

                     Is this the witness statement of Ilan Pappé?

35                  **Prosecutor Gurdial Singh Nijar:**

                     No, this is his CV, his curriculum vitae, who he is, what he has done and so on. His CV, so this is the documents that he will confirm as being his document that he has prepared to give his background as to his expertise in this area. Could it be marked please as P12.

40                  With your leave, may I proceed?

45                  **Judge Lamin Yunus (President):**

                     Alright, the book, Ethnic Cleansing?

<sup>65</sup> See Appendix C.

**Prosecutor Gurdial Singh Nijar:**

Perhaps this also can it be marked as P13?

1

And the other document, the 2G, from page 2793-1, because it is a document that was inserted. It's a book that he has written together with very distinguished linguist-historian Noam Chomsky. I will be referring to it. It goes on to page 2793-34 (loose document).

5

President : Gaza in Crisis. Do you want to mark?

10

**Prosecutor Gurdial Singh Nijar:**

Just make it part of the bundle.

**Professor Ilan Pappé:**

Professor Ilan Pappé, good morning to you, can you hear me?

11

**Professor Ilan Pappé:**

Yes, good afternoon to you.

20

**Prosecutor Gurdial Singh Nijar:**

Do you have sight of your CV? Have you look at your CV, this is indeed your CV?

**Professor Ilan Pappé:**

Yes, it is my CV, I can confirm.

21

**Prosecutor Gurdial Singh Nijar:**

Yes, I shall just direct you to a few salient aspects of your CV. You are an Israeli historian, and a Professor at the College of Social Sciences International Studies at the University of Exeter in the UK. A director of the University's Centre for Palestine Studies, and co-director of Exeter Centre for Ethno-Political Studies.

3

You are actually born in Israel? Where?

**Professor Ilan Pappé:**

Yes, that's right, in Haifa.

4

1 - **Prosecutor Gurdial Singh Nijar:**

You were a senior lecturer in Political Science in Israel, at University of Haifa?

5 **Professor Ilan Pappé:**

Yes, that is right.

**Prosecutor Gurdial Singh Nijar:**

1984-2007?

10 **Professor Ilan Pappé:**

Yes.

**Prosecutor Gurdial Singh Nijar:**

15 You also held the chair of the ML Toma Institute for Palestinian and Israeli studies in Haifa for some 8 years and you have authored 15 books to-date?

**Professor Ilan Pappé:**

20 Yes.

**Prosecutor Gurdial Singh Nijar:**

25 Amongst some, there is a book called Ethnic Cleansing and they largely deal with Middle East studies with some focus on Palestine? And you wrote this other book, Gaza in Crisis, appears to be recent ones, together with Norm Chomsky?

**Professor Ilan Pappé:**

30 Yes.

**Prosecutor Gurdial Singh Nijar:**

35 And you have also, after the release of pertinent British and Israeli document in the early 80s, you have been re-writing the history of Israel's creation in 1948? And relating also to the flight of some 700,000 Palestinians in the same year?

**Professor Ilan Pappé:**

Yes.

40 **Prosecutor Gurdial Singh Nijar:**

You have written that in 1948, expulsion of Palestinians was not something happened ad-hoc, but actually constituted ethnic

cleansing of Palestine in accordance with the design of ethnic cleansing of Palestine. 1

**Professor Ilan Pappé:**

Yes. 5

**Prosecutor Gurdial Singh Nijar:**

Step by step, take us through the establishment of this contention that you have made, dating from the 20s onward to the early 40s and then to 1948. For reference, you can look at Page 15 onwards of your book. 10

**Professor Ilan Pappé:**

Yes, I do recall it in my memory. 15

**Prosecutor Gurdial Singh Nijar:**

Tell us slowly and carefully from the time in the 1920s when the Palestinians made out the majority of between 80-90% of the total population of the then Palestine. Can you narrate to us? 20

**Professor Ilan Pappé:**

I should say that Zionist movement in the beginning in 1930s was not preoccupied with the question of what would be the fate of native people of Palestine who are like you said, the majority. It is around mid 1930's the Zionist leader, movement began to deliberate seriously what should be the fate of Palestinians. 25

Around 1937, we begin to see, as historians, the first evidence for the plan that would be implemented in 1948. The basic strategy of the Zionist Movement was pushing forward, was to drive and take over as much Palestine as possible with as few Palestinians in it as possible. The means of doing this was not very clear in the 1930's as yet because Palestine was under the British Mandate. So sovereignty lay with the British empire, neither with the Palestinians nor with the Zionist movement. 30 35

But it's important to explain around the period, the first notions of what would be the fate of people of Palestine began to be articulated. In very simple terms, that fate would be to leave the country voluntarily or to be expelled. The vision of the 40

1 Zionist movement is that you could not have Jewish state with  
Palestinians in it.

5 The crucial date, for me, is in the 1940s, this is where the  
military wing of the Zionist movement - the Haganah - begins  
to prepare "the village files". This is a detailed list of all the  
villages of the Palestinians in Palestine with the idea of taking  
these villages over by force when the opportunity emerge.

10 In the beginning of the 1940s, no one knew exactly when  
Britain would leave Palestine. But it was very clear in the early  
1930s that the moment Britain would declare it wants to end  
the mandate over Palestine, that will be the moment that the  
Zionist movement will have to take Palestine by force and  
decide the fate of the Palestinians living in it.

15 When Britain indeed made that decision in February 1947,  
the British cabinet had a crucial meeting and decided that  
it did not want to stay in Palestine any longer and decided  
20 to return the future of the country to the United Nations; at  
that very moment, the Zionist leadership - both its military  
wing and its political wing - moved from abstract ideas of  
what to do with the local people to more concrete strategies  
and plans.

25 It took about a year, between February 1947 to around March  
1948, for the Zionist leadership to prepare a plan of systematic  
30 eviction by force of the Palestinians from Palestine. The plan  
was eventually conflated into commands to the military units  
of the Jewish forces to cleanse by force village after village and  
to take over the 11 towns that the Palestinians had at the time.  
And it took another year for the plan to be completed - not  
35 in full - but within that time almost 85% of the Palestinians  
who lived there were kicked out by force in that year, between  
February 1948 to February 1949.

**Prosecutor Gurdial Singh Nijar:**

Thank you. When you talk about the plan, we always come  
across what is known as Plan Dalet. What is this Plan Dalet?

40 **Professor Ilan Pappé:**  
Plan Dalet. Dalet in Hebrew is the letter "D". So Plan number

4. And there was Plan No.1 in 1946, Plan no. 2 and 3 in 1947, which gradually developed into Plan No. 4.

Plan No. 4 had two formats. There was an official document called "Plan D" that was distributed among Zionist leaders in March 1948 which specify the need of ethnic cleansing but declared officially that this would not apply to the whole Palestine but only to the areas that the Jewish forces would take beyond the space that was accorded to the Jewish State in the UN partition plan.

The other "Plan D" was ... on thousand or so military ... one big file called "Situation D" which would actually be a systematic plan for cleansing every village, every neighbourhood in Palestine. The people who decided on that plan - a small group about 30 - most of them were generals in the Jewish military outfit Haganah, 3 or 4 of them were experts on Arab affairs in Zionist establishments, and the chairman was David ben Gurion who would become Israel's first prime minister. And they met on a weekly basis in Tel Aviv and slowly and gradually turned Plan D into a master plan, a blueprint, for the systematic expulsion of the Palestinians from their country.

**Prosecutor Gurdial Singh Nijar:**

The idea was expulsion. They were expelled. What happened to those who did not want to move? Was it accompanied by more than just an expulsion?

**Professor Ilan Pappé:**

The method for expelling was the same. The method was to encircle the village or neighbourhoods by 3 flanks and leave 1 flank open with the hope that the occupied forces would intimidate the population to the extent that they would flee, and under the threat of occupation.

In many cases the population, especially in the rural areas, naturally did not want naturally to leave their homes where they've live for hundreds of years. And in order to force them to leave, in few cases, either villagers were executed in order to intimidate the others to force them to leave, and in about 30 to 40 cases, the whole male population of the village

1        were massacred in order to bring the ethnic cleansing to a completion.

5        Let me give the numbers. Palestine had around 800 villages at the time. 530 villages were expelled ... [Skype disconnected]

I'm back. I hope you are too.

**Prosecutor Gurdial Singh Nijar:**

10      Yes. You were saying there were 800 villages, 530 villages were expelled. You can continue from there.

What happened to these villages that were taken over?

15      **Professor Ilan Pappé:**

The villages that were occupied were wiped out physically. And on the ruins the Israelis either built Jewish settlements or planted recreational courts. In the cities, the Palestinian neighbourhoods were re-populated by Jewish immigrants who came either from Europe or the Arab countries.

**Prosecutor Gurdial Singh Nijar:**

what happened to the names of the Palestinian villages like Lubia and Sauria and so on?

25      **Professor Ilan Pappé:**

All the villages were renamed. Where a Jewish settlement was built, the settlement would receive either a Hebrew version of the Arabic name or a different name. Israeli archaeologists were recruited in some places to put a claim that actually these villages were actually, originally, 2,000 years ago biblical places. In some place, biblical names were given. There was a special naming committee that made these decisions - what would be the name for the new place.

35      **Prosecutor Gurdial Singh Nijar:**

As far as the UN partition plan was concerned, was there, in your view, a parity - was it equitable in terms of the division, the land allotted to the Palestinians and the Jews?

40      **Professor Ilan Pappé:**

The UN partition plan was a very bad plan. One has to

remember that Palestinians were 2/3 of the population, and they were granted only half of the country. They were asked to share the land - that is to give half of their own land to a group people that most of them came about 3 years before.

You can imagine, in Malaysia, if a group of people who come to your country 3 years ago were given half of your country to create their own State in it; I think every decent, reasonable person would say that this is not a fair and just solution. This is why the Palestinians rejected the partition plan.

But I should also say that I don't think the Zionist leadership accepted the partition plan. We know from the documents that they decided to declare their acceptance of the partition only after they heard that the Palestinians were going to reject it. So they knew that in any case this would not be a realistic programme, and they could ignore it as well.

**Prosecutor Gurdial Singh Nijar:**

What was the final distribution that the Palestinians were forced into accepting?

**Professor Ilan Pappé:**

The Palestinians were forced to accept a State within 44% of Palestine at the end of the day, without territorial integrity, divided between North and South, and without Jerusalem as their capital. That was the deal that was offered to the people of Palestine. And to accept a Jewish state in 56% of their homeland.

**Prosecutor Gurdial Singh Nijar:**

According to my information, the Jews at that time owned land about 6% and they were given 56%.

**Professor Ilan Pappé:**

Absolutely. The Zionist's strategy, until the 1940s, they attempted to create a Jewish State by purchasing land, by buying land. All that they could succeed through that was acquire about 6.4% of the land.

**Prosecutor Gurdial Singh Nijar:**

Just to clarify: 6% given 56% of the land, and 94% of the Palestinians were given the balance 44% of the land.

1   **Professor Ilan Pappé:**

That is absolutely true.

**Prosecutor Gurdial Singh Nijar:**

5   The Palestinians and Arabs, how did they react to this?

**Professor Ilan Pappé:**

10   The Palestinian leadership rejected the partition plan. The Arab League ... to not accept it, but they did offer the United Nations different means: they suggested that in every other country, if the Mandate comes to an end, the people of Palestine should vote about their future vision. And they suggested democratic decision, and to find out what the majority of the people who lived in Palestine wanted. To have two peace plans, if you like. One was the partition peace plan of the United Nations, and the other one was, in a way, an Arab-Palestinian peace plan which said, "*we want the same fate as Egypt and Iraq, Tunisia, Algeria where the people will be asked what was their vision for the future - how would they like their future in actual terms.*"

20

**Prosecutor Gurdial Singh Nijar:**

What happened to that proposal?

**Professor Ilan Pappé:**

25   The United Nations established a special committee. That committee was asked to prepare a peace plan. They could not agree totally about the peace plan. The majority adopted what we call today the partition plan. But there was a small group of states that were asking for a different plan to be presented to the United Nations which was more or less based on the Arab and Palestinian idea of how to solve the question.

30

The partition plan won 2/3 support of the United Nations General Assembly at the time. The other plan, which was called the minority plan, had an equal number of supporters and people who objected to it.

35

The United Nations at that time had a very small number of member States because quite a number of the countries of Asia and Africa were under colonial rule at the time.

40

**Prosecutor Gurdial Singh Nijar:**

And then there was 1948 - there was this ethnic cleansing of

villages and so on. At the end of that, what was the balance of  
apportionment of land? 1

**Professor Ilan Pappé:**

The Jewish State took over 93% of the land in what became Israel. About 100,000 Palestinians were left out of the population in that area that became the Jewish State. 5

Apart from scores of villages, like I said 530 villages were either turned to Jewish settlements or forests, the rest of the Palestinians, 750,000 of them became refugees, scattered all over the neighbouring countries and in the West Bank and Gaza in refugees camps managed first by international charity organizations, and from 1950 onwards by the United Nations. 10

**Prosecutor Gurdial Singh Nijar:**

Coming to the spring; You have also described a resident of the village of Tantura, at page 65, a very poignant actual account, the turmoil and catastrophe, and what he went through. Just want you to confirm that. 20

Now, I want to bring you to the Spring of ... Now, ethnic cleansing, according to the final report of commission of experts established pursuant to Security Council Resolution 7-80 of 1992 which was appointed by the Security Council with regard to the ethnic cleansing committed in the former Yugoslavia. They said that ethnic cleansing could fall within the meaning of the Genocide Convention. Are you familiar with that report? 25

**Professor Ilan Pappé:**

Yes I am. 30

**Prosecutor Gurdial Singh Nijar:**

Do you agree with their conclusion? 35

**Professor Ilan Pappé:**

Yes I do. In 1948, the Zionist plan was to get rid of Palestinians from Palestine in a way that all the Palestinians, let's say, were to move to Iraq, they would have accepted it - they don't feel the need to exterminate, destroy, the Palestinians in that respect of the genocide. 40

1 However, I think that the fact that the Palestinians could only  
be expelled to the borders of the Jewish State meant that despite  
their plan to ethnically cleanse them, they remained for the  
Zionist ... an existential problem.

5 And because of that, and from a historical perspective, the  
fact that the ethnic cleansing in Palestine in 1948 did not solve the problem for the Zionist leadership turned the ethnic  
cleansing ideology of the Zionist movement creating the State  
10 of Israel into an existential threat to the Palestinians that - as I  
wrote in the book that I wrote with Noam Chomsky - has the potential of leading to genocidal policies. And in some cases these genocidal policies were already executed ... attack on  
Gaza since 2006.

15 So I don't think there was a genocidal plan in 1948. I think the plan was to get rid of the Palestinians. However, the fact that getting rid of the Palestinians did not solve the problem - also grew the Palestinian steadfastness and the Arab world's position. In historical perspective, the ethnic cleansing lead to something that potentially can ... turn into genocidal policies.

20 I'm not a legal expert. I am not giving you a legal definition. I'm giving you my assessment as a historian. And as an activist.

25 **Prosecutor Gurdial Singh Nijar:**  
So the seeds of this genocide were sown in the expulsion exercise?

30 **Professor Ilan Pappé:**

And even more than that. If you have a State which has as its ideological infrastructure the idea that the local indigenous native ethnic group has no right to be there - and the main effort is to first get rid of it, not to kill it - if this remains your ideological infrastructure, there is always the potential that the line between expulsion and extermination would be crossed either intentionally or even unintentionally because this basic idea that someone has no right to be in ... for me is a genocidal idea.

35 40 I am saying that historically speaking, this has the potential of becoming genocidal and in some cases has already became genocidal.

**Prosecutor Gurdial Singh Nijar:**

1

You are familiar with Sabra and Shatilla?

**Professor Ilan Pappé:**

5

Yes I am.

**Prosecutor Gurdial Singh Nijar:**

We have heard evidence of how there was evacuation by the PLO, there was a promise by the UN to protect the defenceless people, and on the eve of the episode, somehow the UN forces disappeared and there was this massacre for over 40 hours. These were part of the people who were expelled from the 1948 situation and ended up first in tents, then in mud huts, and then in zinc and sometimes in brick structures in Sabra and Shatilla.

10

15

**Professor Ilan Pappé:**

Yes. It's a good example of what I was talking about. You expelled the Palestinians in 1948 and you think that you have solved the problem by forcing the Palestinians to live in refugee camps in Lebanon.

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But what happens if the Palestinians in the refugee camps have not given up all their struggle? You cannot expel the Palestinians further from Lebanon. Eventually you'll have to decide to do something more drastic, and I think Sabra and Shatilla was one of these chapters where you move from expelling to destroy because there is a limit to how many times you can expel people.

25

And I think 1982 was a warning to all of us what is going to happen if the Palestinian refugee camps are not going to accept the lives as refugees and continue to struggle for their right of return.

30

**Prosecutor Gurdial Singh Nijar:**

35

These were the Palestinians who were outside the border, in Lebanon.

Now we talk about those within Gaza and the West Bank. In Gaza, in chapter 7, the first Rains operation.

40

**1 Professor Ilan Pappé:**

In 2005, the situation in Gaza had changed from the Israeli perspective. They thought they had succeeded in eliminating resistance. But Gaza proved to be a different case, with rise of Hamas. There was a different kind of resistance to the Israeli occupation.

The Israeli reaction culminated in 2005 and 2006. Their idea was to implement and react with all military forces they have against the civilian population to deter it from any future resistance.

In 2006 the Israelis called that particular strategy as the Dahiya strategy. The idea is you have a civilian population, and you the best tanks, gunships, aircrafts against a civilian population so as to make sure that nobody would ever react in any way against Israel's policies. The result when you use F-16s, tanks, and guns, is genocide. It destroys population in a systematic way. Gaza is encircled in a wall, since 1994. There is no way to run. The number of casualties are very high. The effects are genocidal in my mind. And that's what I wrote in the book I co-authored with Noam Chomsky.

**Prosecutor Gurdial Singh Nijar:**

They gave these bombing operation names: First Rains 2005, Summer Rains, June 2006, Autumn Clouds 2007/08. These are the fancy names. Really insulting the seasons - as part of this operation. You write about this, do you not?

**30 Professor Ilan Pappé:**

Yes, I find the names particularly sadistic - to use the names of the beautiful seasons - when you talk about rain, you are raining bombs of the worst kind on civilians. I found this particularly sick. And I wanted to highlight the tension between the names used to show the dehumanization of the Palestinians. And that's why I must say, after many many hesitations, I've decided to call the Israeli strategy in the Gaza Strip "incremental genocide" because you dehumanize people to such an extent that when you rain on them bombs and you call it "rains", that means you don't treat them anymore as human beings.

**Prosecutor Gurdial Singh Nijar:**

We come to Operation Cast Lead which you also write about in your book. You talked about the fact that in February 2008, Israel's Defence Minister said, "*Palestinians risked a Shoah.*" What is a Shoah?

1

5

**Professor Ilan Pappé:**

Shoah is a Hebrew word - the genocide of the Jews that took place in the Second World War in Europe. The Nazi extermination of the Jews is called Shoah. It does not have any other meaning in Hebrew. So if the Minister says that he wants to inflict such punishment on the Palestinian people, the only English translation for the word "shoah" is genocide.

10

**Prosecutor Gurdial Singh Nijar:**

Was there in fact a planning to do this shoah in Gaza?

15

**Professor Ilan Pappé:**

I don't have documents to that extent. What I do know, especially from the brave soldiers - Breaking the Silence - who published their testimonies, we know that the orders for the soldiers on the ground and during the training was to treat the Gaza villagers and the city of Gaza as a military outpost which has to be demolished.

20

25

I don't know if this is a shoah or not, but this is a total elimination of the civilian population.

**Prosecutor Gurdial Singh Nijar:**

This operation has come to be known as Operation Cast Lead. It lasted 3 weeks, 1,400 Palestinians killed including 300 children, hundreds of unarmed civilians, large areas razed, thousands homeless, economies in ruins.

30

35

Was that your assessment as a historian of what transpired?

**Professor Ilan Pappé:**

Yes. And I think it is no less important to remember that even at the time when there is no military assault, the people in Gaza are strangulated by a control over their food supply, their medicine, their basic needs. People die not just from military attack but also from malnutrition and lack of medicine and lack

40

1 of elementary food supply. So it's a comprehensive strategy of trying to starve and to succumb a population which refuses to accept the Israeli occupation as a way of life.

5 **Prosecutor Gurdial Singh Nijar:**

So Gaza, after the '67 war, Gaza and the West Bank were occupied and continue to be occupied till today by Israel?

10 **Professor Ilan Pappé:**

That's right.

15 **Prosecutor Gurdial Singh Nijar:**

And you also quote in your book, a UN Rapporteur saying, "Gaza is like a large prison with the key thrown away."

20 **Professor Ilan Pappé:**

Absolutely. Dugard was the Special Rapporteur for the United Nations was shocked when he visited Gaza and saw the conditions. He realised that this like a huge prison - it incarcerates almost 2 million people in a similar way that anyone who lives in a jail lives. They didn't commit any crime. Their only crime is that they are Palestinians who live in Gaza.

25 **Prosecutor Gurdial Singh Nijar:**

Conditions of life were created that were quite virtually impossible to endure. They can't go out fishing, food is controlled, medicine is controlled, and then they come and bomb you - Summer Rains, Autumn Clouds and so on - on a sustained basis.

30 Yesterday, there were 3 air strikes against Gaza

35 **Professor Ilan Pappé:**

That's right.

35 **Prosecutor Gursdial Singh Nijar:**

This is largely a civilian population. It's been described as the most densely populated city/area in the world. Is that right?

40 **Professor Ilan Pappé:**

That is absolutely right. And had it not been for the tunnels that they excavated to bring in food and materials, I think the situation would have been worse.

An Israeli journalist wrote that the tunnels in Gaza reminded him of the tunnels of the Warsaw Ghetto.

Now the tunnels are under danger of being blocked by the Israeli but also by the new Egypt government. And I am very worried and apprehensive about the fate of the people of Gaza in this year and in the coming months because of the new reality.

**Prosecutor Gurdial Singh Nijar:**

This reality you have referred to as "genocidal reality" in your book with Chomsky at page 190.

**Professor Ilan Pappé:**

For me, there is quite a distinction between ethnic cleansing and genocide - again, not as a legal expert so I'm making the moral and historical distinctions. Ethnic cleansing appear, I think, where there is a space to move the people outside one occasion to the other.

In very much as the case of the massacre in 1948 when Israeli army has the situation in which it cannot move the people. Here we're talking about 2 million people. But it's the same method: if you cannot move out the people from their location, and you don't want these people to be there, you move from ethnic cleansing to genocide.

**Prosecutor Gurdial Singh Nijar:**

And also creating the conditions of life: the economy, the physical, the cultural, the religious, the renaming of villages and so on. So this is a total package, as it were.

**Professor Ilan Pappé:**

Absolutely. When I interview Israeli generals and ask them what is their final strategy - if you're going to starve these people and you're going to create unbearable conditions - what do you expect them to do? The first answer is, "they will leave." And I answered that they can't leave, nobody is going to allow them to leave.

And he shrugged. He said he don't know. I don't think they even want to think aloud about the possibility, but I think

1 deep inside they are aware that the kind of policies they are  
pursuing are genocidal policies.

**Prosecutor Gurdial Singh Nijar:**

5 Professor Ilan, thank you very much for your extremely lucid  
and informative account. We take questions from the *Amicus  
Curiae* who is conducting the defence, or clarification from  
the judges.

10 **Amicus Curiae Jason Kay:**

I have a few questions.

Dr. Pappé, have you been called a revisionist historian?

15 **Professor Ilan Pappé:**

Yes. I think they call a group of historian, which I was one - there  
were 3 of us - because we were the first Israelis who challenged  
official narrative of the State of Israel. The term revisionist in  
Israel doesn't work very well because the right wing Zionist  
movement is calling Israel the Revisionist movement. So if you  
call Israeli historians "revisionist historians" it is confusing. So  
the term used in Israel was the "new historians".

25 But for people abroad, we were like the American historians  
who challenged the official American history of the Cold War.  
They were also call "revisionist historians".

**Amicus Curiae Jason Kay:**

30 And your current view of history is a minority view. Do you  
agree?

**Professor Ilan Pappé:**

In Israel itself, yes, definitely. It's a minority view within Israel.  
Yes.

35 **Amicus Curiae Jason Kay:**

Your parents, they escaped Nazi Germany?

**Professor Ilan Pappé:**

40 That's right.

**Amicus Curiae Jason Kay:**

In an interview with The Guardian, you had mentioned, I'm quoting verbatim, please correct me if I am wrong, "Had it not been for Zionist movement, my parents and many like them would not have escaped." Yes? 1  
5

**Professor Ilan Pappé:**

That is true. That is a correct quote.

**Amicus Curiae Jason Kay:**

You are alive today because of Zionism. Yes? 10

**Professor Ilan Pappé:**

Absolutely. Absolutely. 15

**Amicus Curiae Jason Kay:**

Do you feel guilty being alive because of it?

**Professor Ilan Pappé:**

No. I think that because I am alive and because as a historian I understand something that even my parents understood, but not many of their friends, that coming to Palestine would not have to end with the dispossession of the local people. There was a possibility to come to Palestine and live next to or alongside the Palestinians, and not be scared of the Palestinians. 20  
25

My view on this, by the way, is a famous letter by Mahatma Gandhi to Jewish philosopher Martin ..... . When Martin wanted Gandhi to support the Zionist idea in 1930s, Gandhi said to him what probably my parents would say: "*There's nothing wrong with the Jews looking for a refuge in Palestine. There is something very wrong when they think that the only way that they can establish that refuge is by kicking out the Palestinians.*" 30  
35

And I think that this is what I mean - that I am thankful for those who saved my parents, but I condemn them for later on expelling the Palestinians.

**Amicus Curiae Jason Kay:**

Would you agree that the body of your work and your views could be to assuage the guilt of being alive because of Zionism? 40

## 1    Professor Ilan Pappé:

No, I don't feel that way. I think I come from a comfort zone. I come from the side that lives comfortably while the other people who are oppressed. And I feel on two levels that it is my duty to do what I do. There is very little guilt. In fact, I feel very well with what I do.

10    One is because my parents were victims of genocidal policies by the Nazi, I don't want to be part of a new genocide. And I don't want someone in my name to destroy and exterminate other people - this is one reason why I do what I do.

15    Second, if you are in a position of relative comfort, you have a duty to help those who are oppressed. I feel, I have no problem with my parents or friends like them who understood that they were received with open hands by the Palestinians. And I think most of the Jewish settlers when they came were received by the Palestinians. Everyone in the Arab world receives guests. We know about the Arab hospitality. But once I come as a guest to your house and I claim that this house is actually mine, and eventually I kick you out of that house, I have violated your hospitality. And this is something I cannot accept as a human being, first and foremost.

## 25    Amicus Curiae Jason Kay:

One final question. Is it true that prior to 1947, the people who inhabited the land that became Israel was really a melting pot of different ethnicities such as the Greeks, the Turks, the Arabs, the Armenians, the Persians, the Sudanese, the Algerians, the Samaritans, the Tartars and the Georgians. Would you agree to that?

## Professor Ilan Pappé:

35    No, I don't think so. I think every ethnic group in the world in 1947 was made of certain mixtures of populations in the prior centuries to its creation. What is important is not so much the ethnic mix. It was the indigenity of the people.

40    We are talking here about a population that doesn't matter however it defines itself, and however its ethnic fabric was, this was a population that lived for at least a millennium - if not more - at the same place. And at the time, most people in

South East Asia, in Africa, in Latin America, and in the Arab world said to the European powers that colonized them, "We want independence. We want sovereignty." The international community recognized this right. The only place in the Arab world that this right is not recognized was in Palestine. And this is, I think, an injustice that has to rectified.

*Amicus Curiae Jason Kay:*

Dr. Pappé, thank you for your time and participation in this Tribunal.

*Professor Ilan Pappé:*

Thank you.

*Prosecutor Gurdial Singh Nijar:*

Thank you, I have no re-examination. Thank you, for your brilliant testimony. Are there questions from the panel of judges?

*Judge Tunku Intan Mainura:*

Hello Professor Ilan, is there anywhere in your books that reference the name Amos Yaron? If there is, can you please tell me the page number?

*Professor Ilan Pappé:*

Amos Yaron was involved the 1982 massacre. I wrote about 1948 and 2005 only. I don't think he played a very important role in the periods I was looking at. I may have mentioned him in passing.

*Amicus Curiae Jason Kay:*

May I be permitted one more question? Thank you.

Do you agree that your parents came to Israel to escape the Nazi Holocaust?

*Professor Ilan Pappé:*

Yes.

*Amicus Curiae Jason Kay:*

Do you agree that the people who came to Israel subsequently did so to ensure that that type of event would never happen again to a person of Jewish background?

## 1 Professor Ilan Pappé:

Not entirely because I'll why. I think the Jews who escaped Germany and Europe during the time of the Nazi Holocaust were indeed refugees looking for safe haven.

5 The Jews who came became 1882 and 1930 and laid the foundation for the Jewish State came as colonizers. They came for the same reasons that Europeans came to Africa, or to Asia, or to Latin America. They came to found a colonial enterprise. America is a good example. The people who genocided the native American were mostly refugees from religious persecution from Europe.

10 15 One of my books - I don't know which one - I try to give an example which I use a lot with my students to explain this balance between the fact that the Jews were in the 1930s refugees and what they did in Palestine.

20 25 If you look for a safe place for battered women, let's say - or abused children - and you find a land where you want to host them where they would not be under danger anymore, but in order to have this land, you kick out the people of that land, you throw them out of the window or the balcony or you kill them, you have created a worse crime in order to solve the previous crime.

30 So in other words, the fact that the Jews were looking for a safe place did not justify the ... of Palestine.

35 After the Holocaust, as you may know, most of the Jews who survived did not wish to go to Palestine. They wanted to go to the United States of America. But in 1946 the Americans decided, for anti-Semitic reasons, that they don't want to have any more Jews in America. And this caused the Jews to look for another place that helped the Zionist problem.

40 So in other words, if you're a refugee, it doesn't give you the licence to kill someone, or to expel someone. It should make you a better human being who would understand the terrible crime to make someone a refugee.

**Amicus Curiae Jason Kay:**

You did point out that the Jews from Europe wanted to go to America but could not because of the anti-Semitism there. So do you not agree that the Jews who went to Palestine did so to avoid - to make sure - that there would not be a recurrence of Holocaust they just suffered? 5

**Professor Ilan Pappé:**

That may be true about the Jews who came between 1933 and 1946. The question is: Was the best way to ensure that there would not be another Holocaust ... 10

**Amicus Curiae Jason Kay:**

Was to create a State

**Professor Ilan Pappé:**

My contention is by doing what they did in 1948, and by doing what they are doing now, they are again endangering the Jewish people around the world with another Holocaust. So maybe their intentions were good, but you know, we have a saying in Hebrew, "*The road to hell is paved with good intention.*" 15 20

**Amicus Curiae Jason Kay:**

Thank you Professor. Thank you so much.

**Professor Ilan Pappé:**

Thank you.

**Prosecutor Gurdial Singh Nijar:**

Can the witness be released? Thank you so much.

My next witness is Ms. Taghreed Khalil Nimat. We refer to the statutory declaration that she has made, at Tab 6. 30

[witness takes oath in Arabic]

**Prosecutor Gurdial Singh Nijar:**

You are Ms. Taghreed Khalil Nimat?

**Taghreed Khalil Nimat (via translator):**

That's correct.

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1   **Prosecutor Gurdial Singh Nijar:**  
      You live in West Bank?

5   **Taghreed Khalil Nimat (via translator):**  
      That's correct.

10   **Prosecutor Gurdial Singh Nijar:**  
      City of Nablus?

15   **Taghreed Khalil Nimat (via translator):**  
      Yes.

20   **Prosecutor Gurdial Singh Nijar:**  
      Bit Eba?

25   **Taghreed Khalil Nimat (via translator):**  
      Yes.

30   **Prosecutor Gurdial Singh Nijar:**  
      47 years old?

35   **Taghreed Khalil Nimat (via translator):**  
      Yes.

40   **Prosecutor Gurdial Singh Nijar:**  
      You want to put in record the terrible experience of Israeli?

45   **Taghreed Khalil Nimat (via translator):**  
      That's correct.

50   **Prosecutor Gurdial Singh Nijar:**  
      And you live with parents and nine siblings?

55   **Taghreed Khalil Nimat (via translator):**  
      That's correct. Yes.

60   **Prosecutor Gurdial Singh Nijar:**  
      In paragraph 4, you recall your early days in 1979-1980, your  
          father was captured by the Israeli forces and put into prison  
          for 18 days for singing a song about Palestine freedom at the  
          Najah National University?

Taghreed Khalil Nimat (via translator): 1

That's correct. Yes.

Prosecutor Gurdial Singh Nijar:

In or about 1991 your father was again captured by Israeli forces and put into prison for 21 days for singing a song promoting Palestinian freedom, again at a performance at Najah University. 5

Taghreed Khalil Nimat (via translator): 10

Yes.

Prosecutor Gurdial Singh Nijar:

1984, when you were 20 years old, you were second year of studies at Najah National University the Israeli troops came to your house, searched through your entire house including your room and accused you of being active in promoting hatred against the Israeli government? 15

Taghreed Khalil Nimat (via translator): 20

Yes

Prosecutor Gurdial Singh Nijar:

And the soldiers insulted you verbally calling you 'animal' and 'stupid'? 25

Taghreed Khalil Nimat (via translator):

That's correct. Yes.

Prosecutor Gurdial Singh Nijar:

Then in 1987, you graduated from the university. You applied for a job at the government office. Your job application was rejected. 30

Taghreed Khalil Nimat (via translator): 35

Yes. That is correct.

Prosecutor Gurdial Singh Nijar:

You say it is a common understanding in the community that if any family has a history of being detained by the Israeli government, it would be difficult to get a job at the government office. 40

1 Taghreed Khalil Nimat (via translator):

Yes. That is correct.

**Prosecutor Gurdial Singh Nijar:**

5 In 1995, you say you started working as a psychologist at Dr. Sayed Kamal Mental Hospital in Bethlehem.

Taghreed Khalil Nimat (via translator):

Yes.

10 **Prosecutor Gurdial Singh Nijar:**  
And you stayed at the female staff hostel in the Hospital.

Taghreed Khalil Nimat (via translator):

15 Yes

**Prosecutor Gurdial Singh Nijar:**

31st March 2004 about 1am, while you were sleeping, you heard sound of bombings?

20 **Taghreed Khalil Nimat (via translator):**  
Yes

**Prosecutor Gurdial Singh Nijar:**

25 And you went to the window of your bedroom and you saw few blocks of the hospital building consisting of the administration office, male staff hostel damaged by the bombing

30 **Taghreed Khalil Nimat (via translator):**  
Yes

**Prosecutor Gurdial Singh Nijar:**

At that time you heard sound of gunshots?

35 **Taghreed Khalil Nimat (via translator):**  
Yes.

**Prosecutor Gurdial Singh Nijar:**

And bombings?

40 **Taghreed Khalil Nimat (via translator):**  
Yes

**Prosecutor Gurdial Singh Nijar:**  
Coming from the nearby blocks?

1

**Taghreed Khalil Nimat (via translator):**  
Yes. That's correct.

5

**Prosecutor Gurdial Singh Nijar:**  
And you saw lots of Israeli soldiers surrounding the Hospital?

10

**Taghreed Khalil Nimat (via translator):**  
Yes

5

**Prosecutor Gurdial Singh Nijar:**  
Then being terrified, you quickly ran to the other rooms  
looking for my colleagues?

15

**Taghreed Khalil Nimat (via translator):**  
Yes. That's correct.

20

**Prosecutor Gurdial Singh Nijar:**  
Then four of your colleagues and you went to the living room  
and stayed there together until about 6am?

**Taghreed Khalil Nimat (via translator):**  
Yes

25

**Prosecutor Gurdial Singh Nijar:**  
During that time you heard sound of gunfire and bombs at  
intervals?

30

**Taghreed Khalil Nimat (via translator):**  
Yes

**Prosecutor Gurdial Singh Nijar:**  
You also heard hospital patients who stayed in the nearby  
block screaming in pain?

35

**Taghreed Khalil Nimat (via translator):**  
Yes

40

1      **Prosecutor Gurdial Singh Nijar:**

You heard an Israeli soldier making announcement through the PA system demanding people staying at the admin office to come out of the building and surrender?

5

**Taghreed Khalil Nimat (via translator):**

Yes

**Prosecutor Gurdial Singh Nijar:**

10     And at about 6am, the Israeli forces left the premises?

**Taghreed Khalil Nimat (via translator):**

Yes

15     **Prosecutor Gurdial Singh Nijar:**

We then went out and went to the administration office.

**Taghreed Khalil Nimat (via translator):**

Yes

20

**Prosecutor Gurdial Singh Nijar:**

And when we reached there, I saw that the office was in a terrible mess.

25     **Taghreed Khalil Nimat (via translator):**

Yes

**Prosecutor Gurdial Singh Nijar:**

30     And after the incident, you learned from my colleagues that during the incident, the Israeli soldiers forced the people who were staying at the second floor at gunpoint to jump out of the window to the ground?

**Taghreed Khalil Nimat (via translator):**

35     Yes

**Prosecutor Gurdial Singh Nijar:**

There were about 18 of them?

40     **Taghreed Khalil Nimat (via translator):**

Yes

- Prosecutor Gurdial Singh Nijar:** 1  
All captured by the Israeli troops?
- Taghreed Khalil Nimat (via translator):**  
Yes 5
- Prosecutor Gurdial Singh Nijar:**  
And later you learned, from the families of these captives, that  
two of the captives were sentenced to life imprisonment by  
the Israeli court? 10
- Taghreed Khalil Nimat (via translator):**  
Yes
- Prosecutor Gurdial Singh Nijar:** 15  
And two were given 18 years imprisonment?
- Taghreed Khalil Nimat (via translator):**  
Yes 20
- Prosecutor Gurdial Singh Nijar:**  
And some were released?
- Taghreed Khalil Nimat (via translator):**  
Yes 25
- Prosecutor Gurdial Singh Nijar:**  
And three of the captives who were released said that the Israeli  
soldiers asked a lot of questions about her? 30
- Prosecutor Gurdial Singh Nijar:**  
So through all this you were greatly traumatised?
- Taghreed Khalil Nimat (via translator):**  
Yes 35
- Prosecutor Gurdial Singh Nijar:**  
And you had a nervous breakdown?
- Taghreed Khalil Nimat (via translator):** 40  
Yes

1   **Prosecutor Gurdial Singh Nijar:**

And you have to be on medication for something like months?

Taghreed Khalil Nimat (via translator):

5    Yes

**Prosecutor Gurdial Singh Nijar:**

Talk about another incident. On 15th April 2004, you were travelling by car from Nablus to Bethlehem. How far is that?

10

Taghreed Khalil Nimat (via translator):

About 80 kilometres.

**Prosecutor Gurdial Singh Nijar:**

15   And then you were stopped by an Israeli military car?

Taghreed Khalil Nimat (via translator):

Yes

20   **Prosecutor Gurdial Singh Nijar:**

You were captured?

Taghreed Khalil Nimat (via translator):

Yes

25

**Prosecutor Gurdial Singh Nijar:**

Brought to a room?

Taghreed Khalil Nimat (via translator):

30   Yes

**Prosecutor Gurdial Singh Nijar:**

Detained 29 hours no food or water?

35   **Taghreed Khalil Nimat (via translator):**

Yes

**Prosecutor Gurdial Singh Nijar:**

40   And during the interrogation, you were interrogated and insulted verbally?

**Taghreed Khalil Nimat (via translator):**

Yes

1

**Prosecutor Gurdial Singh Nijar:**

They called you animal?

5

**Taghreed Khalil Nimat (via translator):**

Yes

**Prosecutor Gurdial Singh Nijar:**

Threatened to put you into prison?

10

**Taghreed Khalil Nimat (via translator):**

Yes

15

**Prosecutor Gurdial Singh Nijar:**

And throughout when you were being questioned during the detention there was no break or time to rest - continuous?

**Taghreed Khalil Nimat (via translator):**

Yes

20

**Prosecutor Gurdial Singh Nijar:**

After that you had problems - stigmatized by your community including your friends and colleagues?

25

**Taghreed Khalil Nimat (via translator):**

Yes

**Prosecutor Gurdial Singh Nijar:**

They asked you to stop contacting them because they were afraid of being blacklisted by the Israeli government for associating with you?

30

**Taghreed Khalil Nimat (via translator):**

Yes

35

**Prosecutor Gurdial Singh Nijar:**

And you have been traumatized by all this - by the detention, you have nightmares, disturbed sleep, constant anxiety?

40

1 Taghreed Khalil Nimat (via translator):

Yes

Prosecutor Gurdial Singh Nijar:

5 Then we come to checkpoints. Whenever you want to go through checkpoints, you are constantly harassed, you say? Checkpoint/. Constantly harassed?

Taghreed Khalil Nimat (via translator):

10 Yes

Prosecutor Gurdial Singh Nijar:

If you want to go, say from Nablus to Bethlehem, are they lots of checkpoints?

15 Taghreed Khalil Nimat (via translator):

I will take the backdoor routes because if I go through conventional roads, I will be stopped at every single checkpoint.

20 Prosecutor Gurdial Singh Nijar:

And you say here that if you go through the checkpoints you will be detained for one or two hours and sometimes you are not even allowed entry.

25 Taghreed Khalil Nimat (via translator):

Yes. That's correct. At almost every one of them I will be interrogated or kept in hold for several hours.

Prosecutor Gurdial Singh Nijar:

30 And sometimes refused entry also?

Taghreed Khalil Nimat (via translator):

That's correct. Yes.

35 Prosecutor Gurdial Singh Nijar:

Can you read her and translate the last sentence at paragraph 15?

Taghreed Khalil Nimat (via translator):

40 Many of my countrymen face a similar experience that I have gone through. I want more people to know about what has happened to us.

**Prosecutor Gurdial Singh Nijar:**

So this is the statutory declaration. We've been given advanced notice that there is no cross-examination. If the Panel members have any questions? If there are none, then I asked that the witness be released. Thank you very much.

1

5

I think perhaps we have time to squeeze in one more witness.

I call upon Dr. Walid to the stand. This will be the tenth witness.

Statutory declaration number 5.

10

**Prosecutor Gurdial Singh Nijar:**

For the record, you are Dr. Walid Elkhatib?

**Dr. Walid Elkhatib:**

Yes

15

**Prosecutor Gurdial Singh Nijar:**

And you reside in Bethlehem district, West Bank in Beit Jalla city?

20

**Dr. Walid Elkhatib:**

Yes

**Prosecutor Gurdial Singh Nijar:**

I think you can speak in English?

25

**Dr. Walid Elkhatib:**

Yes

30

I, Walid Elkhatib, hereby solemnly and sincerely affirm and swear that I shall speak the truth and nothing but the truth in giving evidence in this Tribunal.

**Prosecutor Gurdial Singh Nijar:**

With your kind leave, I will leave him to read it himself since you can speak English. You can go through your statutory declaration. You may proceed now.

35

**Dr. Walid Elkhatib:**

I, Dr. Walid Elkhatib, 53 years old now and qualified as a medical doctor. I have a Masters degree in Public Health. I am

40

- 1 in charge of child care. I am Director of School Health, Ministry  
of Health Palestine. I am in charge of occupation and disability  
and health rights in Palestine.
- 5 I live in Bethlehem District since I was born, and in Beit Jalla  
since 1960. I was ... the Israeli war against Arab countries in  
1967 till now.
- 10 The purpose of making this declaration is to put on record my  
experience as a Palestinian living in Bethlehem and effect that  
the Second Intifada have had on Palestinian children. I have  
many times been exposed to explosions. I have developed  
hearing problem and am now using a hearing aid since 2002.  
I have no family or medical history of loss of hearing.
- 15 From 1988 until 1996, I worked as a general practitioner. I  
worked at an emergency clinic at UNRWA.
- 20 In the First Intifada I saw many patients who were brought in  
with different kinds of injuries as a result of Israeli violence -  
people with gun shot wounds, who had been exposed to tear  
gas and people who were physically abused by Israeli soldiers.
- 25 17 years ago, I started work as the Director of the School Health  
Department at the Ministry of Health. Since then, until today,  
I am in charge of Child Health and Protection, Social Health  
And Palestinian Child Law and Rights.
- 30 After I graduated in Palestine with a Masters degree in Public  
Health in 2001, I started to look at health from a different  
angle. I looked at Palestinian health not only from the physical  
point of view but how much Israeli occupation has affected  
Palestinian health beyond physical health. It is not merely  
absence of disease and disability. What I perceived as equally  
35 important was emotional, social, mental and environmental  
health, nutrition and behavior.
- 40 My evidence here is mainly on the effect of Israeli occupation  
on Palestinians, especially children. Most doctors will look at  
physical health. From my point of view, Israeli occupation,  
especially during the First Intifada (1987-1993) and the Second  
Intifada (2000-2009) has greatly affected Palestinians.

The invasion of Palestinian cities by Israeli forces, shelling and bombing, shooting, usage of tear gas, the building of an apartheid wall to separate Jerusalem and West Bank, check points which restrict the movement of Palestinian people, separation and violation of all Palestinian rights - all these things have affected Palestinian health and education, especially that of children.

The First and Second Intifadas. The First Intifada (uprising) was not a military intifada It involved demonstrations against occupation. There were no roadblocks, no wall, no shelling and no airplane bombing. Palestinian people used stones whereas Israeli soldiers used tear gas and gunshots.

In the emergency clinic where I worked, I saw a lot of these cases. I myself have been exposed to tear gas many times. A pregnant woman will exposed to tear gas has a higher probability of having a miscarriage. A doctor, however, can never say that a miscarriage has been caused by tear gas. If he does, he will be imprisoned by the Israelis.

Tear gas also affects the upper respiratory tract. It is very hard for people with bronchial asthma and many such people died when exposed to tear gas continuously. I remember very well also some kinds of tear gas caused very severe irritability. That is why the doctors had to secure the limbs of such patients. This sort of tear gas made some people very nervous, and they could not control themselves. Some lost consciousness for few days. Many had frequent nervous attacks, like seizures or convulsions.

The live ammunition used were rubber bullets and metal bullets. Rubber bullets contain a metal part inside. I have seen a woman who had a rubber bullet pass through her skull from the front and out from the back of her head. She died after 25 days in ICU. Rubber bullets have caused many cases of death.

Once my mother tried to help a young man who was being arrested by Israeli soldiers. They shot her in the leg with a rubber bullet. I took care of her for one month after that.

According to our reports, most of the victims were shot

1 on the upper part of body. This means that the forces shoot  
to kill.

5 Israel only considers those below 12 years of age as children,  
unlike other jurisdictions where children are those below the  
age of 18. It is acceptable to kill anyone above 12. Many children  
were shot using live ammunition. During the Second Intifada,  
30% of those injured and martyred were children under the  
age of 18.

10 The Second Intifada began in September 2000, when Ariel  
Sharon went to Masjid Al-Aqsar and the Palestinians were  
protesting against this visit. Palestinians consider East  
Jerusalem as a Palestinian occupied east city. On that day,  
15 Israeli soldiers killed 20 people outside a mosque. We  
protested against the visit of Ariel Sharon and the killing of  
20 Palestinians. But the Israeli forces killed other people at  
the West Bank and Gaza. And that is how the Intifada started.

20 The difference between the First and Second Intifada is that  
during the Second one, the Palestinian authority was already  
established. We had and still have Palestinian military forces  
and policemen. That is when military action started between  
25 Palestinians and Israelis. Israel responded by using tanks,  
helicopters and so on.

30 Mental health issues among Palestinians. Since the Intifada,  
my concern has also been about mental health. Mental cases  
increased during the Intifada, especially among children. There  
are many reports and studies conducted in the West Bank  
35 and Gaza which show very clearly the increase in mental and  
emotional illnesses during Intifada. About 90% of Palestinian  
people have been exposed to Israeli violence during the  
Second Intifada. A lot of work is needed to meet the needs of  
children from a mental health point of view. There are many  
many incidents of bedwetting, nightmares, post traumatic  
stress disorder, eating and sleeping problems, especially  
among children. These are only some of the problems. There  
40 are many more other mental health problems experienced by  
Palestinian children.

There is also a problem with education. Many children drop

out from school and the level of education has been very low during the Intifada.

Children suffer from anxiety, stress, sleep disorders, nervousness, violent behavior and suicidal tendencies. According to survey conducted in Palestine - and by the way I was in charge, I was the manager of this survey - in 2010 in cooperation with the World Health Organization, which I personally oversaw, 24% of schoolchildren in Palestine have suicidal tendencies. Other problems encountered among children were loss of self-confidence and hopelessness.

The prevalence of all of the above problems is greater at the West Bank and Gaza than at other locations, and higher during the Intifada.

During the 2nd intifada, it was found that in 77.8% of Palestinian families, at least 1 member suffers from mental problems. In part of these cases, the mental problems develop into illnesses which require special intervention. In others, what is required is psychological support and assistance.

For example, in cases where a member of the family was killed, the family members would require psychological support to problem or disturbance may develop into mental illness. assist them to deal with the crisis. If such support is not available, there is a risk that the mental problem or disturbance may develop into mental illness.

During the Intifada we also found an increase in psychosomatic diseases, which are mostly caused by mental stress which is manifested as physical complaints, such as headache, stomach aches, chest pains, hypertension and others.

In relation to post traumatic where stress disorder (PTSD), I participated in a study in 2001, we studied the extent and severity of PTSD among children, and we found that it is also dependent on where they live. We found that children exposed to shelling or bombing around their houses had severe PTSD. The other children further away from the nuclear of bombing (more than 500 metres), had less severe forms of PTSD.

1 Other health problems among Palestinians. During the First  
5 Intifada, I was very active with other doctors to organise health  
campaigns to villages where we provided providing medicine,  
support etc. questioned about why medicine. I was arrested  
and questioned about why I organized such campaigns, and  
on the source of money or medicine.

10 There is also increased incidents of disability among  
Palestinians. Among 20% of injured people have become  
disabled during the Second Intifada. The most recent report  
from Palestinian Ministry of Health and Ministry of Social  
Affairs (2011) showed that 7% of Palestinian children are  
disabled, some because of the Intifada.

15 Generally the number is 1-2% higher in Palestine because of the  
violence. From 2001-2011, there were 2,282 cases of disability  
(93.9% male, 6.1% female). Most of the men were involved in  
the Intifada. 65.6% of them suffered disability as a result of  
20 live ammunition. Others were affected by shrapnel, rubber  
bullet, explosions,

25 As a result of the greater number of disabilities, it means that  
these persons also have less opportunities government for  
work and end up in poverty. There is greater pressure on the to  
support these persons, by way of provision of social services,  
health services, education etc.

30 Poverty is rife in the West Bank and Gaza. It increased from  
an average of 20% prior to the Intifada to up to 51% during  
the Intifada. It is more prevalent in Gaza. Poverty leads to  
poor eating habits, social problems, and health problems.  
Anemia among children has increased, and more than 42%  
35 of our children have anaemia as a result of imbalanced diets.  
About 21% of pregnant women have anaemia. This is clearly  
related to poverty, which in my opinion, is somehow related  
to Israeli occupation.

40 Conditions of poverty also mean poor nutrition. We found that  
during the Intifada, children's growth was stunted because  
they did not have enough protein. There are many cases of  
children with low weight.

During the Second Intifada, the rate of children with low weight (less than 5 years old) increased from 2.5% to 3.2%, the rate of low height increased from 7.5% to 7.9%, and wasting (severe loss of weight) increased from 1.4% to 1.7%. 1

According to the United Nations Population Fund (UNFPA), there was a 40% increase prematurity and miscarriages in pregnant women during the Second of Intifada. 5

Israeli soldiers have also violated international law by attacking hospitals and ambulances with shelling and shooting on the excuse that wanted people or terrorists are in hospital. 10

Let me give you an example: During the invasion of Jenin in 2002, I know about a doctor who was in the ambulance when the Israelis shot the ambulance and he was killed. 15

Currently 53% of the Palestinian population are below 18 years old. 20

There now exist many checkpoints which restrict the movement of Palestinian citizens. There are altogether about 730 checkpoints between cities, towns and villages in the West Bank. 25

There are 2 different types of checkpoints. One is a constant checkpoint, meaning that soldiers are constantly stationed there. The other is known as a flying checkpoint, which is set up at whim anywhere anytime. Checkpoints impede and delay the movement of Palestinians. There have been many cases of pregnant women, who are forced to stop and wait at checkpoints by Israeli troops. Because of the delay, many babies have been born at these checkpoints. There have also been many emergency cases stopped at checkpoints, and prevented from going through to the hospitals. In such cases, people have died at checkpoints. 30 35

The Israelis built a wall between the West Bank and Jerusalem. Although Jerusalem is 7 minutes by car from Bethlehem, I cannot go there. I cannot get permission to go to in Israel were prevented from going across Jerusalem. People who previously worked in Israel were prevented from going across once the 40

1 wall was built. Very few can obtain permission to go across. Entry to Jerusalem is like entering into a fort, it is not a simple checkpoint. It is like a defence zone.

5 During the First Intifada they started to put checkpoints between where I live in Bethlehem and Jerusalem. One day I saw a Jew in the street, who was wounded in the abdomen. I told them I am a doctor. The soldier asked me to provide help to the wounded man. I provided him emergency relief. At that  
10 time, the Israeli ambulance came and took him to the hospital. The next day it was in the Israeli newspaper that a Palestinian doctor saved an Israeli citizen. After that, the Israeli authority gave me the green light to go into Jerusalem. However, that only lasted until the Second Intifada. During and after the  
15 Second Intifada, I could no longer go into Jerusalem.

20 I have also come close to death several times. The first time was in 2004 to 2005, when my aunt was in hospital with heart problems. When she was discharged, I took her home. Once in the late evening during Ramadan, I was supposed to go to her house to help her with the dressing of her wound. I did not know that the place where my aunt lives was under a curfew. I went on my way and suddenly I heard a soldier saying "*stop!*" and the clicking of a gun. I put up my hands and said I am a doctor. He asked me to pull up my shirt. He came to me and tried to talk to me in Hebrew. I answered in English. He said "*you know I could kill you and no one will and ask anything - why are you here ?*"  
25

30 I answered that I am a doctor I am going to see a patient and that I did not know that there was a curfew. He asked for my identification and said again that he had the right to kill me. I gave him my identification and he went back to the tank. He used a walkie-talkie and was asking someone about me. He gave that person my identification number. He asked them whether I was a doctor. When he received confirmation that I am a doctor, he came back and said, "*you are lucky I did not kill you.*" He took me in front of the tank and asked me to stay there. About 10 minutes later, a group of Israeli soldiers came to the tank. The soldier told the leader that I am a doctor on my way to see my patient. I was told to go back home and was not allowed to see my aunt. I was told to go and not to look back.  
35  
40

Over the years, the situation in the West Bank and Gaza has become worse. The Israeli authorities have increased in strength. We can only estimate that it will get worse in the future. The Palestinians face a lot of challenges. We are being threatened all the time by the US and Israel - they threaten to cease the transfer of taxes, to strengthen the checkpoints, to stop aid, to completely stop entry to Jerusalem.

Before the Second Intifada, I believed that Israel was looking for peace with Palestinians. But now I do not believe it. Israel does not believe Palestinian territory is Palestinian. They believe that it is historically Israeli and they are taking it back. They threaten to increase settlements in Palestinian territories if Palestine continues to try and gain recognition as a State from the United Nations.

Israel believes that eventually Palestinians to the will leave their lands beyond the walls. Israeli strategy is to deprive the Palestinians of their basic needs to make them leave. The Palestinians are badly in need of support services. Otherwise they will have no choice but to leave. We as Palestinians, must show our capacity to withstand the coming challenges. It is most crucial for our survival.

**Prosecutor Gurdial Singh Nijar:**

We formally tender this statutory declaration.

**Amicus Curiae Larissa Cadd:**

Your Honours, I am conscious of the time of the day and I expect that I will be some half an hour to at most 45 minutes depending on the answers of the witness. I would respectfully submit that perhaps the Honourable Tribunal would like to hear the cross-examination tomorrow and perhaps I should not start tonight so that the witness can continue to converse with his colleagues and the like in the meantime.

**Prosecutor Gurdial Singh Nijar:**

I have no objections.

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1    **Judge Lamin Yunus (President):**

Alright. We will adjourn and begin your cross-examination  
and at 9 o'clock tomorrow morning.

5                [5.41pm]

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23 November 2013  
(Morning session 1)

1

**Prosecutor Gurdial Singh Nijar:**

May it please Your Honours. Yesterday we ended with the evidence of Prosecution witness 10, Dr. Walid and we adjourned because there was insufficient time to continue and complete the cross-examination. So this morning we will resume with the cross-examination of Dr. Walid and I call Dr. Walid to the stand.

5

10

**Amicus Curiae Larissa Cadd:**

Yesterday you gave some evidence which related to your witness statement and I want to take you to paragraph 10 of that witness statement.

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**Judge Lamin Yunus (President):**

Just to remind that this is on former oath.

Dr. Walid Elkhatib:

20

Ok.

**Amicus Curiae Larissa Cadd:**

You refer there to the 1st and 2nd Intifadas. You say that Palestinian people used stones whereas Israeli soldiers used teargas and gun shots. That's an accurate statement in respect of the 1st Intifada, wasn't it?

25

**Dr. Walid Elkhatib:**

Yes.

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**Amicus Curiae Larissa Cadd:**

But in the 2nd Intifada, the situation had changed because, you say, there was a Palestinian Authority?

35

**Dr. Walid Elkhatib:**

Yes

**Amicus Curiae Larissa Cadd:**

And you had a Palestinian police and a Palestinian military force? Could you say "yes" for the record?

40

1      **Dr. Walid Elkhatib:**

Yes

5      *Amicus Curiae Larissa Cadd:*

One of the other differences between the 1st and 2nd Intifadas was because there were also some people who were acting as freedom fighters? That's a "yes".

10     **Dr. Walid Elkhatib:**

Ok.

15     *Amicus Curiae Larissa Cadd:*

And some of those Palestinian freedom fighters, they made home-made rockets?

20     **Dr. Walid Elkhatib:**

The Palestinian you mentioned, they carried only gun, not helicopter, not tank. Some Palestinians carried only guns. So unequal. We cannot compare the Palestinians who have very old guns with Israeli forces which have tanks and helicopters and also ... use it in the 2nd Intifada for bombing people.

25     *Amicus Curiae Larissa Cadd:*

In the 2nd Intifada, there were people making home-made rockets in Palestine?

30     **Dr. Walid Elkhatib:**

In West Bank actually no. It was somehow in the other strip, but in West Bank no, where I live.

35     *Amicus Curiae Larissa Cadd:*

But the Intifada isn't just in the West Bank, is it?

**Dr. Walid Elkhatib:**

Excuse me, let me say something. If in Gaza, as you said now, it became as a reaction to Israeli action against Palestinians, you know. And even these rockets, you mentioned, very old, it means nothing if you compare with so sophisticated rockets ...

40     *Amicus Curiae Larissa Cadd:*

But those rockets have killed people, haven't they?

**Dr. Walid Elkhattib:**

If you want to ask me how many people, very very very few.

1

**Amicus Curiae Larissa Cadd:**

I didn't ask how many, but they have killed people, haven't they?

5

**Dr. Walid Elkhattib:**

As far as I know, they all old type of rockets, no. Some dangerous only.

10

**Amicus Curiae Larissa Cadd:**

It is the case that some of those homemade rockets have hit Israeli kindergartens, for example, where children are.

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**Dr. Walid Elkhattib:**

I want to tell you something. The rocket you mentioned used by Palestinian, some Palestinians who live in Gaza, very old type of rocket - it means it is not directed. I know what you are trying to say, but I am not completely with you because this is not direct to someone, you know. This is the problem of these rockets. If we compare it between these old rockets used by the Palestinians and the so sophisticated directed rockets used by Israeli airplanes ...

20

25

**Amicus Curiae Larissa Cadd:**

It's a terrible thing to fire a rocket and not know if it's going to kill children, isn't it?

**Dr. Walid Elkhattib:**

Ok. The Israelis themselves, once they bomb people they don't care about other people not their target. For instance, I remember very well one case when they used 1,000 kilogram bomb to kill 1 person together they killed also about 18 people most of them are children.

30

35

**Amicus Curiae Larissa Cadd:**

I repeat my question: It's a terrible thing to fire a rocket and not know if it's going to kill children ...

40

**Dr. Walid Elkhattib:**

Yes. They don't know where their rocket will go. Yes, you're right.

1      **Amicus Curiae Larissa Cadd:**

The 2nd Intifada began as an uprising that the Palestinian started?

5      **Dr. Walid Elkhattib:**

Look, the 2nd Intifada started as a result of the visit of Prime Minister Sharon to Al-Aqsa Mosque. You know, Al-Aqsa Mosque is very sensitive for Palestinian, for Muslims all over the world; and we believe that time that this is something political visit. It is not as he said just to make peace with Palestinian. We don't believe that. We know, especially Sharon, we know what he means by his visit to Al-Aqsa. The Palestinian protested. But at day, why Israelis kill 20 Palestinians? Why Palestinian people in Jerusalem - there is no gun. They just protest. They are civilians. Why the Israeli soldiers kill 20 persons because they protested against Sharon visit to Al-Aqsa?

**Amicus Curiae Larissa Cadd:**

20     You know who Suha Arafat is, don't you?

**Dr. Walid Elkhattib:**

Suha Arafat?

25     **Amicus Curiae Larissa Cadd:**

You know who she is?

**Dr. Walid Elkhattib:**

She is the wife of President Arafat, yes.

30

**Amicus Curiae Larissa Cadd:**

If I said to you that she had made a statement in these terms, "he," meaning President Arafat, "had already decided to carry out an Intifada after the Oslo Accords and the failure of Camp David," that would go against the idea that it was purely because of a visit by Ariel Sharon, wouldn't it?

**Dr. Walid Elkhattib:**

I not believe that because we know from the 1st Intifada, we have experience with the Israelis that if the Palestinians would plan to go for Intifada, I know and we know the price which we have to pay for that. That's why I not believe that because

40

me as a Palestinian who lived during the 1st Intifada; and the 2nd Intifada, I can say with sure that I not believe that, it's not true - even if she say like that.

*Amicus Curiae Larissa Cadd:*

If I were to suggest to you that the reason why there was a 2nd Intifada was because that Arafat saw that repeating the 1st Intifada in new forms would bring the necessary popular international and Arab pressure upon Israel, what would you say?

**Dr. Walid Elkhattib:**

Somehow, and I agree with you, but I want you to know something very important. As you know now that I lived in Palestine since the beginning, and I know, I know, because there are versus between a national interest of Palestinian people with occupation ... with time with more and bigger and bigger and bigger. That's why we reached a moment that people themselves go to protest against occupation because of the Israeli government - violence of all human rights in Palestine. I believe that this is the main reason for the 1st Intifada and for the 2nd Intifada, because we believe - ok, let me say one thing also.

After the 1st Intifada and the peace negotiations started between PLO and Israel, we started to believe somehow that the coming peace, the peace is coming for Palestinian. But unfortunately, we became to believe more that Israel were not going for real peace. It means the same problem the same controversial between Palestinian interest and occupation. It means the same situation but the difference again that the 1st Intifada it was civilian Intifada against occupation while the 2nd one became as a military because during that time we have our military forces, I mean policeman and some even activist, you know. So not fair the reason which you mention but I believe it's not the reason.

If Intifada part 1 and people themselves don't want, believe me, Intifada will not be started. The people themselves started the Intifada against, and I think they have a right for resistance occupation somehow.

1      **Amicus Curiae Larissa Cadd:**

So the main reason for the 2nd Intifada was in actual fact the occupation, not the visit by Ariel Sharon which was in the Israeli perspective a peace-making exercise?

5      **Dr. Walid Elkhhatib:**

Look, I believe that it is an ongoing process - that when we reached the Sharon visit it was the last moment when the people became, you know, upset. So I think this is the moment

10     ...

Dr. Walid Elkhhatib (via translator):

... that was the moment when the last card was drawn.

15     **Amicus Curiae Larissa Cadd:**

The line was drawn in the sand, so to speak?

Dr. Walid Elkhhatib:

Yes.

20     ...

**Amicus Curiae Larissa Cadd:**

It is possible, although I accept you might think it unlikely, but it is possible that the visit by Ariel Sharon was an attempt to make peace?

25     ...

**Dr. Walid Elkhhatib:**

No. Of course not. He said that, but nobody believed him because all Palestinians know who is Sharon.

30     **Amicus Curiae Larissa Cadd:**

When you say, "nobody believed him," you mean, "no Palestinians believed him?"

Dr. Walid Elkhhatib:

Sharon is killer of Palestinian children, Palestinian people. You remember Sabra and Shatilla? You remember when he became Prime Minister how many Palestinians were killed when he became as Prime Minister. The Israeli invasion to Palestinian cities started when Sharon became Prime Minister. And he is very extremist, right-wing. He hate Arafat, he hates Palestinians. We have long time experience with his policies, with his ideology.

**Amicus Curiae Larissa Cadd:**

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So it is not possible for Ariel Sharon to change and try to see  
the peace?

**Dr. Walid Elkhhatib:**

5

No.

**Amicus Curiae Larissa Cadd:**

I'm going to move to a different topic now. I would like to  
draw your attention to paragraph 20 of your statement. You  
have a heading - "Mental Health Issues Among Palestinians".

10

Mental health issues have become a global phenomenon  
recently, hasn't it?

15

**Dr. Walid Elkhhatib:**

Yes, I think so.

**Amicus Curiae Larissa Cadd:**

And one of the reasons why is because people are now  
recognizing this as a valid illness?

20

**Dr. Walid Elkhhatib:**

25

Look, let me clarify one thing. All of us can have some mental  
reaction, mental symptom, but it doesn't mean that is illness.

**Amicus Curiae Larissa Cadd:**

I accept that. What I am suggesting to you is that people  
recognize it more now.

30

**Dr. Walid Elkhhatib:**

35

Yes, because a lot of cases we have it. Because of everywhere,  
as you said, I agree with you. But where we have more cases  
of mental illness - where there political instability. But in other  
countries where they are economical, and political stability,  
the incidence of mental illness are less. Yes, there is a very  
significant relationship between stability or instability where  
incidence of mental illnesses.

**Amicus Curiae Larissa Cadd:**

40

But your statement doesn't make that comparison between  
Palestine and other countries. Where is the data which relate  
to the other countries to show this?

1      **Dr. Walid Elkhattib:**

Let me say with that I meant here, the figures, I use it - official report - and as you know, there was a need for studies and research within Palestine, and all these data came out of these studies and official reports - official organization mainly in Ministry of Health Palestine. In other countries I think the same. I reviewed the numbers in other countries from their official government.

10     **Amicus Curiae Larissa Cadd:**

But those documents and reports from other countries are not contained in your statement.

**Dr. Walid Elkhattib:**

15     Look, we can compare the percentage of the incidence, but Palestine is something different. When we conduct research, we always look at the ... . I believe that some of these percentage is not due to occupation, I believe it. But when we started - I mentioned also here - which percentage of mental illness, among whom - and we found where there is killing, where there is very act of military action between Israel and Palestinian, these figures were very far Palestinian towns.

20     What does it mean? It's very clear that there's a very significant relationship between the military action against Palestinians and the incidence of mental illness is mentioned here.

**Amicus Curiae Larissa Cadd:**

25     But, the comparison figures that the Court would need to be able to look at for other countries so that it could make that comparison and understand it itself is not contained in your statement.

**Dr. Walid Elkhattib:**

30     Let me compare also these figures with Palestinian figures themselves. Before Intifada and after Intifada. And there is a difference, believe me, there is a difference between before Intifada when it was more quiet than after Intifada. After Intifada, or during Intifada, the incidence of mental illness ... The attendance of mental clinics extremely filled during Intifada. It is out of the Ministry of Health records.

**Amicus Curiae Larissa Cadd:**

Again, those different figures between pre-Intifada and post-  
Intifada are not contained in your report, are they?

1

**Dr. Walid Elkhattib:**

As far as I know that, I have to talk about Palestinian figures.  
Somebody asked me to compare, so I [did not] put down the  
figure in other countries.

5

**Amicus Curiae Larissa Cadd:**

But you can understand a context would be helpful to a  
decision-maker in a case like this?

10

**Dr. Walid Elkhattib:**

Look, I told you that in other places where there are conflicts,  
you know, I have email from colleagues from other Palestinian-  
Arab countries, like from Syria, they are talking about  
intervention cause there is a need to study mental health issues  
during the political situation in Syria. In the Arab countries  
like ... or so and so, they have least concern of mental health  
because no conflict, there is no conflict there. What does it  
mean? Does it mean for me there is very strong relationship  
between conflict, between problem in the country with mental  
health. But there is a difference between what happen in Syria  
and what is happening in Palestine - it is the Israeli occupation,  
the main reason.

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**Amicus Curiae Larissa Cadd:**

Where does that causative conclusion come from in the data?

30

**Dr. Walid Elkhattib:**

I told you. When I reviewed the reports or the study conducted  
in other countries, that's why I can compare what I have here  
with these reports.

35

**Amicus Curiae Larissa Cadd:**

And it would be helpful for the court to have that data in the  
same way that you did to be absolutely sure that you have  
interpreted it correctly?

40

**Dr. Walid Elkhattib:**

Ok. I think it is useful to have comparison between countries  
where they have conflict with others where there's no conflict.

1 But again, we are talking about the effect of occupation. What I  
am saying about Palestine, at the first time I mentioned - there  
... IN Palestine, in Palestine itself between occupation and the  
effect of occupation on Palestinian people in general, mainly  
in mental health also.

5 And scientifically this is proved, this relationship, not only by  
our research but everywhere in the world.

10 **Amicus Curiae Larissa Cadd:**

If I can take you to that paragraph again, and you speak of  
90% of Palestinian people being exposed to violence in the  
2nd Intifada. Where did you draw your data from for those  
people? How did you get the sample population to make this  
15 calculation?

Dr. Walid Elkhattib:

In the 2nd Intifada, the Ministry of Health ... the Palestinian.  
The 1st Intifada, because we had very poor health services  
20 delivered by occupation itself because the occupation was in  
charge of delivery [of] health services, education and so on so,  
but that time Palestinian NGOs worked very well, and very  
active; and I was a member of Palestinian NGO and we worked  
as a volunteer to replace very poor health services provided or  
25 supported by occupation itself. That's why, that's from where  
I know, I have all these figures.

**Amicus Curiae Larissa Cadd:**

Would it be fair to say that these statistics are drawn from  
30 people who went to see a medical professional?

**Dr. Walid Elkhattib:**

In 1st Intifada, it is a figure, it is a report; but report of Palestinian  
NGOs who took responsibility, very big responsibility - and all  
35 these NGOs supported by international organizations. It means  
all Palestinian NGOs should report to these organizations ...  
the reports all these organizations about what happening in  
occupied Palestinian territory.

**40 Amicus Curiae Larissa Cadd:**

In the 2nd Intifada, these figures of 90% were drawn from  
people who went to see a doctor or a nurse.

**Dr. Walid Elkhhatib:**

Yes.

1

**Amicus Curiae Larissa Cadd:**

It wasn't a survey of the general population, was it?

5

**Dr. Walid Elkhhatib:**

I told you that we have the reports and we have studies, we have surveys conducted in Palestine during Intifada - Ministry of Health itself and also universities were concerned or conducted the research in this issue; and we have many studies.

10

**Amicus Curiae Larissa Cadd:**

Why aren't those studies showing that contained in this statement?

15

**Dr. Walid Elkhhatib:**

I think it should be very short to describe. It's very clear. If there is a need for details, I could write more details.

20

**Amicus Curiae Larissa Cadd:**

I'm going to move to the issue of schoolchildren now. And you oversaw the cooperation with the World Health Organization a survey?

25

**Dr. Walid Elkhhatib:**

Yes

**Amicus Curiae Larissa Cadd:**

That survey wasn't sent to all schools in Gaza or the West Bank, was it?

30

**Dr. Walid Elkhhatib:**

Yes.

35

**Amicus Curiae Larissa Cadd:**

Yes it was sent to all schools, or no it wasn't.

**Dr. Walid Elkhhatib:**

No no. No need to visit all schools. When you conduct study, no need to visit all school. 10% of all schools, it's enough.

40

1     **Amicus Curiae Larissa Cadd:**  
      How were those schools chosen?

5     **Dr. Walid Elkhatib:**  
      Ok. This study, you went on 2010, you mean?

Amicus Curiae Larissa Cadd:  
Yes, I'm speaking of 2010.

10    **Dr. Walid Elkhatib:**  
      This study was in cooperation with WHO and CDC in United States and the 10% of schools selected taken randomly, taking into consideration female-male, cities and towns.

15    **Amicus Curiae Larissa Cadd:**  
      Do you recall how many students were surveyed?

Dr. Walid Elkhatib:  
... but more than 10,000.

20    **Amicus Curiae Larissa Cadd:**  
      If I were to suggest to you that in one of the surveys of Gaza only 2,122 students was surveyed, would that surprise you?

25    **Dr. Walid Elkhatib:**  
      I cannot remember exactly the number, but by the way, this survey conducted not mainly on inter health issues. It was under the name "Global School Health Survey" which contained about 10 modules, one of them was about mental health including suicide.

30    **Amicus Curiae Larissa Cadd:**  
      Who drafted the questions that were going into that survey?

35    **Dr. Walid Elkhatib:**  
      These questions it is internationally, but every country should update this questionnaire to be within the look and contents, that's why we have a committee, Palestinian committee from Ministry of Health, Ministry of Education and NGOs - we review the draft questionnaire and adapted this with the Palestinian context.

**Amicus Curiae Larissa Cadd:**

So you would be able to put questions which related purely to the Palestinian context into that survey? 7

**Dr. Walid Elkhattib:**

Yes. Yes. 5

**Amicus Curiae Larissa Cadd:**

In that survey, it dealt with health like the size and weight of children, for example ... 10

**Dr. Walid Elkhattib:**

Yes - healthy lifestyle, nutrition, habits, physical exercise, and other modules including smoking, drugs. 15

**Amicus Curiae Larissa Cadd:**

And the questions related to suicide, there were, I think, 3 of them? Sorry, 6 of them - my error.

**Dr. Walid Elkhattib:**

Actually ... not only the question, you have to think about suicide. If direct question ... very few who said, "yes I tried." But the 24% we have here they have thinking, you know. By the way, it was very shock results - not only for us, but for WHO, that among the Muslim population, amongst Palestinian student we have 24% of all student have suicide tendencies. 25

**Amicus Curiae Larissa Cadd:**

The questionnaire also dealt with an issue which confronts most schoolchildren around the world: bullying, being picked on. 30

**Dr. Walid Elkhattib:**

Yes. As I told you, it was randomly selected schools and children. We are not select, "*ah you have to answer, and you don't have to answer.*" Even the school children simply picked at randomly. 35

**Amicus Curiae Larissa Cadd:**

I understand that. The question is: There is at least 2 questions in that survey that dealt with children being bullied or picked on by their peers or other people. 40

1      **Dr. Walid Elkhatib:**

It was question about violence between students themselves.

Amicus Curiae Larissa Cadd:

5      And in that survey, the bullying questions came straight before the questions on suicide?

Dr. Walid Elkhatib:

I don't remember.

10     Amicus Curiae Larissa Cadd:

Could the Registrar please provide the bundles that were prepared this morning to the Bench. I understand my learned colleague has one already, and one to the witness.

15     If Your Honours and Dr. Walid would go to page 1, there is a heading which says the "Global Based Student Health Survey 2010 Palestine Questionnaire." Is that the questionnaire we were speaking about, Dr. Walid?

20     Dr. Walid Elkhatib:

Looks like.

Amicus Curiae Larissa Cadd:

25     If I can take your attention to question 37 and 38, which is on page 8. You will see those 2 questions about bullying: "*During the past 30 days on how many days were you bullied*" is the first one, yes? And the second is: "*During the past 30 days, how were you bullied most often,*" is the second question.

30     And immediately after that, at questions 39 to 45 on page 9, those are the 6 questions about suicide.

Dr. Walid Elkhatib:

35     Ok.

Amicus Curiae Larissa Cadd:

They follow immediately after the bullying question.

40     Dr. Walid Elkhatib:

So you're trying to say that there's relationship between their answer because the question about suicide came after the 2 questions? I disagree with you.

**Amicus Curiae Larissa Cadd:**

And you very quickly reviewed this questionnaire, there are not any questions in this which are specific to the Palestinian situation, are there?

**Dr. Walid Elkhattib:**

I know that there is direct effect of occupation to Palestinian and indirect effect of occupation. I think indirect effect of occupation to Palestinian children in schools.

**Amicus Curiae Larissa Cadd:**

If I were to say to you that when it is a criminal matter, you have to prove a matter beyond reasonable doubt, I would suggest to you that this does not meet that test.

**Dr. Walid Elkhattib:**

Ok, maybe, ya, I believe in you. But where there is evidence there is indirect effect of occupation - I believe that 24%, does it mean because of occupation? There is percentage of suicide among the schoolchildren. But 24% in Palestine, I think, is higher, maybe it is indirect; directly some are related to general situation with Palestinian children there. And the general situation affected by occupation itself.

You are trying to - when you are talking about martyrs, about injured, about disabled children and the main cause of dying, the main cause of disability is due to Israeli violence against Palestinian. It is mentioned in my application here.

**Amicus Curiae Larissa Cadd:**

This survey would have been the perfect opportunity to raise specific Palestinian issues in terms of children, wouldn't it?

**Dr. Walid Elkhattib:**

Let me say: The main aim of this survey is to study the behavioural issues of Palestinian children. There is not aim to link it with occupation; but when we discussed the results, somehow, we found relationship between these results with the general situation where our children live and study. That, we can estimate that there is a relationship between the very bad condition in Palestine which I... the Israeli violence, the Israeli occupation on Palestinian people; it's related to Palestinian

1 children that's why somehow, partially, they answer these  
questions.

5 You know, this is a social problem. You cannot be like  
mathematics.

*Amicus Curiae Larissa Cadd:*

10 The results from that survey were divided into a number of  
various - one being West Bank and one being Gaza. And I think  
that there was a UNRWA version of the West Bank and Gaza,  
and there was also a OPT version of the same thing.

15 If you look at page 14 and 15 ... if you look at page 14, that is  
the result for the West Bank, and if you look at page 16 and 17  
there is another set of result for the West Bank.

**Dr. Walid Elkhattib:**

20 Let me clarify a thing that this survey conducted on refugee  
camps which is under UNRWA responsibility; while the  
governmental Palestinian schools conducted by Ministry  
of Health and Ministry of Education - that's why you see 2  
different reports.

*Amicus Curiae Larissa Cadd:*

25 So the first report is the government report ...

**Dr. Walid Elkhattib:**

30 Government report, and the second ... was responsible for  
survey conducted in refugees camps.

*Amicus Curiae Larissa Cadd:*

And the children in refugee camps is in particularly dire  
circumstances, aren't they?

35 **Dr. Walid Elkhattib:**

Yes.

*Amicus Curiae Larissa Cadd:*

40 And if you look at the mental health ...

**Dr. Walid Elkhattib:**

By the way, the UNRWA conducted this research is a study

not only in Palestine - also in Syria and Lebanon and  
Jordan.

1

**Amicus Curiae Larissa Cadd:**

But these results relate to the West Bank part?

5

**Dr. Walid Elkhhatib:**

Yes - among refugees living in the West Bank, yes.

10

**Amicus Curiae Larissa Cadd:**

So if we look at the mental health of children - percentage  
of students who have ever seriously considered attempting  
suicide during the past 12 months ...

**Dr. Walid Elkhhatib:**

Page number 14 ...

15

**Amicus Curiae Larissa Cadd:**

Page number 14, just under the heading "Mental Health" - You  
see the total figure is 23.3%

20

**Dr. Walid Elkhhatib:**

Ok.

**Amicus Curiae Larissa Cadd:**

And if we look at page 16, in terms of the refugee camps, the  
same question, there is a percentage of 20.9%

25

**Dr. Walid Elkhhatib:**

Yes.

30

**Amicus Curiae Larissa Cadd:**

So, those children who are in significantly dire circumstances  
in a refugee camp have a lower suicide rate than those who  
do not have that.

35

**Dr. Walid Elkhhatib:**

This is the results.

**Amicus Curiae Larissa Cadd:**

I just want to know if you wanted to comment and explain  
why that could occur.

40

1      **Dr. Walid Elkhatib:**

I cannot understand why you are trying to say. In Palestinian camps the condition is worse than in other town. But in general, 20.9%, or 23%, not so big difference between them. Let me say one thing: in the UNRWA schools, the children is still in the schools until 13 years old, then they go to governmental schools. And some refugee people attend governmental schools.

10     That's why I cannot consider the difference between camps and governmental schools is significant.

*Amicus Curiae Larissa Cadd:*

15     What you're saying is there is a cross-over where they go to school so it might not necessarily be an accurate reflection?

**Dr. Walid Elkhatib:**

Yeah.

20     *Amicus Curiae Larissa Cadd:*

Can I take you to paragraph 24 of your statement. You state there that, "*during the 2nd Intifada it was found that in 77.8% of Palestinian families at least one member suffers from mental problem.*"

25     Where does that figure come from? Who did you survey?

**Dr. Walid Elkhatib:**

The survey was conducted by Palestinian University ...

30     *Amicus Curiae Larissa Cadd:*

If you were able to ...

**Dr. Walid Elkhatib:**

35     Let me tell you one thing: All university cannot conduct any survey without cooperation with Ministry of Health ... if this discovery or survey ... schools.

*Amicus Curiae Larissa Cadd:*

40     When you finish giving evidence today, would it be possible for you to try to find out that university and perhaps find out

the methodology and source of that so it can be given to the Court for them to consider? 1

**Dr. Walid Elkhattib:**

Ok, Of course. 5

*Amicus Curiae Larissa Cadd:*

Thank you.

I'm now going to move on to an issue of other health issues among Palestinians which is page 5 of your statement. You give evidence in those following paragraphs which include, for example, the increase in ... 10

**Dr. Walid Elkhattib:**

Which one? 15

*Amicus Curiae Larissa Cadd:*

Paragraph 32 which is at page 6. Paragraphs 32 and 33 speak about premature and miscarriages in women who are carrying children. My question relates to paragraph 33, in particular, where it says "there's a 40% increase in prematurity and miscarriages during the 2nd Intifada." If I were to suggest to you that there are other reasons than the Intifada or occupation for that increase, what would you say? 20 25

**Dr. Walid Elkhattib:**

Yes, of course. I mentioned at the beginning that not all these percentages are due to Intifada. But believe me, as far as I mentioned, the effect of teargas - let me clarify that by myself I know many cases of early miscarriage. Miscarriage on pregnant women have been immediately after explosion to teargas. But at that time, until now, we as a doctor cannot say directly that miscarriage is due to teargas - from ... we cannot say that. 30 35

But we know from our hearts, as a doctor, that many cases of premature miscarriages happen immediately after teargas. That's why this 40% increase in prematurity and miscarriages in pregnant women. 40

1      **Amicus Curiae Larissa Cadd:**

In fact, the World Health Organization has identified some of the leading causes of infant deaths, or prematurity and low birth weight, haven't they?

5      **Dr. Walid Elkhattib:**

Yes. We know we know we know the reasons of ... of babies. We know these cases. We know there are medical causes of prematurity and miscarriage. But if you compare the medical causes with the causes in Palestine, especially when the women are exposed to teargas, especially teargas, I'm not sure about stress, if there is a relationship between stress and prematurity - maybe. But after exposure to teargas, it's very clear for us, from the 1st Intifada and the 2nd Intifada.

10     And by the way, the Israelis, it is very easy for them to use teargas - everywhere they throw bombs, teargas.

15     **Amicus Curiae Larissa Cadd:**

If I were to suggest to you that the World Health Organization in a report on Palestinian birth rate said this: *"Some of the leading causes of infant deaths found in the survey such as low birth weight or prematurity and congenital malformations overlaps somewhat and are associated with certain known determinants including early pregnancy and consanguineous marriage."*

20     **Dr. Walid Elkhattib:**

Look, even WHO cannot say that the ... could be a reason for prematurity and miscarriage - even WHO - because the ... political issue, more than medical issue, you know to talk about it. But we as the Palestinians, we know it, and we saw and we know that many women came because they have premature miscarriage, and when you ask them, they said, "yeah, there was clash, it was teargas." After that, they came to the hospital. It is no scientific improvement.

25     By the way, once the main doctor of the hospital where I worked tried to call somewhere to Israel to ask about detail, nobody answered him, said, *"sorry, we cannot ask you, even if you are a doctor."* If there's something secret, what does it mean? What is this teargas? That's why we cannot say directly that teargas can cause premature miscarriage.

**Amicus Curiae Larissa Cadd:**

But when you say at paragraph 33, "*there was a 40% increase during the 2nd Intifada,*" that is the very inference you're asking this Tribunal to make.

1

**Dr. Walid Elkhattib:**

Oh yeah. It is very clear written here: 40% increase. But nobody can say why 40% increase. We can't say, "*because of teargas,*" otherwise they will put - if not me - might be the people who will write it in the prisons, they will ... against him, if somebody will say clearly that there is a scientific relationship between teargas and prematurity.

5

I think it is very clear what I am trying to say.

10

**Amicus Curiae Larissa Cadd:**

If I were to read you another portion of that same report for you to comment on: "*Although Palestine refugee communities face socio-economic hardship and have high fertility rates, their infant and childhood mortality rates are among the lowest in the Arab world.*"

20

What would you say?

25

**Dr. Walid Elkhattib:**

This is because we have a very good health services provided for Palestinian children after birth, and even before.

30

**Amicus Curiae Larissa Cadd:**

I just want to take you back to paragraph 31 now.

35

**Judge Shad Saleem Faruqi:**

Counsel, yesterday you had mentioned that you would take 30 minutes to 45 minutes, I think that has been exceeded. We are really pressed for time. And I have to say this you - any research with a medical or social is subject to criticism and whether the methodology is safe or not, there's no research on earth where the methodology is totally unquestionable.

35

Why don't you make your point to him as an expert witness; ask him a 'yes' or 'no' and let's move on.

40

1   **Amicus Curiae Larissa Cadd:**

I'm obliged to the court and I only really have only a couple of extra points now if that is the case.

5       If I can move to checkpoints. You indicate that there are some 730 checkpoints between cities - paragraph 36, page 6.

Dr. Walid Elkhhatib:

Ok.

10     **Amicus Curiae Larissa Cadd:**  
And you say some are "flying checkpoints" that move and others are stationary ones.

15     **Dr. Walid Elkhhatib:**

Yes.

**Amicus Curiae Larissa Cadd:**

How do you know there are 730?

20     **Dr. Walid Elkhhatib:**  
There is an Israeli organization. The main issue of them, you know, observe what's going on on the ground on checkpoints. Their report, and also Palestinian reports, you know, and also international NGO who work in West Bank, they know about all these checkpoints.

25     **Amicus Curiae Larissa Cadd:**

Is this an approximate figure then, because it can't be determined exactly?

30     **Dr. Walid Elkhhatib:**

Look, let me say, it's mentioned here, "730 checkpoints." More less, depends. Sometimes from the security point of view for Israeli themselves, they stop one checkpoint. I remember from my way from Bethlehem to Ramallah, it was a checkpoint we called ... when they made it like a border between West Bank and Jerusalem, they closed it. It means one checkpoint is no now.

40      But at that time, around 730 checkpoints.

**Amicus Curiae Larissa Cadd:**

I now want to take you to paragraph 41 on page 7 of your statement. You spoke there how you had walked into a curfew by accident, and the Israeli soldier told you to pull your shirt up. That is considered quite insulting to a Palestinian, isn't it? 5

**Dr. Walid Elkhhatib:**

Yeah. I remember very well.

**Amicus Curiae Larissa Cadd:**

And one the reasons why Israelis do this is that they have had suicide bombers in the past, haven't they? 10

**Dr. Walid Elkhhatib:**

Yes. 15

**Amicus Curiae Larissa Cadd:**

And even though it is offensive to you, it is possible that they were asking you to do that to prove you were not a threat? 20

**Dr. Walid Elkhhatib:**

Ok. I understand why they ask me that question.

**Amicus Curiae Larissa Cadd:**

And you being a sensible man complied because you didn't want to get hurt? 25

**Dr. Walid Elkhhatib:**

Yes. 30

**Amicus Curiae Larissa Cadd:**

I have no further questions for this witness and I hope that the cross-examination has assisted the Court, from *Amicus*. 35

**Prosecutor Gurdial Singh Nijar:**

Thank you. I just have a few questions in re-examination.

First, you said that the aim of this survey was to study the general behaviour of Palestinian children, but when you analyzed the relevant data, you saw a relationship arising from the effect of Israeli violence? 40

1      **Dr. Walid Elkhattib:**

Yes

**Prosecutor Gurdial Singh Nijar:**

5      And you have summarized that effect in your statutory declaration?

**Dr. Walid Elkhattib:**

Yes

10

**Prosecutor Gurdial Singh Nijar:**

And so you have talked about mental issues, you have talked about education problem, you have talked about other health problems, suicide, and so on - you have summarized this?

15

**Dr. Walid Elkhattib:**

Yes

**Prosecutor Gurdial Singh Nijar:**

20     Thank you. The second point I want to ask you is: You said that this was your methodology - you took a random survey?

**Dr. Walid Elkhattib:**

Yes

25

**Prosecutor Gurdial Singh Nijar:**

10,000 children?

**Dr. Walid Elkhattib:**

30

More than 10,000. Randomly.

**Prosecutor Gurdial Singh Nijar:**

Is this an accepted methodology?

35

**Dr. Walid Elkhattib:**

Yes, of course.

**Prosecutor Gurdial Singh Nijar:**

Your report was accepted?

40

**Dr. Walid Elkhattib:**

It was in cooperation with CDC, a very famous American centre - Centre for Disease Control. Health centre.

**Prosecutor Gurdial Singh Nijar:**  
And they accepted your report?

1

**Dr. Walid Elkhattib:**  
Yes.

5

**Prosecutor Gurdial Singh Nijar:**

Thank you. The other point is you said that you have not provided the data because you can give the details but you wanted to summarize it, that's why you didn't provide the data? 10

**Dr. Walid Elkhattib:**  
Yes.

15

**Prosecutor Gurdial Singh Nijar:**

It was suggested to you, "*It's a terrible thing to fire rockets and not know where it is going to land and if it is going to kill children,*" this was suggested to you. Israeli, when they attacked Sabra and Shatilla ... 20

**Amicus Curiae Larissa Cadd:**

Your Honours, I have an objection to the question in that format.

25

**Prosecutor Gurdial Singh Nijar:**

I will rephrase it. Don't worry. No worries about that.

Cast Lead, in Gaza. There were attacks on Gaza?

30

**Dr. Walid Elkhattib:**  
Yes.

**Prosecutor Gurdial Singh Nijar:**  
There was bombing?

35

**Dr. Walid Elkhattib:**  
Yes

**Prosecutor Gurdial Singh Nijar:**  
Was it directed to targets?

40

1      **Dr. Walid Elkhatab:**

Yes

Prosecutor Gurdial Singh Nijar:

5      To women?

Dr. Walid Elkhatab:

Yes

10     **Prosecutor Gurdial Singh Nijar:**

To children?

Dr. Walid Elkhatab:

Yes

15

Prosecutor Gurdial Singh Nijar:

To civilians?

Dr. Walid Elkhatab:

20

Yes

Prosecutor Gurdial Singh Nijar:

Direct. Terrible thing?

25     **Dr. Walid Elkhatab:**

Yes

Prosecutor Gurdial Singh Nijar:

Compared to rockets. Let's see the proportion.

30

Then we had Sabra and Shatilla. There was killings, you remember?

35     **Dr. Walid Elkhatab:**

That I remember.

Prosecutor Gurdial Singh Nijar:

A lot of civilians were killed?

40     **Dr. Walid Elkhatab:**

Of course.

**Prosecutor Gurdial Singh Nijar:**  
Children were killed?

1

**Dr. Walid Elkhhatib:**  
By the way ...

5

**Prosecutor Gurdial Singh Nijar:**  
No no just answer my question, don't worry. Just answer my  
question.

10

Children were killed?

**Dr. Walid Elkhhatib:**  
Yes

15

**Prosecutor Gurdial Singh Nijar:**  
Women were killed?

**Dr. Walid Elkhhatib:**  
Yes

20

**Prosecutor Gurdial Singh Nijar:**  
As far as you're concerned, was it also with the involvement  
of Israelis or not, Sabra and Shatilla?

25

**Dr. Walid Elkhhatib:**  
Yes yes yes.

**Prosecutor Gurdial Singh Nijar:**  
And the final point, you said, "*Sharon is the killer of the Palestinian people.*" What do you mean by that?

30

**Dr. Walid Elkhhatib:**  
I remember very well. When Sharon became as Prime Minister,  
the total number of Palestinians who killed - more than before.  
And we remember Sabra and Shatilla, it was the responsibility  
of Sharon himself.

35

**Prosecutor Gurdial Singh Nijar:**  
I see. He was Defence Minister then, and there was large  
number of deaths. And this Sharon, who had killed, who was  
held responsible in Sabra Shatilla, and you said, "*more were*

40

1        *killed than ever before,"* this same killer - as you call him - walked  
      into Al-Aqsa Mosque, did he not?

**Dr. Walid Elkhattib:**

5        Yes

**Prosecutor Gurdial Singh Nijar:**

10      And he walked in alone, or with a large number of people? Did  
      he walk into Al-Aqsa Mosque alone or with a large number  
      of people?

**Dr. Walid Elkhattib:**

Many soldiers ...

15      **Prosecutor Gurdial Singh Nijar:**

He walked with soldiers ...

**Dr. Walid Elkhattib:**

20      Yes, of course.

**Prosecutor Gurdial Singh Nijar:**

Were the soldiers armed?

**Dr. Walid Elkhattib:**

25      Many policeman and soldiers ...

**Prosecutor Gurdial Singh Nijar:**

30      Policeman, soldiers, and they walked into Al-Aqsa Mosque  
      which is a sacred area for not only Palestinians but the whole  
      of the Muslim world?

**Dr. Walid Elkhattib:**

Of course.

35      **Prosecutor Gurdial Singh Nijar:**

Is that right? And people demonstrated, you said?

**Dr. Walid Elkhattib:**

40      Yes.

**Prosecutor Gurdial Singh Nijar:**

And what happened to the people who demonstrated?

**Dr. Walid Elkhattib:**

20 person killed ...

1

**Prosecutor Gurdial Singh Nijar:**

20 people were killed.

5

I've no further questions Your Honour. Thank you.

Unless there are questions from the Bench, I would ask that  
the witness be released.

10

Dr. Walid, thank you very much for your testimony. As far as  
we are concerned, prosecution thanks you very much for the  
useful testimony.

15

**Dr. Walid Elkhattib:**

You're welcome.

**Prosecutor Gurdial Singh Nijar:**

Our next witness is the last witness for the prosecution.

20

**Judge John Philpot:**

Mr. Prosecutor, I have a question for you. We have Part C of  
your evidentiary list which I have received in part. What is  
their status with respect to being evidence? Have they been  
filed or not?

25

**Prosecutor Gurdial Singh Nijar:**

Yes, they have been filed, and they are in the bundles, and  
they actually form part of our documentary evidence, and it  
was agreed during case management that we could refer to  
them in our submissions without the need to call the maker.

30

**Judge John Philpot:**

When were they filed?

35

**Prosecutor Gurdial Singh Nijar:**

They were filed well before the trial and they are in all these  
bundles.

40

**Judge John Philpot:**

So we can take cognizance of them as if it's evidence?

1      **Prosecutor Gurdial Singh Nijar:**

Yes, as documentary evidence, and I will be referring to it in my submission.

5      **Judge John Philpot:**

Thank you.

**Prosecutor Gurdial Singh Nijar:**

10     The next witness is Jawad Musleh who is number 11 in the list of witnesses, and I would invite Your Honours to look at Statutory Declaration Tab 4.

Can the witness please be sworn in?

15     **Jawad Musleh:**

I, Jawad Musleh, hereby solemnly and sincerely affirm and swear that I shall speak the truth and nothing but the truth, the whole truth in giving evidence.

20     **Prosecutor Gurdial Singh Nijar:**

Mr. Jawad, you are Jawad I.H. Musleh, and you reside in Bethlehem district in Beit Sahour?

25     **Jawad Musleh:**

Yes

**Prosecutor Gurdial Singh Nijar:**

I will ask you to read your statutory declaration. Just before that, you are, just a matter of curiosity, what is your religion?

30     **Jawad Musleh:**

Christian

**Prosecutor Gurdial Singh Nijar:**

35     Christian, living in Bethlehem. Your Honours, I would ask him to read his statutory declaration since it is in English. I think it would facilitate proceedings.

Please read slowly and loudly, thank you.

40     **Jawad Musleh:**

I just want to ask to take consideration that what had happened

to me has also happened and is still happening to tens of thousands of Palestinians who have been arrested by Israelis since 1967 and who were tortured and some of them killed in prison.

So myself I was arrested 8 times by the Israeli authorities and the army. First time was in August 1985. I was sentenced for 20 months. I was first taken to a place called Elmaskobeya Prison in West Jerusalem for interrogation. Then I was taken to another prison called Damoun located in Haifa, and finally I was taken to Ramallah prison in the West Bank.

In 1985 I was 15 years old and I was a student at Catholic school at Beit Sahour. It was summertime and I was going to move on to the 11th Grade, and on the I was going to move on to the 11th Grade, and on the 24 August 1985, the Israeli troops came to our neighbourhood in the middle of the night. They surrounded the neighbourhood and the house. ... they came to the house and knocked the door violently before my father opened to them and they told my father that they wanted to arrest me. They checked and searched my room and took my ID and the cuffed me from behind and covered my eyes and pushed me into an army jeep.

4 other people from the town were also arrested at the same time and we were taken to Elmaskobeya prison for interrogation. I spent 6 days and 6 nights at this centre where Israeli intelligence and guards used different kinds of torture - mental torture, psychological and physical.

They wanted me to confess the accusations - the main charge was that I was member in Palestinian political party. They wanted me to admit that I was member in party called PFLP. They tried to make me believe that they knew everything about me. At first I refused to confess and they started torturing me, beating me all over my body using clubs, sticks, and their legs and hands. The worst part was when there was no interrogation actually because I was in confinement with my hands tied behind my back and with a hood over my head, and that was extremely smelly which made me very hard to breathe. It was not possible to move or to breathe properly. My hands were tied behind either to a chair or to a piece of iron

1           welded to the wall. It was not possible to go to the bathroom or to have food.

5           When I used to asked for water or to go to the bathroom, the guards or the intelligence would blackmail me. They asked me to confess first before I could get anything or to go to the bathroom.

10          It was also difficult to sleep. The guards used to come every hour and then, and they kicked us to grab us from sleep.

15          After 6 days in this situation at the interrogation centre, I had to confess the charge especially that I was still a kid with no experience. There was a court hearing and there was a lawyer representing me. However, from what I knew, the decision was usually made by the Israeli intelligence.

20          It was a long and hard sentence - 20 months - for doing nothing actually; only for this charge, being a member in a political party. They thought that a long and hard sentence would keep me away from politics.

25          I was arrested 8 times and they are listed with you. You want me to read them?

30          I was tortured each time except for the last 2 times. In the last 2 detentions, 1989, 1990 - it was for administrative reasons. This is I told that Israelis used for people who are suspected to be active in political activities, but there is no proof. In such detentions, prisoners are not entitled to a hearing or lawyers, to object or to challenge their detention. Prisoners are sent straight to prison and they can only object to the period of detention. The period of detention is usually 6 months - very very often the sentence is confirmed for 6 months. In very rare cases, it might be decreased to 4 or 3 months.

35          When my lawyer asked for documents in relation to my detention, he was told that my file is confidential and that information had been given. However, the Israeli intelligence gave the court the reason for arrest. This is how, these are the procedures in such detentions; that the intelligence and the judge they decide the ruling, the period of time of detention.

1  
And the judge decides whether it is 6 months or whether  
should be decreased or renewed.

5  
Many people detained for administrative reasons. Their  
sentence were renewed for another 6 months and many people  
spent many years in administrative detention by renewing 6  
months after 6 months.

10  
During this detention there would be no physical torture but  
the conditions of prison are so hard and amounting to torture.

15  
These kinds of arrests are very common especially before the  
advent of the PNA, Palestinian National Authority, 1994. Now  
there are more than 5,000 prisoners in the prisons including  
children, elderly, men, women, Muslims and Christians.

20  
25  
Israeli forces always come and arrest people at night. I was  
most of the times arrested at night, except for one time where  
I was arrested in a demonstration. The Israeli army attack the  
demonstration and they started shooting in the air. 4 people  
were arrested, including myself. I was beaten very hard and  
I was unconscious for a few hours. When I woke up, I found  
myself in a prison. I was bleeding all over my face, body and  
hair. The other prisoners took care of me. I spent 3½ months  
in prison.

30  
In the other arrest, I do not confess my charges and twice,  
actually, I was detained for 3½ months and in other cases it  
was only interrogation for 18 days.

35  
40  
During each interrogation the Israeli intelligence wants to know  
about my activities, my relationships with political parties.  
There charges were rioting, participating in demonstrations,  
illegal activities, boycotting Israeli goods and inciting others to  
do the same, and that I was a security threat and a danger to  
the State of Israel. The focus of the interrogation usually was  
on my relationship with political parties and they would also  
try to find out more about other people. They wanted to get  
names of other people who are active in the cause.

Shall I continue?

1      **Prosecutor Gurdial Singh Nijar:**

Yes.

Jawad Musleh:

5      I was sent twice to a prison called Qeziot Military Camp. It is located in the Negev desert, south of Palestine. It looks like a Nazi concentration camp with watchtowers and fences. It is located in the middle of the desert and is completely isolated from the world. There were no means of connection with the outside world. We were completely isolated. We had no access to visiting families or to lawyers. I spent there 6 months each time.

15     Lawyers couldn't visit me. It was difficult. I was visit only once by my lawyer. And daily life inside prison was horrible. It was isolated and food was not good, it was not enough and was not good quality. This prison, we were all housed in tents. These tents were installed on sandy ground. Each section had 10 tents. There were fences all around. In one tent there would be 22 persons. It was very crowded and it was always dusty and dirty. Dust and sand would get into our boots. We didn't have books or anything to read or write. All we got was the tents and ... some food.

25     I was also held 3 other times in a prison called Dahariyeh. Within the camp, located south of Hebron; this one also very horrible place. Rooms were very crowded. We used to sleep over each other - with legs over each other. There was no space to move inside the room, and the rooms were very dirty and unhealthy. We were forced to wear prison clothes that were dirty and smelly. There was no access to bathroom or toilet. The prison guards would bring us a barrel for this purpose. All of us had to ease ourselves very openly in the room. When the barrel was full we were allowed to take it out and empty it and bring it bad.

35     Everything used to smell bad - our mattresses, our clothes, everything. There was no natural light. We were not allowed to leave the room. In other prisons, usually is allowed to go out of the room for one or two hours.

40     But in this prison, in particular, we were not allowed to get

out unless we go to the court or when we are transferred to other prisons. In this prison I was never visited by my family or my lawyer.

Sometimes we are beaten by the guards, although no interrogation was being carried out. They would come 3 times to the in the rooms to count us and we would have to stand with our face to the wall. Anyone moves or talks, we were beaten hard with clubs. Anyone who move or cough or sneeze, also we would be beaten.

This prison as well, when prisoner arrive at the prison, soldiers would stand in line on both sides. We have cuff and our eyes covered. We have to hold each other and walk through. When we pass between the 2 lines, the soldiers they would beat everyone with clubs, sticks and hands. There was no exception.

The food they given to us was not only bad but it was not enough and we didn't have enough food; and it was not possible to have showers.

The situation there is bad because it used to be a temporary holding place. By the time they decide what to do with prisoners - one time I spent one month there until I was taken to another prison.

Ok, that is about prisons. Shall I continue?

In 1992, I was participating, or planned to participate in a peaceful demonstration in Beit Sahour when suddenly a car came to the place of demonstration and 4 people came out of the car and started shooting. It was a Palestinian car - Palestinian cars are different from Israeli car. Very often the soldiers used to come with Palestinian cars so that people at demonstration would not know that they are soldiers; and they were also wearing civilian clothes, they were not wearing military uniform. Those persons who came out of the car, they opened fire. I was shot twice in my leg. One bullet went through the flesh and my muscles. The other one cut the sciatic nerve in my right leg which caused the complete paralysis of my foot. Now I have to wear special tools to help me walk properly. At that time I was a student at Bethlehem University

1 and I had to lose one semester of university because of  
my injury.

5 After I was shot, the soldiers took me in their jeep to their  
headquarters and they wanted to send me to prison. But I  
was bleeding and there was an argument between the soldiers  
and with the officers what to do with me, and finally because  
I was bleeding very, they decided to send me to the hospital.  
At the hospital, there was a guard at the door of my room for  
10 2 days and when they found out my injury was serious they  
decided to leave.

15 I spent one week in that hospital and I was asked to pay  
thousands of shekels. I didn't want to pay - I told the hospital  
that, "*the army brought me here and they should pay.*" But hospital  
insisted that I should pay and therefore I had to run away from  
the hospital and therefore I couldn't get medical report from  
this hospital. I went to rehabilitation centre later to continue  
my treatment.

20 Until now, my foot is completely paralyzed and I cannot feel  
anything. Sometimes I feel painful electrical spasm in my leg.  
As a result of my injury, I have had other accidents because I  
cannot feel anything. My foot has been scalded with hot water  
25 and even suffered cuts. So I don't know whether I am injured  
because I don't feel anything, and it was twice in practice that  
I had to remove my nail because it was infected, but I don't  
feel it. When I see it, it's already too late.

30 When I was arrested, I was 15 years old. I almost knew nothing  
about the Palestinian cause. But in prison - I spent sometime  
in prison - I met other prisoners there who were older than me  
and more experienced and we learned more and more about  
the Palestinian cause inside the prison; about the history of  
35 the conflict, the political parties and, of course, the discipline  
of the prisons. We managed to convert prisons into kind of  
school, or revolutionary school.

40 The Israelis think they can kill our soul in prisons by sending  
us to prison but it is there in prisons that our ... homeland is  
strengthen. The prisons are political detainees and we spend  
time discussing the Palestinian cause and analyze the political  
situation.

In my opinion, during the 1st Intifada there was a big chance that we could achieve freedom and independence. Unfortunately the Palestinian leadership at that time was in a hurry to have political achievement and that's why they signed the Oslo Accords. In my opinion, those accords were a mistake committed by PLO. Now 20 years of disagreement, negotiations, the Palestinian cause has deteriorated. More and more Palestinian lands are being taken away. More and more Israeli colonies are being built on lands in the West Bank and Jerusalem. It is more complicated with almost 700,000 Jewish settlers living in the West Bank. Jerusalem is being Judaised and Israelised. The Israelis are taking more and more Palestinian lands and building more settlements all around Jerusalem to make it Jewish city and force Palestinian to leave.

Jerusalem, particular, has special case. Life for Palestinians is very difficult. Very often the houses are being demolished on grounds that they have no permits or licences. In Jerusalem, it is impossible for Palestinians to get licence to build, and when they do build small rooms or extensions to their existing houses, they are demolished.

It is also very expensive for Palestinians to buy houses or lands in Jerusalem. If anyone owns a piece of land, no permission is given to the Palestinians to build houses there. So many people had to leave Jerusalem to the West Bank.

The Jewish settlers are encouraged to live in Jerusalem and ... the strategy is to force Palestinians to leave and to replace them with Jewish residents in Jerusalem to make it look like a Jewish city.

Now there are around 200,000 Palestinians living in and around Jerusalem but this number is getting less and less everyday because many people have to leave and Israel considers Jerusalem their capital and they wanted it to look Israeli and Jewish city.

The Israelis started building the separation wall in 2003 and they say it's a security barrier. But I believe it's a strategy to confiscate more lands because in some strips of the borders of the West Bank, it's inside those land and it's a way of taking

1 more and more lands. Because of the wall and the checkpoints, Jerusalem is completely separated now from the other places of the West Bank and Jerusalem and all the areas around are annexed to Israel.

5 I live not far away from Jerusalem, it's less than 30 minutes drive. But I have not visited Jerusalem for the last 15 years. To go to Jerusalem, special permit should be issued by the Isreali authorities, and this permit is not easy to get. People should present proof of what they are going to do in Jerusalem, whether they work there, or they have certain things to do, they have to give the proof otherwise permits are not given. I applied many times to get a permit but I never got one.

15 Jerusalem is an important city for Muslims and Christians. The Dome of the Rock and the Al-Aqsa Mosque are most sacred places for Muslims in Palestine, whilst the Sepulchre Church and Via Dolorosa and many other places that are sacred for Christians in Jerusalem. But both Christians and 20 Muslims are not allowed to go and visit the holy places. Jerusalem has always been the centre and the heart of Palestine - economically, culturally, historically - but now Palestinians are not allowed to visit.

25 The Israelis also took control Area "C" including Jordan Valley - they consider it as security area. So what is left for the Palestinians is very small percentage of Palestine; and it's getting smaller everyday by continuous building of settlements. The areas of the Palestinians now are getting small and isolated and they look like ghettos actually.

30 To move from one place to another inside the West Bank, we have to pass through checkpoints, and at every checkpoint we have to present our identification. There are, according to ... 35 which is a international human rights organization, there are 550 checkpoints and roadblocks around and inside the West Bank, in addition to 'blind checkpoint' which the Israelis set up at any place and at any time.

40 According to Oslo Accords that we signed in 1993, the West Bank was divided into 3 areas, "A", "B" and "C". Area "A" is the land that is supposed to be under the Palestinian Authority

control and this area covers the main cities and towns like Bethlehem, Hebron and Nablus and other areas. Area "B" is the small villages surrounding the main cities where Israel is in control of security and Palestinian Authority is in control of the civil services like health and education. Area "C" which is the rest of the West Bank, and it's the majority of the area of the West Bank, is in the complete control of the Israeli authorities. Checkpoints and roadblocks are set up throughout areas "A", "B" and "C" which covers the largest land area in the West Bank.

In order to travel from Bethlehem to Ramallah, we have to pass through 2 checkpoints, and they are very often closed, without prior notice, for long hours. Palestinians have to wait for long periods in queue before they can pass through the checkpoints. Very often processing of persons passing through the checkpoints is delayed or carried out very slowly which causes huge problems in travelling even short distances.

Many people, for example, from Bethlehem work in Ramallah - which is usually one hour drive; it could take two hours or three hours, sometimes more, because the checkpoints are closed or delayed, therefore those people cannot get to work on time.

I should also mention here that checkpoints are not means of separation of West Bank from Jerusalem or West Banks cities from each other but many incidents happen at checkpoints - many people are arrest, many Palestinians are arrested at checkpoints and many people are killed at checkpoints. Only last month, 2 people were killed at 2 different checkpoints in the West Bank.

As a result of Israeli control of Area "C", Israel controls all the borders and the movements of the Palestinians, they can easily stop you from moving from one place to another by closing the checkpoints. The Palestinians, of course, who live in the West Bank, are not allowed to go to Gaza, and the same for Gaza people - they cannot come to the West Bank; and we are not allowed to go to Jerusalem or any other part of Israel.

1 Area "C" is also considered the richest source of water supply.  
5 Palestinians are suffering from water shortage and the water resources are all controlled by the Israeli authorities. Water supplied to the Israeli settlers at a cheaper price and it's 5 times more in volume compared to the Palestinians. Those water resources are located in our land - they are supposed to belong  
10 to Palestinians - but we have to pay more money, and we get less water. The water supply to Palestinians is inadequate; therefore our daily life, our daily usage, and causes us great hardships and sufferings.

15 Many farmers in the West Bank depend on olive harvest. Palestine is full of olive trees. Many lands have been divided by the wall and therefore the farms that are located next to Israeli settlements or military camps, farmers cannot access their lands easily. Many of them are completely deprived of accessing their lands, in some cases they are given permits during the olive harvest to go to their lands, but due to -  
20 because they are deprived from accessing throughout the year to fertilize, water and take care of their trees - the harvest is poor and so many trees have dried up. In many cases, the settlers have stolen the olives from the farms and in other cases, settlers have burned the trees and very often they send their sewage water, they discharge it to the lower land, to the  
25 Palestinian farms. Of course this destroys the farms and trees and damages the environment.

**Prosecutor Gurdial Singh Nijar:**

30 Thank you. I just have, in volume 1 of the Prosecution bundle, we have the maps. Can the maps please be projected? We have maps, but they were not in colour. But the Secretariat has inserted, just after page 1 of volume 1, the coloured part of the West Bank and Gaza which shows the wall, the fence, the Israeli controls and so on, and the Israeli settlements.

35 Mr. Jawad, just look at this, the map of the West Bank after Israeli occupation since 1967. You can see Israeli control, the walls, the fences - the wall, the red line - goes right into the West Bank, encloses the West Bank. And then the roads, and  
40 Israeli settlements are marked in triangular form. This is what you are referring to just now?

Jawad Musleh:

Yes

1

Prosecutor Gurdial Singh Nijar:

I turn to the next page, Volume 1, page 2. Can the next map be shown please? The first is the purple one, Jerusalem there. It says there, "*Israeli unilaterally declared municipal area of Jerusalem.*" So this has been taken over unilaterally by Israel?

5

Jawad Musleh:

That's right.

10

Prosecutor Gurdial Singh Nijar:

If you look at the map as a whole, you are talking about Area "A", Area "B" and Area "C". So in the West Bank itself, the only area that open to Palestinians to move around freely is area?

15

Jawad Musleh:

Area "A"

20

Prosecutor Gurdial Singh Nijar:

Area "A". And this you say just now, in your testimony, are only the cities?

25

Jawad Musleh:

Major cities, yes; and the surroundings. But they are isolated by Area "C"

30

Prosecutor Gurdial Singh Nijar:

So they are isolated by Area "C". And Area "C" is under whose complete control?

35

Jawad Musleh:

The Israeli control.

40

Prosecutor Gurdial Singh Nijar:

Israeli control. So the West Bank is divided into cities and then you have Area "C" which is under the complete control of the Israelis.

45

Jawad Musleh:

Yes

1      **Prosecutor Gurdial Singh Nijar:**

And to move from the city, if you have to go to another city,  
you have to cross this Area "C".

5      **Jawad Musleh:**

Exactly.

**Prosecutor Gurdial Singh Nijar:**

Under the complete control of Israelis?

10     **Jawad Musleh:**

Yes

**Prosecutor Gurdial Singh Nijar:**

15     And this is where the checkpoints are?

**Jawad Musleh:**

Exactly, yes.

20     **Prosecutor Gurdial Singh Nijar:**

And this is where you say some are killed and some are  
arrested?

**Jawad Musleh:**

25     Yes.

**Prosecutor Gurdial Singh Nijar:**

Thank you very much. I offer the witness for cross examination.

30     **Amicus Curiae Larissa Cadd:**

There are no questions for this witness Your Honours.

**Prosecutor Gurdial Singh Nijar:**

If there are any queries from the ...

35     **Judge Shad Saleem Faruqi:**

In this map, in pink, if I see the colour correctly ... roads. Who  
controls the road?

40     **Jawad Musleh:**

Who controls the roads?

Judge Shad Saleem Faruqi:  
Who controls the roads?

1

Jawad Musleh:

The roads that are located in Area "C" are, of course, controlled by the Israelis, and many those roads are not allowed for Palestinians to use actually. So they are designed for the use of the settlers only. Of course they were built on lands that belong to the Palestinians and those roads are they to connect Israeli settlements with each other, or to connect them with Jerusalem. Some of them, we Palestinians are not allowed to use.

5

10

Prosecutor Gurdial Singh Nijar:

Your Honours, we have been talking a lot about checkpoints and the problems associated with checkpoints. We have a very short video which shows the kind of problems that are encountered at the checkpoints, and we have provided it to the Secretariat before the start of the trial and we communicated to the defence that they could collect these videos to look at before the start of the trial. It's a very short video - I do not know if the defence has any objections to those videos being shown - they have indicated that they have no objections. A very short one. We will look at the checkpoint videos.

15

20

[Checkpoint video shown]

25

I think it's in the same vein. We leave it at the moment. With your kind leave, may this be marked as an exhibit? This video will be P14.

30

Your Honour, we also undertook to provide translated copies of the death certificates of the Sammouni family, 21; and the Registrar will furnish you all with the copies, and we will furnish to the defence as well. The originals in Arabic have been marked as P8. We ask to have this marked as P8(1-21).

35

Amicus Curiae Jason Kay:

Your Honours, may we just request that the versions in Arabic be provided to us for a few minutes for us to double check?

40

Prosecutor Gurdial Singh Nijar:

Yes.

1        And finally, there was a question asked about white phosphorus by Judge Shad Faruqi. We will make available a document on that, but I think we will take it as part of the submissions rather than as an exhibit. Thank you.

5        That, Your Honours, concludes the case for the prosecution. According to the procedure, the defence, at the conclusion of the prosecution case, the accused or the *Amicus Curiae* may submit no case to answer. So we leave it now in the hands of  
10      the *Amicus Curiae*.

***Amicus Curiae Jason Kay:***

Your Honours, before we submit on no case to answer, may we request a short recess? And we will be ready immediately  
15      after the recess.

**Judge Salleh Buang:**

How long do you want?

20      ***Amicus Curiae Jason Kay:***

15 minutes.

**Prosecutor Gurdial Singh Nijar:**

Sorry Your Honour, I forgot to ask to release the witness  
25      - otherwise he will be here until I don't know when. My apologies. Can the witness be released please.

**Registrar Musa Ismail:**

All rise.

30

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35

40

23 November 2013  
(Morning session 2)

***Amicus Curiae Jason Kay:***

May it please the Court, our submissions for no case to answer will be taken by Dr. Matthew Witbrodt.

***Amicus Curiae Dr. Matthew Witbrodt:***

May it please the Court. The submission of the *Amicus Curiae* Team regarding the Prosecution's case is that there is no case to answer.

Firstly, in regards to charge 3, the Prosecution has failed to prove its case. Whilst there is no doubt that wrongs have been committed, the elements of crime alleged in the present case have not been proven. In particular, in relation to the allegation of genocide, the *dolus specialis* requirement for the crime has not been met - while the *mens rea* for the intent to commit the action has already been met, the specific intent required for the element to substantiate the charge of genocide has not been attained by the prosecution in the present case.

The burden of proof for the charge of genocide is much higher than your typical criminal offence. As a result, the threshold must be proven beyond a reasonable doubt, almost to a certainty, in order to maintain the criminal act constituting genocide.

Secondly, in regards to charge 4, the Tribunal lacks jurisdiction of the present case at Bar. While the ruling submitted by the Tribunal in regards to jurisdiction earlier considered the issue of universal jurisdiction, it failed to account for the consent to jurisdiction required to adjudicate a proceeding involving a dispute to which one State is a party.

Universal jurisdiction refers to the ability, if not obligation, of a body to exercise jurisdiction over an offence that is universally condemned. However, the ability of a judicial body to exercise jurisdiction over an individual - a natural legal person - differs from the exercise of jurisdiction over a State.

States, as parties to a dispute, MUST consent to the jurisdiction

1 of the judicial body for jurisdiction. The 2 cases referred to  
in the ruling concerning the jurisdiction of the Tribunal - the  
Congo v. Rwanda and the Genocide Case. In both instances,  
the International Court of Justice rendered rulings.

5 In regards to the Genocide Case, the International Court of  
Justice ruled that it did maintain jurisdiction on the basis of  
the fact that genocide was a *jus cogens* and on the basis that  
it was accorded jurisdiction in accordance of Article 9 of the  
10 Genocide Convention.

15 However, in the similar case, the case of Congo v. Rwanda, the  
International Court of Justice held that due to the existence of  
a reservation against Article 9 which confers jurisdiction over  
disputes arising between two State parties to the Convention,  
the International Court of Justice was unable to exercise  
jurisdiction on the basis of "want of jurisdiction".

20 The State of Israel has not agreed to participate in the present  
proceedings nor has it accepted the jurisdiction of the Tribunal  
in the present proceedings. Therefore, the Tribunal cannot  
legally assert that it may exercise jurisdiction over the alleged  
conduct of the State of Israel.

25 **Judge Shad Saleem Faruqi:**

Basically, you're saying that the Rwanda case overrides the  
previous one?

**Amicus Curiae Dr. Matthew Witbrodt:**

30 No. What I'm saying is the identical principles were applied  
in both the Rwanda decision and the Genocide Case decision.  
They both stem from the initial jurisprudence from the  
International Court of Justice on the subject of consent to  
jurisdiction - as early as East Timor, that's a pivotal case in the  
35 jurisprudence of the International Court of Justice.

40 However, in regards to "consent to jurisdiction," once again,  
in the Rwanda case, because the International Court of Justice  
did not have express or explicit consent by the State party to  
the dispute, they were unable to exercise jurisdiction over the  
dispute.

This, Your Honours, is an accepted principle of customary international law, as referred to in the decision in Rwanda, and in the separate opinion, Judge Elaraby.

Judge Shad Saleem Faruqi:

The State commits grave atrocities, crimes against humanity, genocide; but does not consent - international law is helpless?

*Amicus Curiae Dr. Matthew Witbrodt:*

In the present dispute involving the State of Israel, arguably the Tribunal lacks, as a matter of fact, in accordance with international law, the Tribunal lacks jurisdiction over the State.

International law is not helpless. In regards to universal jurisdiction and the lack of sovereign immunities for acts of *jus cogens*, universal jurisdiction can be applied in the case of individual criminals for the purposes of liability.

Judge Shad Saleem Faruqi:

But the State commits the most heinous of offences - I'm not talking about Israel, any State - but says, "*Keep away. Don't interfere. I'm a sovereign State. Sovereignty is a shield against everything.*" So your view is that nothing can be done?

*Amicus Curiae Dr. Matthew Witbrodt:*

In regards to the criminal liability - the matter brought before the Tribunal today is a matter of criminal liability, in particular. In regards to the State, there is nothing to suggest or support an argument that the State can maintain liability for a criminal offence under contemporary international law.

The State may be held responsible under State Responsibility - however in those instances, it's limited to reparations based upon tort and restitution.

The distinction, and I understand there are many arguments and issues concerning the lack of criminal jurisdictions over States - However, you must understand criminal responsibility and criminal liability in relation to international human rights norms and international humanitarian legal norms which prohibit collective responsibility and collective punishment.

1 If you are to assign or ascribe criminal liability to the State you  
are effectively charging - you are indicting - every individual  
5 in the territory of Israel. The entire purpose of individual  
criminal responsibility under international law is to ensure that  
the individuals responsible for the commission of a criminal  
act are held liable and are held accountable while at the same  
time guaranteeing due process to those individuals that did  
not actively participate and are not liable for the actions that  
occurred.

10 In the present case, if you are to suggest that there is criminal  
liability to the State of Israel, Palestinians that happen to  
reside in Israel by circumstance alone are found guilty and  
are condemned alongside the people that actually committed  
15 the crimes - the individuals that actually have liability for the  
criminal actions. That, under international human rights law  
and international humanitarian law, is unjustifiable.

**Judge Shad Saleem Faruqi:**

20 Isn't it possible to limit the liability to the leaders of the State  
who made the decision rather than to the ordinary farmer  
trying to eke out an existence?

25 In commercial, for example, when companies commit crimes,  
you don't go to every shareholder, you go to the brain and  
nerve centre, and you say, "*they are the ones who are liable.*" So  
this idea that the entire population of the State must be held  
30 liable if the State is found guilty, I think you need to convince  
me a little bit more on that.

**Amicus Curiae Dr. Matthew Witbrodt:**

35 Yes Your Honour. The distinction, to apply a domestic analogy:  
the distinction between State responsibility and criminal  
responsibility under international law effectively mirrors that  
of civil liability and criminal liability.

40 In regards to criminal liability, if you want to assert that specific  
individuals are criminally liable for offences committed, that  
is well within accepted international legal practice and the  
practice of national legal systems.

However, in regards to State responsibility, as mentioned previously, it's civil in nature. You can assess a State for reparations based upon restitution and tort. However, punitive damages, to date, are not allowed as they themselves constitute a form of collective punishment against the populace of the State. Initially, in international legal practice prior to the 20th century, punitive damages were allowed, collective responsibility was allowed. Following the practice of Nuremberg, with the Nuremberg Military Tribunals, there are only two or three instances where collective liability was established – and that was only established in cases where you could not determine which specific individuals participated in the commission of an offence.

These issues are not presented before the Court today.

There's sufficient evidence to warrant individual indictments over which the Court may exercise jurisdiction on the basis of universal jurisdiction. However, the Tribunal's exercise of jurisdiction over the State of Israel and its conduct on the basis of State Responsibility rather than criminal responsibility is limited.

**Judge Shad Saleem Faruqi:**

Is international law evolving, or is it still the way it was at the time of Nuremberg, Tokyo? I know at one time State sovereignty was a shield against external aggression, but you are going so far as to say it's also a sword available to a State to commit murder against its own citizens or citizens of others and get away with it. So, is that how far State sovereignty goes, really? I thought things are changing in international law.

**Amicus Curiae Dr. Matthew Witbrodt:**

Again, in regards to Your Honour's question: the State, in and of itself, is not a natural legal person. It is a corporate entity. It's a legal fiction. It's an artificial person for the purposes of international law. Therefore, you can't actually - there's no basis to assert a claim that a State, as an abstract legal entity, is actually capable of committing a crime. It is the individual agents, the individual actors, and the individual organs of that State that are responsible for the commission of the offences, not the State in and of itself; bearing in mind

1 that the international legal definition of a State includes the  
government, the population, the territory.

5 If you charge a State collectively for a criminal offence, you are  
asserting that the liability extends to all of the components of  
that State, with the exception of territory obviously. However,  
in light of the fact that international law is presently evolving,  
you can argue that at some point in the future we might cross  
the threshold, but that threshold has not been reached now;  
10 and these very same arguments were raised in the separate  
opinions in the Rwanda case. Judge Elaraby again, explicitly  
refers to the fact that she is not happy with the in regards to  
State disputes that States may say, "*we don't want a consent to  
jurisdiction therefore your rules don't apply.*" She's not happy  
15 with the fact but at the same time she also recognizes the fact  
that it is a customary international law and until that changes,  
until there's reason to suggest that law has been replaced, that  
is the law which governs.

20 But once again, the issue at stake here is not sovereign  
immunities. Traditionally, sovereign immunities in the context  
of humanitarian legal offences and human rights offences have  
been used to shield individuals from prosecution. The issue at  
25 stake here is whether or not it would be legal in any regard to  
assess collective responsibility or collective liability to a State  
on the basis that it violates another customary international law  
which is that you cannot legally rule that collective punishment  
is the outcome of a trial which would indeed be the case if  
30 this Court maintains jurisdiction over the State of Israel for  
criminal liability.

But as I've said, State responsibility is an avenue which can  
be pursued.

35 **Judge Tunku Sofiah Jewa:**

Dr. Matthew, I have three questions here which I would like  
you to address the Tribunal.

40 First, what is your understanding of the doctrine of *jus cogens*.  
Second, whether the principle of State sovereign immunity  
has acquired the status of *jus cogens*? And finally, if there is a  
conflict between the doctrine of *jus cogens* and the principle of  
sovereign immunity, which principle of law should prevail?

**Amicus Curiae Dr. Matthew Witbrodt:**

The concept of *jus cogens* is fundamentally predicated - it's based on the fact that certain actions, certain conduct, is universally condemned within the international community. As such, any action which constitutes a *jus cogens* violation can be enforced, punished or prevented by other States and other jurisdictions; effectively States within the international community, judicial bodies in the international community, not only have a right to prosecute on *jus cogens* on the basis of universal jurisdiction, they have an obligation to do so, as in *Erga omnes*.

*Erga omnes* refers to the obligation; *jus cogens* refers to the actual offence, the conduct in question.

In regards to sovereign immunity: Sovereign immunity have existed throughout the history of international law. The power of sovereign immunity is waived. Arguably, I would argue that the consent to jurisdiction is not in and of itself a sovereign immunity. It is a right accorded to States under international law. It is a customary international law legal norm in and of itself. I am aware of the fact that custom - international legal custom - can come into existence and it can cease to exist. At the moment, the pivotal question is whether or not the basis for jurisdiction, being consent, is at the moment recognized under international law. There's no proof to the contrary, therefore it must be assumed to continue to exist.

In relation to the conflict: If there is a conflict between *jus cogens* and sovereign immunity - to date, foreign sovereign immunity such as Head of State immunity, diplomatic immunity - these have been waived. These are universally recognized as no longer being applicable in cases involving actions or conduct that are *jus cogens* in nature. However, that is based upon individual liability - individual responsibility. As a matter of law, the consent to jurisdiction still exists and must be adhered to by the present Tribunal.

**Judge John Philpot:**

You made the analogy that the State is like a corporate person. But corporate criminal liability is quite broadly recognized - it's debatable, it's debated. I wonder why you can say that

1 the analogy of corporate liability prevents a State from being  
punished under criminal law - but a corporation can be, in  
many jurisdictions.

5 *Amicus Curiae Dr. Matthew Witbrodt:*

10 The use of the term "corporate entity" - it's referring to the  
nature of the State itself: it is a corporate entity. It has a head  
representing the body, which is the population of the State.  
It was not my intention to say that a State is similar to a  
corporation. The two are distinct subjects and/or objects in  
international law; and they are distinct subjects and/or object  
in national law.

15 The criminalization of conduct of corporations within national  
legal systems is not disputed. Several States have enacted  
legislation to allow their judicial bodies to exercise jurisdiction  
over criminal liability of corporations. Furthermore, it is not  
contested that other corporate entities under international law  
may be assessed criminal liability. However, they are non-  
20 State entities. In each case, armed groups, for example, are  
corporate entities under international law. They may be held to  
be criminally liable in proceedings. This is relatively accepted.  
However, States, at present, still maintain that, though the  
State practice and the practice of international tribunals and  
25 other international judicial bodies at present still recognize  
and still maintain that consent-based jurisdiction or based on  
a consensual nature of international judicial proceedings in  
and of themselves continues to exists to this date, as was held  
by the International Court of Justice in 2007.

30 *Judge Lamin Yunus (President):*

Are you saying that in every case of a sovereign State, you  
can claim immunity, notwithstanding that is the organ of the  
government? You appreciate what I'm trying to say: You cannot  
35 implead a sovereign State in almost every case? That's it?

*Amicus Curiae Dr. Matthew Witbrodt:*

Your Honour, I am not attempting to assert that at all. There  
are a variety of mechanisms and means by which a State can  
40 be held accountable for actions under international law.

For example, as referred to earlier, the Genocide Convention,

Article 9, specifically and explicitly provides that any disputes arising between two State parties to the Convention can be heard by the International Court of Justice. The International Court of Justice has used this as a basis to exercise jurisdiction in cases where the States have argued against the basis for the jurisdiction of the ICJ purely based upon consent. ICERD, the International Convention on the Elimination of Racial Discrimination, also contains similar compromissory clauses which allow for jurisdictions by specific tribunals or specific international judicial bodies in the event that a dispute.

However, in the present case, this Tribunal is not explicitly mentioned in the provisions of the Genocide Convention, and in accordance with the Vienna Convention on the Law of Treaties, Articles 31-33, Genocide Convention in and of itself cannot be construed to allow this Tribunal to exercise jurisdiction without consent by the State party.

**Judge Shad Saleem Faruqi:**

How about our Article 6, Chapter 3, Article 6, clause (b)? Page 20  
34.

**Amicus Curiae Dr. Matthew Witbrodt:**

Your Honours, I would argue that under this provision, this Tribunal, for the purposes of an Advisory Opinion, can exercise jurisdiction. Similar accommodation, similar arrangements have taken place in the practice of the International Court of Justice. Advisory Opinions have been issued and have been answered by the International Court of Justice without requiring consent. The Charter of the Kuala Lumpur Foundation to Criminalise War makes similar provisions. I would argue that this, in regards to international legality, is the most legitimate basis by which this Tribunal can exercise jurisdiction over the charges presented before it today in relation to the State of Israel.

**Judge Tunku Intan Mainura:**

If you look at the International Court of Justice list of contentious cases, you will realise that there are, most of the cases are brought by and against States. So how do you argue that action cannot be brought against States?

1      **Amicus Curiae Dr. Matthew Witbrodt:**

Again Your Honour, in relation to your query: The fact that there are numerous contentious cases before the International Court of Justice, at present, does not invalidate my former assessment of the situation. States bringing forth claims to the International Court of Justice consent to the proceedings by participating in the proceedings. Participation is a passive form of consent.

10     In the present circumstance, the State of Israel has not consented to jurisdiction. They have not answered the charge despite the fact the charge was serviced to the Prime Minister's office. In the present instance, the argument cannot be made that the State of Israel has explicitly, expressively or tacitly accepted the jurisdiction of this Tribunal.

15

**Judge Tunku Intan Mainura:**

20     But as far as genocide is concerned, it has been regarded as *jus cogens*. When it has reached that level, there's no need for States to agree or not to agree to be brought to the court.

25

And as far as your argument about *Erga omnes*, about State responsibility - States have the responsibility to protect other States. And how do you argue this doctrine of *Erga omnes*?

30

**Amicus Curiae Dr. Matthew Witbrodt:**

I am sorry Your Honour. Could you clarify the first question please?

35

**Judge Tunku Intan Mainura:**

The first question is in regard of *jus cogens*: You mentioned just now that States need to be agreeable to be brought to the Court. But as far as genocide and other war crime is concerned, it has been acceptable by the international community that it is a customary international law, it is *jus cogens*, whereby States do not have to accept whether to be brought to the Court or otherwise. In other words, even if the State do not agree to be brought to the Court, the State can be brought to the Court. It has been acceptable. So how do you argue on that point?

40

**Judge Shad Saleem Faruqi:**

In other words, customary international law overrides the requirement of consent. That's what my learned ...

*Amicus Curiae Dr. Matthew Witbrodt:*

In regards to Your Honour's first question. If I'm understanding the question correctly, I can think of no instance in which the State has been brought before a Court concerning conduct amounting to genocide without its consent. Again, in the Democratic Republic of Congo v. Rwanda, both States consented to the proceedings. In the Genocide Case before the International Court of Justice, both States consented to the proceedings.

If you look at the conduct of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Military Tribunals at Nuremberg, the Tokyo War trials - none of these judicial bodies attempted to exert jurisdiction over States. The States were not, in fact, parties to the dispute. In each instance, it is the individuals, acting as agents, or officers of the States. These tribunals have been established to assess the individual criminal liability of specific individuals, key individuals and ministers involved in the commissions of acts of genocide, war crimes, crimes against humanity, crimes against the peace.

But no instance, to date, has there been a trial of a State before a legitimate and legal international tribunal or court that involves a State being put on trial without consent, and a judgment being rendered - with the exception of, arguably, Advisory Opinions under the ICJ.

*Judge Tunku Intan Mainura:*

In that case, we should set a precedent.

*Amicus Curiae Dr. Matthew Witbrodt:*

If the precedent can be reasonably established and is consistent with contemporary and recognized international legal norms and is well reasoned, the Tribunal is free to do so.

However, at the present moment, there is no argument in regards to the non-existence of jurisdiction based upon the consent - explicit, expressed, or tacit consent - of a State to judicial proceeding. None.

1      Judge Lamin Yunus (President):

That is all. Thank you.

Prosecutor Gurdial Singh Nijar:

5      Your Honours, let me respond to the last submission made.

First, I think this is an attempt to revisit the decision that has already been made by this Court as to whether a State can or cannot be charged in this Court - and on this there has been a clear ruling already.

10     As regards the question of appearance: that they have not appeared and not submitted to jurisdiction, this has also been addressed in the written brief and I read the last page of the written arguments of the *Amicus* Defence team, it says very clearly, "*The State of Israel has not entered appearance in these proceedings. By inference it has therefore not submitted to the jurisdiction of this Tribunal.*" It goes on to argue that therefore for that reason it should not be impleaded and no proceedings can go against the State of Israel. This point has been decided by this Court by way of a preliminary objection and cannot now be raised.

15     However, there are equally good reasons, and I shall repeat some of them - the essence of the matter is: Unless they submit to jurisdiction with regard to genocide, then no criminal liability attaches. The question therefore is: Is there or is there not an obligation in international law for parties to adhere to international customary law, including the conventions which are an expression of those laws, for example the Genocide Convention.

20     The fact that nobody has been charged in circumstances that have been outlined by counsel does not mean therefore that that obligation does not exist. The fact that, for example, Bush and Blair have not been charged does not mean therefore the President of United States cannot be charged. That is not the point. That is a weakness of the system, not its strength. And this is why there is a People's Tribunal to supplement the inadequacy and the lack of gumption on the part of the international process to charge them - they should be charged, in fact our whole point will be if we get a genocide conviction,

then we are going to move on the basis of universal jurisdiction to have some States, or even international criminal court to exercise that jurisdiction. So that is the point.

As far as whether or not there is an obligation, *Erga omnes*: Is there an obligation or not? Because if there is obligation, then there can be found some place a tribunal to decide this particular matter because the question is: Is there a basis in international criminal law to charge? That's the point. And the opinion, the decision of the International Court of Justice in the case of Bosnia Herzegovina cited earlier is quite conclusive of the matter in coming to this conclusion that States have an obligation and can be charged. That was a matter raised between States. The respondent was Serbia & Montenegro - they had argued that there was no obligation. This makes a very clear point to direct our minds to the question of whether States have obligation in international law; secondly, whether they can be charged; thirdly, when they are charged claim immunity or no immunity.

I'll just address these questions very briefly.

**Judge Shad Saleem Faruqi:**

Gurdial, I don't think Dr. Matthew ever said that there is no obligation. I think that what he was saying is, "*To charge them in criminal law, you need their consent. Without consent, you have no precedents.*" So what is really necessary here is for the prosecution to point out some precedents, if there are any.

**Prosecutor Gurdial Singh Nijar:**

The first point I made is that the fact that there is no precedent means that is a weakness of the system, not its strength.

Secondly, if parties have, Israel is a party to the Genocide Convention, and they recognise that this is a convention that imposes obligations upon them as a State as well as upon its citizens, then the question of consent to be charged for genocide is absurd. No State would consent. No murderer would consent to being charged. What it would mean is to scuttle completely the whole thrust and purpose of the obligation that is set out in the Genocide Convention because if there is an obligation for you to ensure you yourself do not commit genocide - and that

1 is very clearly set out in the Bosnia Herzegovina judgment, as  
well as to make sure that people within your jurisdiction do  
not commit genocide - then this is a sure way of scuttling the  
whole purpose of the Genocide Convention itself, it requires  
5 consent.

**Judge Shad Saleem Faruqi:**

10 Sadly, the law - domestic law, international law - there's no  
sanctionless duties. It is a concept of sanction that duties -  
duties can exist. They may not be enforceable. I'm with you  
on this point that the whole idea of obligation is that there  
must be enforcement.

**Prosecutor Gurdial Singh Nijar:**

15 Yes

**Judge Shad Saleem Faruqi:**

20 I think what Dr. Matthew was saying is at the moment, there  
is no such thing in international law.

**Prosecutor Gurdial Singh Nijar:**

25 If the judgment of the ICJ in the Bosnia Herzegovina case  
says that if the convention does not merely apply merely to  
individuals but as well as to States - and that includes the  
punishment section of the Genocide Convention - then what  
it in fact is saying is that the convention as whole applies to  
both States and individuals within States.

**Judge Shad Saleem Faruqi:**

30 Yes, I think Dr. Matthew used the word, "States have a  
right," and in that moment I didn't get to intervene. When  
there is a right, there are also some duties, correlative isn't it,  
jurisprudence?

**35 Prosecutor Gurdial Singh Nijar:**

In my respectful submission, I think the Bosnia Herzegovina  
is conclusive to the matter because they do say that it could  
be paradoxical if a contracting party, having agreed and  
confirmed - because the Genocide Convention confirms that it  
has always been an offence - genocide has always been a crime,  
then to say that therefore they are under no obligation unless  
they consent to be charged - and this has only to be note how

absurd it is that a person who is accused of genocide would then say, "Yes, I consent to being charged."

And there is no immunity either. In the case of Jones, and I refer to the judgment of Lord Tom Bingham in which he says, "When it comes to criminal proceedings falling squarely within the universal criminal jurisdiction international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the torture convention conditions were satisfied and at the same time to require immunity to be granted to those properly charged." If you read this and you read the Bosnia decision where it says it's paradoxical if States themselves are not obligated under the Genocide Convention - if you marry these two together that (a) they can be charged, and (b) when they are charged, they cannot claim immunity.

That actually deals with the question of consent because immunity is always sought by those who say, "You should not have charged me in the first place." That also relates somewhat in the direction of whether or not there should or should not be consent because immunity is always sought by the State saying, "You cannot charge me," whether in civil or in criminal jurisprudence. Why? "Because I have immunity. I should be protected." And so they have not consented. That is the point. They have not consented. And if this pronouncement makes it clear - the case provided by the *Amicus* - that you cannot claim immunity in respect of criminal - in civil you can - responsibility, then the question of consent is academic.

And finally, on the point of the fact that you are charging the whole State: When you charge against a State, you never the whole State - all the peoples composed in the State. Essentially what you are doing is you are charging the State for its practices and policies, and no inhabitants of the entire State are privy to the State policies and practices and we heard Professor Ilan Pappé talk about the fact that what is impacting on them is the State policies and practices of those in power.

So this is how it's always understood. Otherwise you need, even in a corporation, you'll need in a corporation - Judge Faruqi and Judge John Philpot - this argument if you extend it would lead to absurd results especially in criminal jurisprudence

1 because you cannot charge a corporation. Why? Because they  
have shareholders - they have hundreds, maybe thousands,  
of shareholders. And so you condemn the corporation and  
hold them criminally liable, you are also condemning every  
shareholder in that corporation. If you use that analogy when  
5 you charge a State for genocide, you are condemning its State  
policies and practices - so you are looking at the governing  
body that governs the corporation or the State.

10 And this is the direction it should go otherwise it is empty  
rhetoric to suggest the Genocide Convention confirms since  
1948 in response to the Nazi crimes that there should be a  
convention to deal with this having declared that in 1948 then  
to say that anyone who commits a present day holocaust is  
15 immune. Simply doesn't make sense.

Thank you.

*Amicus Curiae Dr. Matthew Witbrodt:*

20 Your Honours, I have 5 very brief points to address and I will  
conclude.

25 First, the contention raised by prosecution concerning universal  
jurisdiction: I am aware of the fact that in the previous session  
Bush and Blair were indicted by this Tribunal. The prosecution  
appears to be confusing jurisdiction over an individual with  
the jurisdiction over a State.

**Prosecutor Gurdial Singh Nijar:**

30 Sorry, just to, so that you don't mischaracterize my - I'm not  
saying that. I'm just saying that that was on the question of  
precedent and no precedent. Not on the question of individuals  
or States. Thank you.

35 *Amicus Curiae Dr. Matthew Witbrodt:*

40 However, as I have stated previously, individual criminal  
liability is a completely separate issue to the responsibility of  
States. Universal jurisdiction, as I've already argued, allows for  
the exercise of jurisdiction over individuals. The issue in the  
present case, concerning charge 4, is that the prosecution has  
charged the State of Israel - not individuals within the State of  
Israel, not agents, actors or organs of the State of Israel, but the

charge reads, "The Kuala Lumpur War Crimes Commission against the State of Israel." Charge 3, "The Kuala Lumpur War Crimes Commission against Amos Yaron." This is the distinction in regards to charge 4.

Secondly, I am not arguing that obligations of States do not exist. *Erga omnes* do exist. When they are violated, they are violated by individuals under contemporary international law. Individuals may be held criminally liable. In regards to the responsibility of the State, this is a matter of State responsibility rather than individual criminal responsibility. And as I noted before, State responsibility can be invoked, jurisdiction can be exercised but only on the basis of the State consenting to the proceedings.

Additionally, in regards to the reference to the Genocide Case,<sup>15</sup> The Court did note that it was paradoxical. However, the question concerning the court's jurisdiction was not based upon where the court thought the law should go - what the law should state, what the law should be. The jurisdiction of the court was based upon the fact that under Article 9 of the Genocide Convention the International Court of Justice was allowed to exercise its jurisdiction over disputes between two parties to the Convention. There was no question concerning the court's jurisdiction raised, *per se*.

Finally, the prosecution's arguments rests on what the law should be rather than what the law is. I am aware of the fact that there are arguments that exist that the law should evolve, it should go further than it has. But under international law, the law that exists at the time is the law that must be applied.<sup>20</sup>

If there are no further questions?

**Judge John Philpot:**

I have 2 questions. One, you said the burden of proof for genocide is almost certainty. I don't see that. The burden of proof is beyond all reasonable doubt. And you say the burden is different for genocide than for other crimes, I don't see that. Could you clarify?<sup>30</sup>

1      **Amicus Curiae Dr. Matthew Witbrodt:**

Your Honour, when I made the submission, I seem to recall saying ... I did explicitly state beyond reasonable doubt was the threshold. Beyond reasonable doubt and virtual certainty - between those two limits is the required burden of proof for the charge of genocide.

5      **Judge John Philpot:**

How do you see the Nuremberg creation of the obligation on a State as was argued in the [prosecution's] opposition to your preliminary motions that the obligations not only applied to individuals but to States.

10     Mr. Gurdial can clarify that.

15     **Prosecutor Gurdial Singh Nijar:**

Yes indeed. We argued. And that was a criminal tribunal. And the criminal tribunal, Nuremberg, stated very clearly that there's a duality of responsibility: there's a responsibility of States as well as for individuals. That's in Nuremberg criminal trial, and that is in fact a foundation of genocide. I can read the expressed point, if necessary.

20     **Amicus Curiae Dr. Matthew Witbrodt:**

25     Your Honour, if I may. The issue that arose at the Nuremberg trials - they did exercise jurisdiction over crimes amounting to genocide. The Genocide Convention in and of itself is reflective of this point.

30     In the preamble as well as Article 1 it specifically denotes, in the Genocide Convention, that the crime of genocide is and has been a violation of international law. That portion was specifically included to denote the fact that the Genocide Convention reflected existing law as well as law which has been recognized as customary previous too.

35     In the case of Nuremberg, the Nuremberg Tribunal in and of itself actually provided for the prosecution of collective entities. However, the judges themselves refused to rule on the basis of collective punishment because they said that irrespective of a person's membership in an organization, or an organ, they still had to prove individual liability. You cannot sit down and

say, "You have criminal liability solely based on your membership in an organization." Individual criminal liability, by definition, must apply to the acts or omission of the individuals charged, not the acts or omissions of the organization or entity to which they are a member. That was the precedent established in the Nuremberg trials.

**Prosecutor Gurdial Singh Nijar:**

Can I just respond to that point? That point was expressly repudiated in the Bosnia Herzegovina case where it was argued that before States can have obligations you must charge an individual in that State who's responsible for the acts of the State. But this was rejected in Bosnia Herzegovina. And it said there was no requirement for a prior conviction of the individual before State liability attaches.

**Amicus Curiae Dr. Matthew Witbrodt:**

To clarify my comments Your Honours. I do not believe I have at any time indicated that an individual must be charged prior to a State acquiring responsibility for conduct or actions. I have not argued this.

Prosecution is correct in his assessment that this issue was raised in the former Yugoslavia. What I have just presented concerns the International Military Trials at Nuremberg and the fact that the judges, based upon existing international law at the time of the tribunal - the prohibition against collective punishment is customary international law in nature, you can find references to it in the Geneva Conventions 1-4, Additional Protocols and ICCPR.

However, I was not asserting that individual criminal responsibility must be found prior to State responsibility.

**Judge Lamin Yunus (President):**

[inaudible]

**Prosecutor Gurdial Singh Nijar:**

This is our submission in response to the case to answer, and the Court will have to decide whether or not the defence has a case to answer, and if they have a case to answer, then there must be a submission.

1 Then they got to decide ... the process is governed by Article  
28 at page 43. First there has to be a ruling on whether or not  
they have a case to answer. If they have a case to answer, then  
they have to call their witnesses, then make their submission,  
5 and we will respond, and they have, of course, the final say.

So now it is for this Court to rule on whether there is or is not  
a case to answer.

10 **Judge Salleh Buang:**

I'm with you, except that I this problem. We have been  
listening to your 10 witnesses. I'm still waiting for your closing  
submission.

15 **Prosecutor Gurdial Singh Nijar:**

Except that if you look at Article 28, page 43 of the Charter, it  
says, "*The accused or his counsel or the Amicus Curiae, as the case  
may be, may submit no case to answer at the conclusion of the case  
of the Prosecution Team.*" That's exactly what they have done.

20 Article 29. "*In the event the Tribunal decides that there is a prima  
facie against the accused, the Tribunal shall proceed to receive evidence  
from the accused or his witnesses where present and available, or in  
absence to hear submissions from the Amicus Curiae.*" And it says,  
25 "*The Prosecution Team shall thereafter close the case, followed by a  
reply from the accused...*"

**Judge Salleh Buang:**

30 I'm with you. I am guided by what we have practiced in the  
past in our various cases before us, and if I remember correctly,  
at the end of each of those cases, when you have completed  
submitting your witnesses and your documentary evidence,  
you end up by your closing submission. So I've been waiting  
35 for your closing submission because if I remember correctly,  
you had your closing submission and then finally we crossed  
the bridge whether there is a [case] to be answered. Then we  
get to your final submission and in those past cases, you told  
us that you adopted your earlier submissions - both your side  
and defence.

40 So I was here waiting actually, after I have finished listening to  
all your witnesses and your evidence and you Skype. Where is

your closing submission? I may be wrong, but this is what - I 1  
have this problem that I have.

**Prosecutor Gurdial Singh Nijar:**

I'm quite happy to give my submissions. I'm in your hands 5  
completely.

**Judge Salleh Buang:**

Except now we are stuck with the time of the day, it is already 10  
past lunch.

**Prosecutor Gurdial Singh Nijar:**

I'll only be making one submission. I'm in your hands as to 15  
when I make it. Before we run the whole gamut of arguments,  
at least there should be a ruling as to whether there is a case  
to answer or not.

If there is a case to answer, if it is desired that I proceed first,  
I'll be quite happy to do that. 20

**Judge Salleh Buang:**

I think our difficulty is that before we even decide there is 25  
a case to answer or not, we would like to have your closing  
submission at the end of the prosecution's case, like we've  
done in the past.

**Prosecutor Gurdial Singh Nijar:**

I'm quite happy with that. If that is the ...

**Judge Salleh Buang:**

Can we do it after the lunch break? 30

**Prosecutor Gurdial Singh Nijar:**

But that means the question whether there is a case to answer 35  
is ...

**Judge Salleh Buang:**

We have not made up mind yet.

**Prosecutor Gurdial Singh Nijar:**

... deferred until after my submission? 40

1    **Judge Salleh Buang:**

Yes. And following past practice.

5    **Prosecutor Gurdial Singh Nijar:**

I'm quite happy with that except the Charter says something quite different. But I'm happy to do it either way.

10    **Judge John Philpot:**

I think what it amounts to is that we have a pile of documentary evidence - a lot of documents - and you could run us through them as a way of presenting your documentary evidence as evidence since we've seen the oral witnesses, and then we can deliberate in general with respect to the no case to answer and come back and hear the defence submissions, and you can confirm ...

15    **Prosecutor Gurdial Singh Nijar:**

I think I'm quite happy with that course, and I can commence anytime.

20    **Amicus Curiae Jason Kay:**

I believe I will only need to do the closing for the defence if a case to answer has been decided by the Tribunal. There must be a decision first before that bridge is crossed.

25    **Judge Lamin Yunus (President):**

I think we might as well go for lunch. I suggest that we go off and come back at 2.30.

30    **Registrar Musa Ismail:**

All rise.

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23 November 2013  
(Afternoon session 1)

**Prosecutor Gurdial Singh Nijar:**

May it please Your Honours, I've prepared an outline of submission. And I propose to highlight certain aspects as I go along. I am grateful to your Honours for patiently listen to our witnesses, the evidence and all the various submissions and information in the course of last few days. We've had 11 witnesses, some through Skype and we've also had, up to now, 15 exhibits and we're also be giving as we go along, supply documentary evidence in forms of reports and other secondary sources.

This is a tribunal of conscience more than anything else, as Article 1 states quite clearly. And while we are governed by some technical rules, I think above all, our function as a tribunal of conscience should be overriding consideration - this is something quite important to bear in mind. And we are entitled to draw our own framework for making decisions with regard to this case.

As I said in my opening, this is very extraordinary case because it deals with what Winston Churchill called genocide, "the crime without a name." And a few years later this term - genocide - was coined by Raphael Lemkin, who was a Jew, in his 1944 work, "Axis Rule in Occupied Europe," and it was prompted by the methodical extermination of the Jews by Nazi Germany.

Within a little more than a year, after that Nazi episode and its introduction into the English language, this term was used in the indictment of the International Military Tribunal - that's the Nuremberg Tribunal. And within two years after the International Military Tribunal pronounced its judgment against the principal German accused - Nazi accused - the UN Assembly then passed the Resolution 96(1) and unanimously declared that "*genocide is a crime against the law of nations*"; and to read in part, "*Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial ... shocks the conscience of mankind ...*"

1 In December of 1948, the United Nations General Assembly  
adopted unanimously this Convention which we call the  
Convention on the Prevention and Punishment of the Crime  
of Genocide (the Genocide Convention) and it came into force  
5 in January 1951.

10 The International Court of Justice in 1951 itself, at the request  
of the United Nations General Assembly, gave an advisory  
opinion on the question of reservations to that convention  
- now that's very important because whenever a treaty is  
enacted, then some States will make reservation and say, "I  
am not to be bound by this. This is my interpretation, this is my  
understanding."

15 So, on the question of reservations, this ICJ opinion established  
that, "*the principles underlying the Convention are principles which  
are recognised by civilised nations as binding on nations even without  
any conventional obligation; and it has a universal character both of  
the condemnation of genocide and the cooperation required thereby  
establishing the universality of its scope.*"

20 All this that I have quoted has in some way or other also being  
adopted and accepted by one of the first few cases that was  
brought in Israel itself against Eichmann. The Israel authority  
kidnapped Eichmann, brought him to Israel. They had enacted  
a law which allowed for retrospectivity and charged Eichmann.

25 These are the sentiments that has been expressed by the judges  
itself as to the position - to locate the position of genocide in  
the context of a universal crime.

30 Now, judicially we have the Rwanda case, Prosecutor v  
Kambanda, where it is now considered "a crime of crimes".  
And Schabs, for example, who's written a book called "The  
Law of Genocide," he subtitles his book 'The Law of Genocide:  
Crime of Crimes'. So this is it, the mother of all crimes. And  
this is what we are dealing with.

35 Now the elements of the crime are, of course, set out in the  
convention as I said in my opening, made clear, it consists  
of two parts; one is the *actus reus*, that means the act that is  
involved in carrying out the activity, and the *mens rea* as well.

So genocide, Article 2 is the key article - it's a very small convention, couple of pages, couple of provisions - means any designated acts. And what are the acts? They are set out in Article 2 which says, "killing members of the group, causing serious bodily harm, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction."

So, for these three, for killing, bodily harm and deliberately inflicting conditions of life which are calculated - this, the outcome must be shown. And it must be shown the proof of the result must show the act itself is a substantial cause. So these 3 kinds of acts must be the substantial cause.

And if we go back to Article 2, it says, "Genocide mean any designated acts committed with intent to destroy in whole or in part a national, ethnical or religious group or such."

Now the acts are, of course, punishable and there is a whole - related to genocide - those acts shall be punishable Article 3: genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity in genocide. So the whole range of possible permutations of genocide and its related activities are covered comprehensively.

And, of course, who are the person punishable? They talk about rulers, public officials and private individuals, but as case law has shown, and as we have elaborated in our written submission and as have been ruled by this Court, the obligation extends to State responsibility as well in our respectful submission. I will not elaborate on that.

I go straight to page 4 - Questions for determination by the Tribunal. Now, this is what we have set out in our opening statement: that we must show whether the acts occurred - and it is our respectful submission and I will follow up with the details in a while - that we've shown the acts occurred.

And these act, secondly, if established - as we say they have been - fall clearly within the purview of Article 2 of the Genocide Convention. And, of course, the related provision in the Kuala Lumpur War Crimes Charter.

1 Now, as is common ground, there must be consistent and  
persuasive evidence to show a pattern of the alleged acts which  
will constitute evidence of *dolus specialis*, specific intent, on  
the part of the Respondent. Here I pause to say that you must  
5 show beyond reasonable doubt there is a specific intent. There  
is, in our respectful submission, no question about threshold  
and a threshold plus for *dolus specialis*, specific intent. In other  
words, you must show beyond reasonable doubt there was a  
specific intent, as far as genocide is concerned.

10 The point at page 5: you do not have to examine every single  
incident; nor it is necessary to list out in an exhaustive manner  
all the allegations that are being relied upon. It will sufficient  
15 to examine those facts which will illuminate the question of  
intent; that will illustrate the claim that we are making. And in  
our contention, it will show a pattern of acts - and that's what  
we're required to do - such that it leads to the inference that  
20 there is this specific intent to commit genocide. And I cite the  
Bosnia case, the paragraph is set out and the bundle is set out  
as well. The reference is very clearly set out.

25 The prosecution has provided evidence of facts which,  
examined as a whole, will show that the perpetrators acting  
in the service, and at the behest of the accused - and I'm  
dealing with charge number 4 only - of the State of Israel,  
committed acts with intent to kill, cause serious bodily harm  
30 and deliberately inflict conditions of life calculated to bring  
about physical destruction of the Palestinians as a whole or  
as a part. But directed very clearly to Palestinians.

35 And so the group that must be members of the group. Are  
Palestinians members of a group? Some say no - they are just  
Arabs, therefore they can just move to any part, of Jordan and  
Syria and they will be assimilated there because there is no such  
thing as Palestinians. But now, of course, it is accepted that  
40 Palestinian form a distinct group - although they are dispersed  
and spread, West Bank, Gaza, all the other neighbouring  
countries and whole diaspora. In fact, it is considered the  
largest refugee diaspora in the world and I have given the  
quote from William Cook from his book "The Plight of the  
Palestinians".

And now, it's very clear that Palestinians are considered a distinct group by itself because United Nations General Assembly resolution - just last year, almost a year to this date - gave Palestine a status as a non-member observer state in the United Nations. There were, of course, the usual abstentions by Israel, by the United States and its 'hangars-on' I suppose.

We say that we have to place this charge in a historical context. And it is crucial that the allegations against Israel be looked at from this historical perspective. And we have cited the ICJ Advisory Opinion on The Construction of a Wall which relied on this. In Rwanda also, there was reliance upon locating the problem in the context of history, and as well in the tribunal of the former Yugoslavia where there was an elaborate discourse on the historical context.

We relied upon the distinguished Professor Ilan Pappé to take us through this historical context. We have for reference his two books, both of which have been tendered. They are exhibits P13 and we have also placed in the bundle 2G the relevant extracts from his other book that he has done with another distinguished humanist, Norm Chomsky, called "Gaza in Crisis". We have reference to this at our page 6, right on the top.

These stories are augmented by the first-hand accounts of those who experienced the horrors in 1948 as narrated to Dr. Ang, and we have her witness statement; and also Bayan Hout, who we also have evidence through Skype and she has done testimonial record of a large number of victims at Sabra and Shatilla.

Palestinian oral history is a significant methodology for constructing the past and the present. The reason why we cited references through Dr. Ang about her account is because its oral history that explains. So they explained how they arrived from Sabra Shatilla from the 1948 episode where they were expelled. Of course it is secondary sources. It's hearsay evidence as well. But as the ICJ Bosnia case made clear - there can be reliance on these kind of materials in international tribunals, more so in an international tribunal of conscience. We can rely on reviews, information from persons, international sources, secondary published sources, interviews and press reports.

1 Professor Pappé's account: He talked about the period before  
1948, before the UN Resolution. There was already a plan in  
place to take over this particular area. And this plan was going  
to be activated as soon as the British, which held the mandate  
5 of the territory at that time, relinquished that mandate. That  
was the game plan. And this game plan was put into action  
when the United Nations announced that they were providing  
the Jews with a homeland in a divided Palestine.

10 And this plan, in May 1947 itself for example, page 7 under  
(a) item (i), the Jewish Agency that ran the affairs, that did  
the consultations - this agency had drawn up a map that  
designated most of Palestine as a Jewish state, apart from the  
West Bank of today which was granted to Trans-Jordan. So  
15 this was the plan. There was a plan.

20 Shortly after, the plan was devised. It was called Plan D for  
Dalet. And this plan was to instruct the Jewish - it was a  
political and military plan - forces to cleanse the Palestinian  
areas falling under their control. And this was done by military  
forces as well as the main Jewish underground in Palestine at  
that time called the Haganah. They had several brigades and  
25 they had a huge list of villages that it had to occupy and, if  
necessary, to destroy.

25 So from December 1947 till well into the '50s, as our witness  
Pappé narrated and is also stated in his book - I have as  
references here - this plan was put into action. Villages were  
surrounded on three sides leaving open space for flights and  
30 evacuation at gun-point. And most of the people did not move.  
What happened? They were massacred. Their villages were  
destroyed - we saw how some 530 villages were destroyed.  
They were razed to the ground. The agricultural land was taken  
over. Places were cemented over. This was what Professor Ilan  
35 Pappé referred to as ethnic cleansing.

40 At that time, the Jewish population were settled or owned  
- because they were buying the lands - they were settled on  
only 6% of the land. The Palestinians were on 94% of the  
land. The United Nations devised a partition which granted  
more than 50% of the land to the Jews. So, of course there was  
rebellion by the indigenous people who have been living there

for hundreds of years. This intensified that massacre of the Palestinian population.

At page 8, (ix), Plan Dalet was genocidal in form. Professor Ilan said maybe it was not, at its inception, legally genocidal in form, but as it took shape, the ethnic cleansing metamorphosed into killing, massacre and creating impossible conditions of life so those within Palestine must leave or die. That amounts, in our respectful submission, to satisfy Article 2 of the Genocide Convention.

In 1948, half of the indigenous population were driven out. Half of their villages, towns, urban areas destroyed. Very few ever managed to return. The villages were erased - converted to agricultural lands for new Jewish settlements. And we heard a special committee was formed to Hebraized the names. So the village of Lubya became Lavi, Sauria became Zipori, and so on. The whole idea was to prevent future claims or restore map of ancient Israel to its "ancestral home".

Now this plan expressly stated - Bundle 2I - an article by Rashed and Short called "Genocide and Settler Colonialism: can a Lemkin-inspired genocide perspective aid our understanding of the Palestinian situation?" 2nd last paragraph on my page 8. It's a very useful article I found in the International Journal of Human Rights. And they quote four different authors, the gist of which points to the fact that Plan Dalet was for the destruction of villages to outside the borders of the State, and this, according to Benvenisti, is a program is premeditated cleansing. Josept Weitz, the former head of the Jewish Agency's Colonization Department was quoted as saying, "*The only solution is Palestine without Arabs, and there is no other way but to transfer all of them. Not one village, not one tribe should be left.*"

This mould was cast from 1948 and even before. This is the objective and this is perspective from which we must understand the activities, the State of Israel's policies. This is the inspiration, the ethos, of that State.

If you look at Sabra and Shatilla: Sabra and Shatilla are outside the borders. In a sense, they have achieved their purpose. They have chased this large group of people to outside the

1 borders. But then these people were resisting. They were  
not accepting the fact that they could not go back to their  
homeland. They were refusing to accept the fact that a place  
where they have lived for hundreds of years should now be  
5 a place where they can no longer return and that they must  
live as refugees, as a diaspora, from that particular place. This  
is the resistance. There has been talk of freedom fighters, yes.  
When you are pushed to a corner, any human being, and this  
10 is even recognized in UN Resolutions - liberation for freedom  
is recognised. Fighting, armed struggle for liberation, is also  
recognised.

15 So this, in Sabra and Shatilla - then they have to seek them  
out, then they had to kill them; sometimes themselves, but  
depending on the situation, sometimes by the use of necessary  
tools in a manipulation of the geopolitics of that particular  
country itself.

20 But then people still resists. So they resist. Then you occupy the  
whole territory. We had a situation where they were granted  
56% of the land; now they have taken over the entire place and  
West Bank and Gaza where Palestinians live in concentrated  
numbers - are occupied territories. And it is recognized as  
25 occupied territories by the ICJ Wall decision itself. So there  
is even the legal pronouncement by ICJ on this point. And to  
note that Israel participated in those proceedings, unlike this,  
our own tribunal here.

30 That is the historical context. I won't go into too much detail.  
We've heard testimony of Professor Ilan Pappé on this. All I  
would say is that this ethnic cleansing, if you could look at  
Chomsky and Pappé, Bundle 2G, just to drive the point home.  
... I will move on first.

35 At page 9, paragraph 13, I talked about how land was seized. I  
will not dwell on that. In paragraph 14: the confirmed massacres  
- Palestinian sources combining Israeli military archives with  
oral histories list 31 confirmed massacres beginning with the  
40 massacre in Tirat Haifa on 11 December 1947 and ending with  
Khirbat Ilin in the Hebron area on 19 January 1949 and there  
may have been another 6. These are some examples given by  
Professor Pappé in his book.

There's also a very interesting book which I would like to tender, which is a pictorial record of destruction, "From Palestine to Israel, from 1947 to 1950". It shows a very clear and in poignant terms, how a whole population was expelled, detained behind barbed-wires and military trucks, massacred and so on.

In 1948 itself, UN Resolution 194 of 11 December 1948, in Bundle 2I, at page 5 of the bundle. This is what the General Assembly said, *"Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible; Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees ..."*

This promise of the world community to the refugees at that time in 1948 remains unfulfilled and is the basis of one the fundamental demands by the Palestinian people that they return home. And we heard how they still hold the keys to their houses until today. They come out on demonstrations, they showed Dr. And title deeds to their houses, and so on so forth. This is one of the first resolutions, aside from the partition agreement itself that this State of Israel has thumbed its nose at - it refuses to acknowledge its validity.

So, 1948, for the Palestinian they call it "Nakba" which is catastrophe. For the Israelis, they trumpet it and celebrate it as an act of national liberation movement.

Now, ethnic cleansing, at page 10, it is equated with genocide in Rashed and Short, that is made very clear. But it's not just the question of the authors establishing this. If we look at Bundle 2E ... page 2716. The report itself starts at page 2684. I wish to quite from 2716 under the heading "Ethnic Cleansing". This is a UN report.

*"The expression 'ethnic cleansing' is relatively new. Considered in the context of the conflicts in the former Yugoslavia, 'ethnic*

1           *'cleansing'* means rendering an area ethnically homogenous by  
5            using force or intimidation to remove persons of given groups  
         from the area. 'Ethnic cleansing' is contrary to international  
         law. Based on the many reports describing the policy and  
         practices conducted in the former Yugoslavia, 'ethnic cleansing'  
         has been carried out by means of murder, torture, arbitrary  
         arrest and detention, extra-judicial executions, rape and sexual  
         assaults, confinement of civilian population in ghetto areas,  
         forcible removal, displacement and deportation of civilian  
         population, deliberate military attacks or threats of attacks  
         on civilians and civilian areas, and wanton destruction of  
         property. Those practices constitute crimes against humanity  
         and can be assimilated to specific war crimes. Furthermore,  
         such acts could also fall within the meaning of the Genocide  
15          Convention.

20          Upon examination of reported information, specific studies  
         and investigations, the Commission confirms its earlier view  
         that "ethnic cleansing" is a purposeful policy designed by  
         one ethnic or religious group to remove by violent and terror-  
         inspiring means the civilian population of another ethnic  
         or religious group from certain geographic areas. To a large  
         extent, it is carried out in the name of misguided nationalism,  
         historic grievances and a powerful driving sense of revenge.  
         This purpose appears to be the occupation of territory to the  
25          exclusion of the purged group or groups."

30          There is high authority that do equate ethnic cleansing with  
         genocide. We have the December 1992 General Assembly  
         resolution which appears in Bundle 2G: 47-121 18 December  
         1992, at page 2794-2, with regards to the situation in Bosnia  
         Herzegovina.

35          "Gravely concerned about the deterioration of the situation in the  
         Republic of Bosnia and Herzegovina owing to intensified aggressive  
         acts by the Serbian and Montenegrin forces to acquire more territories  
         by force, characterized by a consistent pattern of gross and systematic  
         violations of human rights, a burgeoning refugee population  
         resulting from mass expulsions of defenceless civilians from their  
         homes and the existence in Serbian and Montenegrin controlled  
40          areas of concentration camps and detention centres, in pursuit of the  
         abhorrent policy of "ethnic cleansing", which is a form of genocide,"

So we again have it repeated that these kind of activities, all of it we say our evidence has shown existed and continues to exist in the case of Palestine.

If we look, there are others, say, it could be categorized as a settler-colonialism, as in Australia - where they came to settle and drove the native population out. As in the United States of America where persecuted individuals from Europe came and collected there and then killed the native Indians. So that was settler-colonialism. That is also inherently genocidal. The only difference between Israel and these other - United States and Australia - Australia, for example, has formally apologised for its activities. And they allow the accommodation of the natives - they give them certain rights, there are even land rights that are given and they are accommodated within the context of the Australian or the United States population and geographic vicinity.

The difference with the settler-colonialism that started in 1948 with Israel is that it continues and it is predicated on the expulsion, massacre and termination of the lives of those settled colonies. And we heard Professor Ilan Pappé said very clearly - he is a victim of Holocaust, his parents are victims of Holocaust, he's even grateful to Zionism to having save his life - but not on the basis of creating another holocaust in its place with respect to the indigenous peoples of Palestine. And that is the crux of the matter. And this settler-colonialism, whether you call it ethnic cleansing or you talk about it in terms of settler-colonialism as does several authors, the most important of which is NurMasalha, the specific intent is to eliminate the national group.

It is a structure, it is not an event. A continuing structure and not limited to the events of 1948. It is a structural construct that others must be exterminated, others must be expelled; and this is the game plan regardless of all these manoeuvres for peace talk and so on - that's why it doesn't result in anything.

And so we have, for example, as was for awhile contended in Australia, *terra nullius* - the land was pure and clean and they came to settle. But it was not *terra nullius*. Zangwill, for example, was talking about, "*a land without people for a people*"

1       *without land*, " suggesting that it was *terra nullius*. Even Golda Meir is quoted as saying, "*they didn't exist*."

5       We have NurMasalha who wrote the book "The Palestine Nakba" talking of the terms being used, about colonisation and so on so forth.

10      My page 11: 1948 was an intensification of a pre-existing Zionist settler colonial project. Nakba is a catastrophe. It's a history of the present: It's on-going dispossession – an on-going Nakba - dispossession, dislocation. The continuity of the trauma is not just the result of 1948 but an on-going process, and continuing into the present and linked to current Israeli settler policies and practices. They talk about the peace process - but even in the lands, the West Bank, there are settler-colonies. The map that was produced through Jawad, those triangular bits, hundreds of them; and a Wall within the West Bank itself. So this is the point: that it is part of current Israeli settler policies to continue the dispossession, to continue the dislocation. End of the day, you have a 2-State system. But where is that state, the West Bank? There is a Wall that had divided it. So what are we talking about? Genocide hides behind expulsion because sometimes people say it's only a question of expulsion - a removal, a transfer. But behind this ugly mask is genocide.

25      These massacres continue. There's an Israeli leading human rights organization called B'Tselem. They track this and they say there has never been an end to the killing of Palestinians. And Pappé provides a small list in his books.

30      And we come to Sabra and Shatilla. We heard the evidence of Chahira and Dr. Ang and Bayan Hout. 3,500 Palestinians were killed. It is suggested that they were freedom fighters - I don't consider that a derogatory term, but aside from that - the fact is, if you look at the whole context in which it occurred, there were PLO fighters, of course - that was at that time the only respectable organization that was trying to advance the cause through every which way, including by armed struggle, because they were being killed - the only answer to those who are being murdered is to try to prevent that murder by trying to equate yourself, although the equation is so unbalanced, a couple of rockets, home-made rockets, stones, and such light.

The gruesomeness of it is just incredulous because we have these refugees who have arrived there from 1948 into this border outside of Palestine, in Lebanon. They've been living there from tents, became mud huts, became semi-zinc and sometimes little brick houses as well. And they lived there. The PLO was there to defend them, to seek recourse for the homeland. And then they moved out under a treaty which was overseen by the United Nations. So all of them moved out, evacuated, leaving behind the old, some young, some very young, mothers, children - left them there. And the understanding at that time, of the treaty, was that there would be peace-keeping forces, the Italians, so on so forth, who would protect those defenceless, because that was the condition upon which the PLO agreed to evacuate. And they all were dispersed - some were sent to Tunisia, some to Syria, leaving their wives and children behind. And they were prepared to do that provided there was protection given to their kith and kin that was left behind.

What happened? Suddenly, one day - and we can't attribute any blame to anybody - the peace-keeping forces moved out and then there began to rumble the tanks to Israel to close all the exit points of this camp, this destitute camp where people lived in poverty. And the Phalangist came in. And, you know, Israel has got its pretext and moves that it chooses with great care - they're a very skillful nation in all this, they have survived this while perhaps because of that. And they used the Phalangists because the newly-elected President of Lebanon had just been killed. And so, of course, it's very easy to use that as a pretext. The Phalangist came in, the Haddad came in. Control decisions were made - the Kahan Commission Report - and I referred to it at my page 12 by Defence Minister Ariel Sharon, Chief of Staff Eitan. They had declared in their meeting - the Kahan Report made it clear - there was a meeting without a full cabinet meeting where Menachem Begin, defence and Eitan took a decision. My colleague Tan Sri Aziz will refer to it in greater length with regard to Amos Yaron.

In relation to genocide, this is in Bundle 3, page 211. After Sabra and Shatilla, the Israeli government was under immense pressure to do something because it was a massacre that was condemned universally without any dissenting voice. And so

1 they set up a commission under the chairmanship of Kahan.  
And the findings of the Kahan Commission is most instructive.

5 If you look at page 12, (b)(i):

10 Defence Minister, Ariel Sharon and Chief of Staff, Eitan  
declared on Sept 16 1982 before the massacres began that  
all of Beirut was under Israeli control - not just a question of  
Sabra and Shatilla. There was a clear symbiotic relationship  
between Israel and the Christian forces who are known as the  
Phalangists or Kataeb assisted by the Israeli Mossad. Even  
the uniforms of the South Lebanese Army (SLA) and the  
Phalangists were the same as those of IDF - and provided by  
Israel. This is the Kahan Commission - Israelis saying this.  
15 The Israeli's exercised some degree of control of the SLA.  
The Phalangists' plan to use force to remove Palestinians was  
discussed at several meetings with Israel - Kahan Commission  
report says this. Three key officials of the Israel cabinet decided  
that the IDF would enter West Beirut: the PM Begin, Defence  
20 Minister Sharon and Chief of Staff Eitan.

25 Eitan said that he and Sharon agreed on the entry of the  
Phalangists into the Sabra and Shatilla camps: the operational  
order provided: "...*Searching and mopping up of the camps will be  
done by the Phalangists-Lebanese army.*" That was the euphemism  
for this massacre

30 Also, a summary of the Defence Minister's instructions: "*Only  
one element, and that is the IDF, shall command the forces in the  
area. For the operation in the camps the Phalangists should be sent  
in.*" This is it. This is they had instructions.

35 The Israeli command post was located on the roof of a multi-  
storey building about 200 metres southwest of the Shatilla  
camp.

Eitan and Phalangist leader conversation as recorded by the  
Kahan Commission, "*Be ready to take part in fighting.*"

40 So there were have it. Very clear, complicit action of the Israeli  
in that whole operation itself, never mind about the specifics  
of where exactly they were located, although we had ... talk

about, the transcripts show that they were right in the middle of Sabra Shatilla itself. We also had Chahira talking about where the Israelis were located.

Linda Malone, in Bundle 2H, in the New York Times, where they talk about "purifying and purging", "mopping up", "cleaning up" the camps. This shows unequivocably the intent of the Israelis at that time.

So the camp were surrounded and under the complete control of the Israelis. The Chief of Staff Eitan, after acknowledging that the Phalangists "had gone too far" still gave the thumbs up to continue the "mopping up".

Page 15: One of the few questions that emerged and influenced, or rather flawed, the findings of the Kahan Commission was: Could the Israelis see from their Command Post? Could they hear the killing from the killing fields - the gunfire, the screams. I have here listed several aspects which suggest the testimony of Ang Swee. She said they went out to that so-called Command Post. First the name: Command Post. What is the purpose of a command post? Command Post is to command. And it is sitting right there at the time when these massacres are going on. And it was a command post of the Israelis - that is not a dispute. This is in the Kahan Report itself. And Dr. Ang, together with others, went up there. They could see very clearly what is going on. It is in Bayan's book - you will see a map of the command post. And you can see the whole spread of Sabra Shatilla - the alleyways in front of you.

And in Linda Malone's article, she has summarized the reports of journalists. Washington Post senior correspondent Jonathan Randal, he said to say that they cannot see from there is an "*obviously wrongheaded factual error*." An Israeli journalist, Amnon Kapeliouk in the Israeli newspaper Yedi'at Aharonot ridicules the finding.

And Jonathan Randal of the Washington Post noted - and this I read from Linda Malone's article, volume 2H at page 2995, the last paragraph, "*In its only obviously wrongheaded factual error, the Kahan Report insisted Israeli troops couldn't see into the camp's alleyways even with giant telescopes on the command post*

1      roof. Journalists who climbed the seven-story building had no such difficulty with their own naked-eyes." As Dr. Ang and her medics attest.

5      Then in the "Inquiry into a Massacre: Sabra and Shatilla" Israeli journalist Amnon Kapeliouk discredited this "serious mistake" based on his own visits to the site. This is a Jew - Israeli. He says that, "*A mass grave dug by the Phalangists south-west of Shatilla 300 metres from the room was clearly visible. The bulldozers allegedly used to bury hundreds of victims were also within view.*" And Kapeliouk quotes the military correspondents of this newspaper, an Israeli newspaper, as saying that, "*the Israeli Army could not see what was happening what was happening under their nose but knew the 'exact street, building and floor in Beirut where every Fedayn lived and knew the exact thickness of the walls around the Baghdad nuclear reactor.*" So he ridicules this.

10     And a New York Times article remarked that, "*from the rooftop of the Israeli observation post, one could look down into the Shatilla camp.*" This same article noted that from the Israeli observation post, "*it would not have been difficult to ascertain what was happening in the camps not only by sight but from the sounds of gunfire and the screams coming from the camps.*"

15     A radio report by Loren Jenkins of the Washington Post in his programme "All Things Considered" then summarised the opinion of eyewitnesses as to the visibility of the camps, particularly Shatilla. Jenkins responded to the question: Do you have any doubt no of the complicity of the Israeli Defence Forces then? Answer: *There is no doubt in my mind that Israel aided and abetted that whole operation. The final proof to me was when I walked and found what was a mass grave in a part of the camp that when you just stand on top of that and you raise your head and you look up at the 7-storey building about 300 yards away - which is the Israeli Army's main observation post - a place where before their own advance into the city they had set up giant telescopes for spotting snipers. And as I stood there, Saturday morning, looking out, there were 6 Israelis looking straight down at me. They stood and watched throughout this whole horrible tragedy as people were brought here, shot, dumped in this grave and packed up.*

20     Even Yaron admits that he was at that outpost according to

the Kahan comment - he admitted that he could hear human voices. This is also reported in the New York Times. Yaron set out lookout post on the roof of the forward command post. Even though Kahan Commission said he knew it was impossible to see very much - so he could see some, but he heard very clearly.

Leila Shahid, in Bundle 1, quotes an Israeli officer saying that watching from the roofs of one of the buildings occupied by the Israelis was like watching '*from the front row of a theatre*'.<sup>10</sup>

This was the spectacle. Sabra and Shatilla. If this is not genocide, then I do not know what is. This is a massacre of major proportions. And I'll come to the legal submissions where even one killing with intent, as a start of the rest of the killings - one body dead - can amount to genocide in law. This is beyond doubt, the *dolus specialis* established beyond doubt.<sup>15</sup>

If we look at how the world community reacted: Bundle 1 page 3, Security Council resolution 521 of 1982, 19 Sept 1982, condemned it as a criminal massacre. And, of course, General Assembly Resolution of 16 Dec 1982, Bundle 1 page 5, page 8, condemns in strongest terms the large scale massacre of Palestinian civilians in the Sabra and Shatilla refugee camps. Resolves that the massacre was an act of genocide.<sup>20</sup>

This was voted upon. The condemnation of it being a large-scale massacre: 123-0. Nobody voted against them, 23 abstentions.<sup>25</sup>

**Judge Shad Saleem Faruqi:**

Professor, this morning we were invited to look at the law and the law alone. May I ask you guidance on this? Is a General Assembly Resolution law in the definition of "law" in international law?<sup>30</sup>

**Prosecutor Gurdial Singh Nijar:**

If you look at my page 27, item G, I refer directly to the value of this resolution on Sabra and Shatilla. It says considerable assistance in construing the scope of 'in whole or in part': a form of authentic interpretation; or an indication of opinio juris of States.<sup>35</sup>

1 So this is the opinio juris of States which has credence and  
validity. It is a form of interpretation - how do you interpret  
that act? How do you ascribe and categorize that particular  
act? What does the world think of it? Opinio juris. So this is  
5 a guide, if you like. It may not be strict law in the sense that  
we understand treaties, conventions and domestic law; but it  
give a form of authentic interpretation. So that is the value.

10 It points cumulatively that this went beyond a normal  
massacre. It was condemned by the world body, although on  
a divided vote. The resolution is there to stay. The resolution  
has a value. It cannot be dismissed out of hand, if nothing else.

15 At my page 13, I referred to the Sean MacBride report. The book  
is available as is the comments in relation to the trial before  
an international commission. This was set up to inquire into  
the reported violations of international law by Israel during  
its invasion of Lebanon. It did not come to a conclusion that  
20 it was genocide. But four of the Commission's six members  
concluded that Israel embarked on "*deliberate destruction of the  
national and cultural rights and identity of the Palestinian people  
amounting to genocide.*"

25 Then we come to another big event: Operation Cast Lead  
in 2008, at my page 16, referred to Chomsky and Pappé's  
book, item 8 of my submission. We had Professor Pappé  
recognize that in February 2008, Israel's Defence Minister said:  
Palestinians risked a 'shoah'. This, he said, meant nothing less  
30 than a holocaust. Holocaust is derived from the Greek word  
"*olos*" meaning completely and "*kaustos*" meaning burnt.  
And this was used in ancient Greece to refer to the complete  
burning of a sacrificial offering to a divinity. It has religious  
connotation and there is some inclination in Jewish literature  
to refer to the holocaust as shoah.

35 We have Ilan Pappé, a Jew, saying - he even ran for the Knesset - it means nothing less than a holocaust. This was largely to  
rectify their Lebanon defeat. In Lebanon they had to withdraw.  
This was in February.

40 Defence Minister - February 2008 - said, "*there's going to be a  
Shoah.*" 6 months later, they launched Operation Cast Lead.

Within minutes, air raids killed 225 people in the most densely populated city in the world. There is nowhere to run. It is under siege. On the left side is the Mediterranean. On the top is Israel. On the bottom is Egypt. It's a small strip of land in which live now about 2 million people. And the shores, there is a siege. It is a prison with the key thrown away. Fishermen can't go beyond a certain limit. Construction material cannot come in. This is the starvation of a population on a slow and steady basis - what I call one of the most carefully engineered slow and steady holocaust of the Palestinian population. Can you imagine? There is no way out. The 2 Sammounis couldn't come here because there is a problem in Egypt, and there's no way out. To get out you need a permit. To get in you need a permit. Fishermen cannot go out beyond 3 miles limit and many times they are shot even if they venture within that area itself.

Our ship that went here to try to build humanitarian aid to Gaza was not allowed in. They were bringing construction materials. The first ship that went there, people were killed. It resulted in break of relations between Turkey and Israel. But Israel does not care. They will not allow building materials unless, and on, terms that they decide. This is the genocide that we're talking about.

In the Cast Lead operation, they used all kinds of weapons. They will not say whether they have nuclear or not but everybody knows that they are one of the most nuclear armed and they're the only ones who are exempt from any sanctions from continuing to develop these nuclear weapons, as we know. Iran, for protesting year after year, they are doing it for civilian purposes, are subject to sanctions.

So this, in Gaza, one of the weapons used was white phosphorus. And Your Honour asked. If I could just tender, this document by Human Rights Watch, Rain of Fire: Israel's Unlawful Use Of White Phosphorus In Gaza.

I invite you to look at Page 62, right at the bottom - White Phosphorus and Law of Incendiary Weapons. Protocol 3 to the Convention of Conventional Weapons (CCW) regulates the use of incendiary weapons. The protocol defines *incendiary weapon as, "any weapon or munition which is primarily designed to set fire*

1       to objects or to cause burn injury to persons through the action of  
flame, heat or a combination thereof, produced by a chemical reaction  
of a substance delivered on the target. The primary innovation  
of Protocol III is to prohibit the use of air-delivered incendiary  
5       weapons against military objectives located within a concentration  
of civilians. Customary laws of war also prohibit the anti-personnel  
use of incendiary weapons so long as weapons less likely to cause  
unnecessary suffering are available. Israel is a party to the CCW  
but not Protocol III. However, a 1998 Israeli military manual states:

10      Incendiary arms are not banned.... Nevertheless, because of  
their wide range of cover, this protocol of the CCW is meant  
to protect civilians and forbids making a population centre  
15       a target for an incendiary weapon attack. Furthermore, it  
is forbidden to attack a military objective situated within a  
population centre employing incendiary weapons. The protocol  
does not ban the use of these arms during combat, for instance,  
20       in flushing out bunkers."

25      At the next paragraph, Israel's use of white phosphorus  
under international law. It says, "Israel's use of white phosphorus  
munitions during the armed conflict in Gaza violated international  
humanitarian law in two distinct ways. First, the IDF's general use  
of air-burst white phosphorus as an apparent obscurant in densely  
populated areas of Gaza violated the obligation to take all feasible  
precautions to minimize harm to civilians and to civilian objects.  
Second, the IDF's use of air-burst white phosphorus in specific  
incidents causing civilian casualties violated the prohibition against  
indiscriminate or disproportionate attacks."

30      This was evidence in media photographs in air-bursting and  
so on. And if we look at ... and they even bombed the UNRWA  
compound in Gaza city. The IDF kept firing white phosphorus  
despite repeated warnings from UN personnel about the  
35       danger to civilians.

40      And I think there's a colourful photograph, if we look at page  
22 and 23, you'll see it's like fireworks raining down, that's  
why it's called rain of fire. So many photographs. Hospitals  
were attacked, at page 17.

The testimonies were given by Mahmoud and Salah. Salah

Al-Sammouni and Mahmoud Al-Sammouni, how they as children, and the kind of brutality that was inflicted upon them. This was an incident that captured the headlines of a large number of newspapers - the Guardian, Al-Jazeera, Jerusalem Post. Here they have an article, paragraph 4, "These chilling facts are not in dispute. Yet last week the Military Advocate General (MAG) of the IDF informed B'Tselem that he had decided to close the Military Police investigation into this incident without taking any measures. According to the MAG, there are no grounds for criminal or disciplinary measures against any of those involved in the shelling of the al-Samouni house." 1  
5  
10

A "command sanction" was imposed on the Givati Brigade Commander, preventing him from future promotion to a command position in an operational environment. 15

... Over three years later, the scars have barely begun to heal for the al-Samouni family. I cannot even imagine the traumas this family endured and the challenge of rebuilding their lives after this horrific tragedy. It is intolerable that we as a society can treat this incident as a sad but inevitable part of military operations. The al-Samouni family deserves answers and Israeli society deserves them as well." 20

We also have the Goldstone Report, which I refer to at my page 17 which said that the attack on buildings, 25

We had the President of UN General Assembly condemn Israel's killings of Palestinians in its Gaza offensive as genocide. This was Miguel D'Escoto Brockmann and he is quoted in Al-Jazeera, which is in my Volume 2I at page 7. 30

And we have the Goldstone Report. This was established by the UN Human Rights Council, a fact-finding mission with regard to Cast Lead 1 and heading the mission was a South African justice called Richard Goldstone who is himself a Jew. Israel refused to participate and also prevented the Mission from meeting Israeli government officials, Israeli victims and from going to the West Bank to meet Palestinian Authority representatives and Palestinian victims. 35  
40

Israel, the accused in this case, complete blank. This is the

1 answer to those of us who say you must get the consent of  
that accused of genocide before you can prosecute them. This  
is the answer. That even a fact-finding mission to look into this  
is blocked completely by the ... not just by biased person, but  
5 by Richard Goldstone who is a Jew, a justice in South Africa  
with a considerable reputation for integrity.

His report is set out in Bundle volume 1 and I have summarized  
some of the key findings.

- 10
- Directly attacked hospitals with white phosphorus.
  - Indiscriminate attacks in violation of international law
  - Deliberate attacks against civilians: not justifiable (including on al-Sammouni)
  - Deliberate arbitrary killings - violation of right to life
  - reckless use in built-up areas:
  - Attacks on the foundations of civilian life in Gaza; no military justification;
  - deny sustenance to civilian population
  - Deprivation of liberty of civilians
  - Dahiya doctrine

25 Dahiya doctrine is very interesting. It means the whole place must be flattened. Nothing must be left standing. Every time they refer to Dahiya, it mean flatten everything, kill everything in sight. Doesn't matter what it is.

30 They also talk about military operations in the context of the existing on-going blockade. The impact was many times multiplied because here is a people who are trapped in this place. They have no place to go. They live amongst themselves in this hugely densely populated area. And they already have no food, shortage of medicine. And then comes this. 3 week thorough attack.

35 ICRC my page 18, said nowhere in Gaza was safe for civilians. Usually they don't speak up in these terms, but even they spoke up. This is their report - Gaza: 1.5 million people trapped in despair - June 2009. We have enclosed this report in our bundle 40 2I, item 4.

Amnesty International also had a report - Israel/Gaza:

Operation Cast Lead: 22 days of death and destruction (2009) refers to the wanton and unjustified attacks on civilians and civilian objects as war crimes; homes destroyed without justification, public buildings destroyed without justification, a fragile economy ruined, destruction of vast areas of cultivated land. And they have not allowed the reconstruction ...

Any one of these items is sufficient to justify genocide, in our respectful submission. But this is continuing.

My page 19, as Professor Ilan Pappé showed, they have these fancy names for these operations, an insult to nature, an insult to mankind. In fact, these areas, like Gaza, despite living near the Mediterranean, there's a scarcity of water, a scarcity of rain. And they call it First Rains, Operation Summer Rains, Autumn Clouds. And this is referred to as John Dugard as creating the prison and throwing away the key into the sea.

First Rains - 2005

Operation Summer Rains: June 2006 - Nov 2006

Autumn Clouds: 1.5 month later: end 2007 - March 2008

Dahiya Doctrine. This policy becomes a strategy.

I then come to the other matters, cultural and religious destruction, page 19. They rename the places, destroy places of worship.

Economic and physical has been put forward in the ICRC report.

There's a report by UNIES - Gaza in 2020: A liveable place?

The habitability of the 1.7 million people of Gaza at risk. And the most recent one is a 2013 report by the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories. This is bundle 2I, item 9. He says that the report earlier of various UN bodies which says that Gaza people are at risk after 2020, he says, "*this is a very optimistic prediction because it could come even much earlier.*"

This was presented to the United Nations, "*The situation of*

1       *the Gaza Strip is particularly troublesome, as its 1.7 million people  
have been compelled to live under a blockade since 2007. Gaza seems  
to be threatened with even greater hardships for its population as a  
result of recent developments in Egypt. While Israel is the Occupying  
5       Power and thus maintains legal obligations to Palestinians in Gaza,  
the population — for the time being — needs consistent access to  
and from Egypt by way of the Rafah crossing and also, in order to  
ensure its survival, needs access to the tunnel network that has  
been supplying Gaza with basic necessities. It should be recalled  
10      that a United Nations report issued a year ago, before the recent  
complicating developments, concluded that the habitability of the  
Gaza Strip was in doubt after 2020.<sup>1</sup> During the mission of the  
Special Rapporteur, several experts on the threatened infrastructure  
15      of Gaza observed that even such a dire prediction was too optimistic,  
and that 2016 was a more realistic date.”*

Now, as we know, Article 2, item (iii) talks about creating conditions of life intended to destroy the group. And here we have the UN itself saying it will not even be habitable for them. This, in our respectful submission, makes a very strong case for suggesting that the conditions of life that have been created, coupled with the attacks, the killing, the maiming, and the destruction of the economy, suggests genocide in very clear terms.

25       And, of course, the freedom of movement is very severely restricted. ICJ - The Wall. Israel is an occupying power; Israel's basis of right of self defence, dismissed. Israel must comply with international obligations and must cease forthwith the construction of the wall. Of course, they have not done that. In fact, they have every plan to extend the Wall. We had no time to show how the building of the wall and the building of roads encroaches into life. And we saw, when Jawad gave his testimony, the videos on the checkpoints in the West Bank. 30       We saw the incredible condition. There are 730.

I pause here to say that only 2 or 3 of our witnesses were cross examined. The effect of that is that the rest of the testimony of our witnesses has to be accepted because once you do not challenge testimony, then according to most fundamental ordinary principles of criminal jurisprudence, those facts are then established because they have not been controverted.

And so, we have the testimony of Jawad, of Nabil, of Taghreed, and the video put it in visual perspective to see what this really means in terrible ways, and that video is P14.

The right to water - this is something quite incredulous. West Bank - and this is also in the human rights report I referred to just now -

**Judge Shad Saleem Faruqi:**

For the sake of record Professor Gurdial; these checkpoints, are they on Israeli territory or Palestinian territory? What are these people moving from one State to another or within their own land?

**Prosecutor Gurdial Singh Nijar:**

As we showed in our map, volume 1 page 2, the West Bank is divided into "A", "B" and "C". The green map, the West Bank: within that territory itself, inside the borders there's a red line is a wall. Inside of these territories - "A" are the cities, Nablus, Jenin, Bethlehem - the cities are category "A", they can move within that city itself.

"C" is that rest of the part that connects - covers the large part of that land. That is why when people were saying, "I'm just going to Jenin, I'm going to my house," that was travelling from the village to the city. The cities are the part which is okay. The "C" is the rest of the area, break up everything else. If you want to travel, you have to get permits. We saw the problem that happened, the poignant story of the mother who had to leave her children because she said, "this is the original," they said, "no, this is the copy." There is no arguing. One single mother with three children, and so she told the eldest of the child - this is the state, this is the condition of life. This is not creating conditions of life to make life impossible to live. We here, half a day without electricity I think my life is going to come to an end. These people are suffering. This is the conditions that are being created on a daily basis. As I said, two days ago, Gaza, strikes again. At will. Of course, maybe a rocket, homemade rocket, something else, stones. This is a reprisal. If we don't call this genocide, then what is our role in society as civilised people? Stand by and watch this as some kind of a parlour game? These are real faces. They come here, knowing that we

1 do not have powers of enforcement, but to come and give their  
version - because nobody else is listening. We have one of the  
witnesses say. So we have here Dr. Walid, we have Taghreed,  
5 we have Chahira, we had Nabil. All of them. Human faces to  
this incredulous crime that is being committed against them.

10 And so, if we look at water. Water is so critical. If we look at  
the Rapporteur's report, 2013 - very current, page 132 of 21,  
paragraph 58 - heading "Water and Sanitation":

15 *"During the mission of the Special Rapporteur to the Gaza Strip in December 2012, a number of interlocutors raised serious concerns about the lack of clean water and adequate sanitation facilities in the Gaza Strip. Some of those issues were briefly touched upon in the previous report of the Special Rapporteur to the Human Rights Council. In the context of the near exclusive control by Israel over all underground and surface water resources in Palestine, the Special Rapporteur reiterates his concerns regarding the occupation-induced water and sanitation crisis. In the Gaza Strip, 90 per cent of water in the underlying coastal aquifer beneath the Gaza Strip is unfit for human consumption as a result of pollution caused by raw sewage and rising seawater infiltration. In 2012, the United Nations reported that the coastal aquifer on which the Gaza Strip is almost completely reliant could become unusable as early as 2016, with the deterioration becoming irreversible by 2020."*

20 ...

25 *The Israeli blockade of Gaza has exacerbated water scarcity and lack of adequate sanitation facilities.*

30 ...

35 *Water scarcity in Gaza has been worsened by the repeated destruction of water and sanitation infrastructure in the course of Israeli military operations. Israel has destroyed at least 306 wells in the Access Restricted Areas of Gaza since 2005. In this context, the Special Rapporteur strongly condemns the targeting of water and sanitation facilities during Israeli military operations, which cannot be justified as a military necessity, and cannot be explained as a consequence of accidents.*

Palestinians in the West Bank are denied their rightful share of water from the underground mountain aquifer and prevented from accessing water from the Jordan River, which are both classified as shared water resources and thus must be shared equitably under customary international law. An estimated 500,000 Israeli settlers in the West Bank and East Jerusalem enjoy approximately six times the amount of water used by the Palestinian population of 2.6 million. Israeli settlers enjoy ample amounts of water channelled directly to the settlements, which allows settlers to irrigate agricultural land and grow water-intensive crops. In contrast, Palestinian farmers depend largely on water supplies transported in tankers or collected by water cisterns, raising agricultural costs and restricting most Palestinian agriculture to unprofitable small-scale operations growing rain-fed crops, which on average is 15 times less profitable than irrigated crops.

The loss of scarce Palestinian water resources occurs not only through demolitions undertaken by Israeli authorities of "illegal" water collection facilities, including wells and water collection tanks, but also as a result of deep-water drilling activities by Israeli water companies. The Special Rapporteur is also concerned by acts of violence by settlers in the vicinity of Palestinian communities; there are several reports of Palestinian springs being taken over by settlers and fenced off.

Israel systematically blocks the development of the Palestinian wastewater and sanitation sector through bureaucratic constraints imposed by the Joint Water Committee and the Israeli Civil Administration. Between 1995 and 2011, only 4 out of 30 Palestinian wastewater treatment plant proposals were approved by the Committee and their construction has been repeatedly delayed.

...

Meanwhile, Israeli authorities profit from the occupation-induced crisis by treating up to 21 per cent of Palestinian sewage ..." and so on, "established inside Israel and paid for by Palestinian tax revenues withheld by Israel."

So tax revenues that Palestine is supposed to get are withheld

1 by Israel every time, and they supply you with water at very  
high cost, and then they take it out of the revenue that is  
supposed to go on to - so this is the condition. In fact, if you go  
visually there, you can see settlements. People have swimming  
5 pools. They are on high ground. People have swimming pools  
while here they can't get waters to irrigate their agricultural  
lands.

10 At page 21: conditions of life, harassment, arrests. I have  
quoted a report. People are arrested. We saw Jawad, Dr. Walid  
threatened. Nabil, young boy. Jawad, his legs. And Jawad  
made it quite clear. His is only one case amongst those that are  
occurring all of the time. And there is a report by the Palestinian  
15 cultural organization which we have made available which  
says that, "*The number of Palestinian prisoners and detainees in  
Israeli prisons and detention centres has reached 4,750 people from  
every sector of Palestinian society ... 17 prisons and detention centres  
... 186 are in "administrative detention" without charge and 13 are  
women, ...*" and so on so forth.

20 They arrest "*Legislative Council (PLC), 3 former ministers and  
a large number of Palestinian officials,*" sick prisoners, elderly  
prisoners. There is torture, there is death. There is refusal to  
hand over even remains of dead prisoners. And we saw with  
25 our own eyes through television how even the PLO at that  
time, the whole place was sieged - any food going in and out,  
even to Yasser Arafat who was an acknowledged head of the  
Palestinian people had to go through Israeli security; and  
now we find there are concerns that Arafat was poisoned.  
30 And poisoned through food. By polonium - the existence of  
polonium. And at that time, that whole PLO building was  
sieged. Nobody could go in, nobody could go out without  
Israeli authorization.

35 Then, if we look at impact, I have Dr. Paola talk of weapons  
on reproductive health on population of Gaza. We have seen  
Paola's very almost dramatic powerful testimony correlating  
weapons with teratogenic and carcinogenic effects in the soil  
that will continue to persist. So there is even a slow murder  
40 that remains in the soils emanating from the weapons that  
have been deposited in the soil by these Israeli genocidist, if I  
like to call them that.

I'm gonna conclude with two short aspects relating to the law: the physical element at my page 22. We only need to prove one or more victims actually suffered physical or mental harm with regard to the actual killings. So if this act is perpetrated with the requisite mental element, then the crime is committed - only one or two. And here we have 3,500 in Sabra Shatilla; and just in the 22 days in Cast Lead there was just the killing alone is 1,400. Then what about the other 'rains' that have been falling? Their white phosphorus, the "Summer Rains", the "Autumn Clouds" and the Dahiya. And the one only three days ago. And sewage is floating down from the highlands to the lowlands. Gaza is almost unliveable even as we speak now because sewage, one of the main things they target, water tanks, the public utilities and so on so forth. They don't even have electricity - you can't get that because then they bomb that, the first thing they bomb, and then they keep bombing and then they allow some construction a little bit, and then they bomb it again before you can do anything else. That is the life. This is what we call genocide. This is the face of genocide, as we saw it through the witnesses. And this is what this Tribunal of Conscience must deal with; not this sophistry, esoteric, technical rules about, you know, all the kind of technical - although we must keep in mind the overarching concern of fairness, transparency and fairness.

So, the physical element - even if you deprive, you see, Nazis reduced the amount of food in occupied territories to 400 and even 200 calories per day. This was considered an act that is genocidal. And here we have water that is reduced - I have the reports here: water that is reduced to below the amount that is required by WHO standards. So, even omission amounts to acts of genocide - it's not just commission.

Then in the AG Israel v. Eichmann case, when you talk about serious bodily or mental harm, it could be cause by, "persecution, detention in ghettos, transit camps, concentration camps, conditions which were designed to cause their degradation, deprivation of their rights as human beings," and so on. This is announced by an Israeli Supreme Court against Eichmann, a Nazi war criminal.

Now, one of our main areas is the killings, but we are also

1 talking about deliberately inflicting conditions of life. So  
what are the acts that relate to this? In my paragraph 23 I've  
set out. This includes, *inter alia*, paragraph 23, under 11.4(a),  
5 amongst other things, subjecting a group to a subsistence diet,  
systematic expulsion from homes and reduction of essential  
medical services below minimum requirement. The case is  
cited. It's a contemporary case: Akayesu.

10 Creating circumstances leading to a slow death. Including  
systematic expulsion from homes. And you don't even need to  
prove outcome. In other words, "*it is immaterial*," in Eichmann  
they said, "*whether you succeed or not. But if you set in motion*  
this," as they have indeed done, "*it does not result in the killing*  
of all, *it matter not. But you have initiated*." So when we talk  
15 about an *actus reus*, these are the acts - you have initiated these  
acts and this suffices in law. Includes methods of destruction  
which do not immediately lead to the death of members of  
the group. Includes circumstances which will lead to a slow  
death, for example, lack of proper housing, clothing, hygiene  
20 and medical care. And I've mentioned this. And I've quoted  
the Guatemalan case committed against the Mayan people by  
the Guatemalan army. They razed villages. They destroyed  
properties, including working fields. Burned harvest. This  
infliction was sufficient to constitute conditions of life that  
25 could bring about, and in several cases did bring about the  
destruction in whole or in part. There we have a decision of  
the Inter-American Court of Human Rights - so it's across the  
globe. Even that regional court has so decided.

30 As far as the law is concerned, we have Article 30 of the Rome  
Statute: Intent and knowledge.

35 Intent: intends to engage in content; or means to cause the  
consequence or is aware that in ordinary course of events, that  
it will occur. So when you bomb people, when you carry out  
this activity; if you know in the ordinary course of events it  
will occur, it is no excuse for you.

40 Knowledge: awareness that a circumstance or a consequence  
will occur in the ordinary course of events. And then, as regards  
knowledge, which is quite fundamental in this case, you don't  
even need to prove plan or policy; although, of course, it will

facilitate proof. And we have shown how this is a consistent policy from pre-1948, Plan Dalet, the expulsion, we have the very lucid evidence of Professor Pappé on this. So if you know the circumstances, then you know what will result from the circumstances. That is the intent.

And in the case against Karadzic and Mladic, the former Yugoslavia case, they were charged with genocide. The intent was inferred from a number of facts such as general political doctrine, repetition of destructive and discriminatory acts, perpetration of acts which violate the very foundation of the group. So this is a pattern of conduct; and we have listed the case and its citation.

So this, in itself, in contemporary international criminal jurisprudence, is sufficient to found the intent, the *dolus specialis*, specific intent, for genocide.

And in Akayesu, page 25, the ICTR said there was no need for the policy to be formally adopted. It's not a question of, "*show us the policy, show us the document.*" There is no need for that. We can show from the circumstances a preconceived plan or policy.

"It's unnecessary," in the Kayishema case, the Rwandan case, "for an individual to have knowledge of all the details of the genocidal plan or policy." So those young boys we saw in the West Bank who were at the checkpoints - young guys, you saw them, very young. One fellow said, "*please put in a nice light.*" That checkpoint video was done by a person from Israel, that's why he was allowed to do it, otherwise he won't be allowed to go there. This young boy at the end said, "*ah, I will look bad, isn't it? Please put me in a good light.*" And the fellow said, "*What kind of good light?*" "*Just say I was following orders.*" So it's true.

These young boys are just following orders. Many of them, as Ilan Pappé said, are new-come settlers. These are people who have come three years before that, and they have settled there, and they have joined the army - and all of them have to join the IDF. And then they are stationed. And they have to carry out these brutal activities. And Ilan Pappé talked about the evidence he collected from those - "Breaking the Silence" - IDF officers who felt bad about Cast Lead and

1 gave him that information about the incredible acts that were going on.

5 So even if you have genocidal intent of some of the members, then in law it suffices. So if really we are looking at, and I have again cited here, what would under the circumstances be deduced from the acts of the principal perpetrators, looking at the mind of a reasonable man?

10 And then, recklessness: consequences suffices. In other words, they should have known. You cannot say, "oh I didn't know that if I do this that it will result in this consequence." Wilful blindness also suffices. Deliberately failing to enquire and know that such inquiry should be taken also suffices.

15 So that's knowledge. So intent, the *dolus specialis*, established. You can have proof usually through speeches, public declarations, meetings, statements, and we have an abundant amount of that, the most pointed one of which is, "*let's commit shoah*," and six months later the shoah started.

20

So the context of crime, its massive

25 Context of crime, its massive scale, elements of its perpetration that suggest a particular animus towards the group and a desire for its destruction. You can look at it from the scale - all these place that we are talking about. And it's a matter of inference, the factors establishing intent include general context carrying out other acts systematically directed against the same groups, scale of atrocities committed, systematic targeting victims on account of their membership of a particular group. Or the repetition of destructive and discriminatory acts. And this is the case of Simba, which we have included. And there is no need for premeditation.

30

35 Destroy, we have looked at it. What does it mean, because it says, "*conditions of life intended to destroy*." There's an extended meaning of "destroy": even if it is not accompanied by killing it suffices. Can be destruction of the political structure, culture, economy, displacement - all these constitute genocide when the consequence is the dissolution of the group. This is the case of Blagojevic.

40

And "part" means considerable number or substantial part, or distinct part, significant enough to have an impact. And we have heard all the Palestinian victims say that this affects the whole of the Palestinian population.

And even the UN Commission of Experts report, appointed by the Security Council, talked about exterminating of a group's law enforcement, military such as to render them helpless against future acts, particularly if the leadership is being eliminated.

It is common knowledge that Israel targets, in Gaza for example, they have targeted attacks against the leadership wherever it is. We have heard about it. It's so common that I do not think I need to prove this particular fact. It's a matter of common knowledge.

To conclude, Your Honours, we submit that the cumulative effect of the action taken by the Israeli government, as proven by the prosecution, has shown beyond reasonable doubt - oh, people are laughing eh - that Israel is guilty of the crime of genocide under the Genocide Convention and the KL War Crimes Charter. Accordingly, we ask this honourable Tribunal to find the State of Israel guilty of the crime of genocide. In this way, may the cry for justice by the Palestinians in Gaza, the West Bank and the diaspora, long ignored by the world community, be finally assuaged. This will bring some form of closure to the first part of their quest for justice - a stepping stone hereafter for civilised States in this civilised world to exercise universal jurisdiction. Thousands are dead, thousands mourn. A whole ethnic populace is now the living dead, almost at the mercy of this State of Israel that stride the world as a colossus with impunity and which now inflicts its updated and technologically advanced version of the holocaust on a virtually defenceless peoples called Palestinians - Palestinians who refuse to yield and so will fight for their God-given right to life and to live sustainably and with human dignity. Those who testified here want closure and justice for themselves. And for their kith, their kin - nay all those who since that fateful years since the 1940s and persisting to the present - are the victims of a genocidal reality.

1 To conclude, I can do no better than quote the words of the  
Guatemalan Nobel Laureate for Literature, Miguel Angel  
Asturias: The eyes of the buried will close together on the day  
of justice, or they will never close.

5 Your Honours, I thank you.

**Prosecutor Tan Sri Dato' Abdul Aziz:**

10 May it please Your Honours, I am going to submit on the first  
charge, that is, Chief Prosecutor of KLWCC v. Amos Yaron.  
My learned friend Professor Gurdial Singh has covered almost  
everything - the points of law, the history and the facts about  
this case. I will try and be as brief as possible.

15 The first charge is against Amos Yaron, the commanding officer  
in charge of the IDF, Israel Defence Force, in charge for the  
area of West Beirut for the camps of Sabra and Shatilla. The  
charge is simply that he perpetrated war crimes, crimes against  
20 humanity and genocide in his capacity as commanding Israeli  
general with military control of Sabra and Shatilla refugee  
camps in Israel-occupied Lebanon in September 1982 when he  
knowingly facilitated and permitted the large scale massacre  
of residents of those two camps. So basically, he was in charge.  
His job was to ensure that there was law and order and there  
25 was peace in West Beirut.

Now, in this charge, from what I can see, there are two issues  
which I will try and demonstrate. The first issue is whether  
30 or not there was a large scale massacre of the residents of  
the camps of Sabra and Shatilla in West Beirut for 3 day, on  
16,17 and 18 September 1982. The second issue is whether  
or not Brigadier-General Amos Yaron had failed to perform  
his duty as commanding officer and therefore had facilitated  
35 and permitted the large scale massacre of the residents in the  
two camps of Sabra and Shatilla in violation of a number of  
international laws which includes our Kuala Lumpur Charter  
Articles 9, 10 and 11.

Firstly, there was large scale massacre. I don't think that is a  
40 difficult thing to do now. Professor Gurdial has described the  
whole range of the massacre in Sabra and Shatilla. I will refer  
to the evidence of two witnesses - two very brave, admirable

ladies who came forward to give evidence; and just refer to parts of their evidence to show that there were a lot of killings.

And I will refer to certain parts of the Kahan Commission which have been discussed by Professor Gurdial. These two will justify that there were massacre, tortures and all sorts of things happening in the 3 days.

First, I would like to refresh our minds on the witness statement, just two or three parts. The first one is by Chahira Abouardini. She gave evidence here. This statement, the statutory declaration, para 4: *I am married and I have 3 children, a pair of twins born in 1980 and a boy born in 1982. My son was 17 days old when the Israeli massacred Palestinians at camp Shatilla on 16, 17 and 18 of September.* She was there. She saw with her own eyes the massacre.

I read paragraph 14: *Seeing the armed men, the children started screaming. The militia ordered all the men to leave the room and stand against the wall outside. The men were searched and their watches and jewellery removed and thrown on the floor. They shot the men. My husband, my brother and my cousin were all shot dead. I saw all these. The children also saw all these.*

I read one more. This is a terrible one. Paragraph 19: *Along the way to the stadium, I saw my cousin's daughter who was pregnant lying dead. The murderers had opened her body and taken out her baby and put the baby on her. The child was dead as well. She was lying on the street. ...'s daughter was actually deaf and dumb and was living in a home for the disabled. The people in the home told me that she has indicated to the soldiers not to kill her because she was pregnant but they did, and did not care.*

The next one, para 32: *In 36 hours, up to 3,500 people from Shatilla and Sabra had been massacred. There are also people unaccounted for who had disappeared.*

Paragraph 33 is important. *The Phalangites (who are Christians in Lebanon) militia worked together with the Israelis. They were known to be puppets for Israeli forces. Israelis used them to go into our houses because these soldiers knew the place and could speak Lebanese. The Israeli was afraid to go in themselves.*

1      The next one, I want to touch on the statement given by Dr. Ang Swee Chai. She gave evidence herself here. In the beginning, she was supporting Israel but decided to change her mind.

5      Now I read para 6 of her witness statement: *However, the 1982 television BBC news coverage of the Israel invasion of Lebanon showed the devastation and destruction brought on the people of Lebanon. Apart from the daily television coverage, the mainstream British newspapers, such as The Times and the Guardian, described the ruthless and continuous bombing of Lebanon and the siege of the capital Beirut and denying the population of water, electricity, food and medicine creating catastrophic suffering.*

15     Just one or two more: *As Gaza Hospital overlook Sabra and Shatilla camps, I also saw families broken up by the invasion come back to life in the bombed out buildings. I learned from the returning families how they had lost family members through the bombs. Many of them wounded, especially the children, but also traumatised by the evacuation of 14,000 PLO members. These evacuees left behind wives, sisters, elderly parents and children, undertaking to go into exile never to come back to their families in Lebanon. I was invited to their homes and they generally shared whatever meagre possessions they had with me.*

25     This is what she experienced there. I just read the last one: *The hospital pointed out that night although shootings were still taking place outside in the camps, patients were beginning to take their own discharge, some carried out by their own families. We continued to operate through the night. The last person I operated on was an 11-year-old boy shot together with 27 members of his family. All 27 died. But he survived. He was brought to the hospital for treatment. As the bodies fell on him, he laid quietly and heard the women being raped and pleading to be spared.*

35     So that's the eyewitness - the witnesses who saw and experienced what actually happened there. I need not describe any further, ... to refer to the Kahan report. The Kahan report has already been described by Professor Gurdial. The Kahan report itself established at least between 300 to 700 people. That's the report itself. I need not elaborate any further.

40     All I want to say is that the first issue as to whether there was

a large scale massacre, and I submit that just the evidence of these two witnesses and the evidence recorded in the Kahan report itself has proven beyond doubt that there was large scale massacre.

I go on to the next issue. The issue is about the General, Amos Yaron, who was the commanding officer in charge to ensure that there would be peace and law and order. Why all this happened? Because the leadership, the army and so on, the IDF, decided to go into Beirut and made a decision to agree that the Phalangists be allowed to enter West Beirut and into the camps.

The issue is: the intensity of the enmity and the hatred between the Israelis and Palestinians has been there for years. And the move of Israeli soldiers into West Beirut is by itself would cause serious problem. And the Kahan report itself concluded that anybody who knew about Lebanon would know that by releasing the Phalangists into West Beirut, into the camps, there would be massacre and so on - that's in the report itself. And surely this General, who was in charge, surely he knew that by releasing the Phalangists into the camps, all this would happen. But he decided to do nothing.

He received reports of the killings of women and children on Thursday evening - the first day. Yet, one, did not check the report - this is in the Kahan report. Two, he did not pass the reports on to the chief of staff or his superior. Did not take appropriate steps to stop the Phalangist and to protect the civilians. It is inescapable that based on the commission's conclusion that at least 7 of the 9 individuals, including Yaron, should have known of the likelihood of a massacre before the Phalangists' entry. And they knew, or should have known, a massacre was going after the entry and yet failed to take appropriate steps to protect the civilian population.

This, all these are embodied in the Kahan report. I would like to say that this general was insensitive to all this. And I submit that by ignoring all this and knowing the circumstances, he himself had the intention of causing death and all this. And I quote here that in his testimony to the Kahan Commission, General Yaron said that he was happy about the decision to

1 send the Phalangites forces into the refugee camps because the  
fighting serves their purposes as well. So let them participate  
and not let the IDF do everything. This is his own words,  
testimony, at the Kahan report.

5 **Judge Shad Saleem Faruqi:**  
What's the page number of this very significant statement?

10 **Prosecutor Tan Sri Dato' Abdul Aziz:**  
Volume 3, page 291,

15 **Judge Shad Saleem Faruqi:**  
Yes, 3rd paragraph, last line: "*we have been fighting here for four months already and there is a place where they can take part in the fighting, the fighting serves their purposes as well, ...*"

Yes, that's very significant.

20 **Judge John Philpot:**  
I'm going to take a moment to explain something that I think  
is important. The special intent is the intent to kill or the  
intent to have this group destroyed in part. There has been  
some reference to being negligent and shutting one's eyes. If  
a person is genuinely shutting his eyes, it's recklessness - we  
know those terms in criminal law. I don't think that's the *mens  
rea* of genocide. You've stated that this evidence which you've  
25 underlined as an intent to destroy, but you might address this  
issue of being negligent.

30 I've listened to Prof. Gurdial and paragraph 520 of the *Akayesu*  
judgment seems to say that - I think it's a mistake. I think the  
recent jurisprudence requires full level. But I'd like you to  
address that, if you can.

35 **Prosecutor Tan Sri Dato' Abdul Aziz:**  
What I can say is this. If you look at the background,  
the intensity of the enmity between the Israelis and the  
Palestinians, and the whole series of incidents. This general,  
he knew right from the beginning that this massacre would  
40 happen. Everyone knew. Definitely he knew. You see, there is  
negligence. He didn't bother to do anything.

Judge John Philpot:

In the evidence - I don't have the reference - on a Friday, the 17th, at 11 o'clock, somewhere he said, "oh, I think the Phalangists have gone too far." He apparently said that. That is evidence that contradicts what you just read out. How shall we treat that evidence? Is that credible? Is that not credible that he said that?

Prosecutor Tan Sri Dato' Abdul Aziz:

He said that because he was supposed to ensure that there would be no trouble. So when somebody mentioned something's that happened, he tried to defend himself. That's all.

Judge John Philpot:

Thank you.

Prosecutor Tan Sri Dato' Abdul Aziz:

I would like to conclude now. I think I have already justified the 2 issues that I mentioned. All I want to say is that even the Kahan report itself found this general guilty of what he was . . . The Kahan report itself.

With that, I conclude my presentation and I pray that he be found guilty as charged. Thank you.

Prosecutor Dr. Shahrizal M. Zin:

If I may assist the court in relation to the issue of *mens rea* of the defendant Amos Yaron for the crime of genocide. Based on Article 10 of the Charter as well as Article 2 of the 1948 Genocide Convention, the standard of *mens rea* for genocide is *dolus specialis*, special intent to destroy in whole or in part of a group to which victims belong to that group.

In the present case, the special intent can be deduced, it can be inferred from factual circumstances. I would like to invite the court to look at the atrocities, the large scale massacres, that were perpetrated in this case. 3,500 Palestinians died in the large scale massacres and out of these, most of them were children and women. So this is what we want the court to do: to adopt the approach of looking at the facts cumulatively, looking at the evidence in its totality,

1 and infer special intent, *dolus specialis*, from the factual circumstances.

5 The same approach has been adopted by ICTY and ICTR. There are a number of cases where special intent of the accused has been deduced from the factual circumstances. This is what we want the court to do.

10 I would like to invite the Tribunal to the ICTY's judgment in the Kristic case. In this case, the defendant planned and participated in the large scale massacre of the Bosnian Muslims in Srebrenica that took the life of between 7,000 and 8,000 Bosnian Muslims. The Trial Chamber concluded that the special intent to kill the Bosnian Muslims of military age demonstrates an intention to destroy in part of the group - Bosnian Muslims. That's been done in this case.

15 Another case is Akayesu. Professor Gurdial has mentioned Akayesu multiple times. In Akayesu, the ICTR adopted the same approach: drawing the special intent from the factual circumstances, looking at the atrocities, the impact of the large scale massacres, killings, extermination, or even genocide. In Akayesu it was deduced - the special intent - from the very high number of deliberate and systematic atrocities committed against the Tutsis. So the court looked at that atrocities. The high number of Tutsis had been massacred. And the court also looked at the numerous systematic acts of rape where the Tutsi women were raped by the rival, the other tribe. This is another circumstance where the court, in Akayesu, and in Kristic, deduced/inferred the special intent from factual circumstances. I submit for the honourable Tribunal to adopt the same approach - look at the facts - as I've mentioned earlier, 3,500 Palestinian refugees in Sabra Shatilla have been massacred. Most of them are children and women. The same facts, the same atrocities, the impact of atrocities and cities being devastated to Palestinians until now.

20 30 35 40 So the Tribunal can deduce special intent of the defendant Amos Yaron to kill in whole or in part of the group where the Palestinians belong, according to Article 2 of the Genocide Convention.

Judge Shad Saleem Faruqi:

1 Could you kindly supply the citation of these cases?

Prosecutor Dr. Shahrizal M. Zin:

5 I undertake to supply Your Honour.

Judge John Philpot:

10 You are correct in law, I think; although since I was on Akayesu, the factual underlying is ... and wrong, but that's another question. This is correct in law that the inference can be done by fact.

Prosecutor Dr. Shahrizal M. Zin:

15 Much obliged Your Honour. Another point that I would like to make, apart from atrocities that can be deduced from factual circumstances of the present case, Professor Gurdial has mentioned about the term, about the speech, used by the parties involved, Eitan, Sharon - mopping up, cleaning up - those are terms that can also be considered, that can also be taken into account by the court to deduce factual circumstances, to deduce special intent from factual circumstances. "Mopping up", "cleaning up" - those are very devastating, very powerful intent to destroy in whole or in part.

20 I would like to conclude my submission on *mens rea*, special intent, *dolus specialis*, based on factual circumstances that can be deduced. I respectfully submit that the effect of the action taken by defendant - Amos Yaron - amounts to creation of the conditions of life to destroy the Palestinian refugees in Sabra and Shatilla, and this encompass very serious offence that shocks our sense of humanity, our conscience. So this constitutes attack to the most fundamental aspect of human dignity.

25 Your Honours, this is a crime of genocide under the 1948 Genocide Convention. Much obliged.

30 Prosecutor Gurdial Singh Nijar:

35 Your Honours, perhaps just to supplement a little bit, and in view of the questions that have been raised. I think if we look at the sum total of the circumstances, first is: he was in charge of the command post. That's very clear. And there is evidence,

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1 as I submitted, that from the command post you cannot but  
see what is going on. There was clear visibility also, as far as  
Yaron was concerned. And then he himself has said, in the  
Kahan report, you could hear noises and sometimes human  
5 voices. And we heard evidence of screams. You know, when  
people are killed - I mean, I have no evidence, but I can well  
imagine, just looking at some of these films - this was mayhem  
for 40 hours. Somebody is sitting there and he's saying that  
he has not seen.

10 We had the evidence of Dr. Ang who said that a sniper from  
the top of this building shot at the hospital, some considerable  
distance - I think one kilometre away - shot at him. That means  
they could see and they can themselves see back. So visibility  
is there. There is a commander and there is visibility. So that  
15 part, I think, makes it very clear that a person must be able to  
see; and I have already cited all those reports by the New York  
Times on people who have gone there and seen, and Dr. Ang  
herself has seen. That's the first point.

20 The second point is let's look at this Kahan report and look  
at it carefully. Of course, Kahan report is an Israeli report in  
respect of Israeli people. But if I could invite you to look at  
Volume 3, page 291, "*We have already determined that the means  
of supervision over what the Phalangists were doing in the camps  
could not ensure the flow of real and immediate information on their  
actions. It is difficult to understand how Brigadier General Yaron  
relied on these warnings and assurances, when he knew about the  
Phalangists' combat ethics.*" So he knows these people are going  
25 there to kill. And, in the earlier part of the report, it is already  
described that the Phalangist have this particular attitude.

30 "He also did not take into account the influence of the assassination  
of Bashir on the fanning of the Phalangists' feelings of revenge." So  
he knew, Kahan Commission says that.

35 "Already shortly after the Phalangists' entrance into the camps, ...  
and which should have spurred him to take immediate steps, whether  
on his own cognizance or by authorization ... or the Chief of Staff,  
40 to prevent," - now, in my submission, if you do not prevent is  
also an offence if you have the knowledge, capacity and intent  
- "the continuation of operations of these kinds. No action was taken

by Brigadier General Yaron, and neither did he see to conveying the information in his possession to his superiors." So that's it.

"An additional explanation by which Brigadier General Yaron tried to justify his behaviour was that in the situation which existed that night, the reports about 300, or fewer, killed did not seem to him sufficiently important to spur him to check whether they were true," - so he knew 300 were killed already. 300 or fewer. So the first part, he knew of their conduct. But he said that he did not think it was, "sufficiently important to spur him to check whether they were true, since on that night, in his role as division commander, he had combat problems which were much more important than the matter of the Phalangists in the camps. We cannot accept this explanation either. If Brigadier General Yaron could find the time to hold a briefing, he could also have issued orders to pass on the reports and to take appropriate measures such as were called for by the information received."

Judge Shad Saleem Faruqi:

I'm a little bit sceptical about some of the statements of the Kahan report. "Combat problems" - what combat problems were there?

Prosecutor Gurdial Singh Nijar:

Precisely.

Judge Shad Saleem Faruqi:

PLO had left. Women and children were in the camps. So, what was the combat problems?

Prosecutor Gurdial Singh Nijar:

That's right. That's his explanation which Kahan Commission rejected. They said, "no, you already know 300 deaths already occurred. One, you knew imminent massacre. Now you know deaths."

Then, they said, "Perhaps it is possible to find an explanation for Brigadier General Yaron's refraining from any substantial reaction to the serious information which had reached him Thursday evening in that he was interested that the Phalangists continue to operate in the camps so that I.D.F. soldiers would not have to engage in fighting in that area. Brigadier General Yaron had no reservations

1       about admitting the Phalangists into the camps; he testified that  
he was happy with this decision and explained his position in that  
"we have been fighting here for four months already and there is a  
5       place where they can take part in the fighting," - what fighting is  
that? That is a massacre. The next sentence, "It is possible to show  
understanding for this feeling, but it does not justify a lack of any  
action on the part of Brigadier General Yaron, considering the reports  
that had reached him."

10      Even the Kahan Commission says that he should have acted.  
The next page, 292, the second paragraph,

15      "This order might have been regarded as enough of a precaution by  
Major General Drori, who had not heard about instances of killing;  
but Brigadier General Yaron should have known that halting the  
advance did not ensure an end to the killing.

20      The notice sent to Brigadier General Yaron under Section 15(A) also  
speaks of the failure to provide any warning to the Chief of Staff when  
the latter reached Beirut on 17.9.82, as well as of Brigadier General  
Yaron's granting the Phalangists permission to send a new force into  
the camps without taking any steps that would bring a stop to the  
excesses. When the Chief of Staff came to Beirut, Brigadier General  
Yaron did not tell him everything he had heard and did not make any  
25      suggestion to him about the continuation of the Phalangist operation  
in the camps. From the time he saw the Chief of Staff (after his arrival  
in Beirut) until the Chief of Staff left Beirut, no warning was heard  
from Brigadier General Yaron - not even a significant comment  
regarding the danger of a massacre. Brigadier General Yaron was  
30      not oblivious to this danger. We have evidence that on Friday he had  
spoken to the Phalangist liaison officer charging that his men were  
killing women and children (statement No. 23 by Colonel Agmon),  
but he did not express this awareness clearly in his meetings with  
Major General Drori and the Chief of Staff.

35      Brigadier General Yaron's inaction regarding the continuation of the  
Phalangist operation in the camps was epitomized by the fact that  
he did not issue, any order to prevent them from replacing forces on  
Friday and did not impose any supervision on the movement of the  
40      Phalangist forces to and from the camps, despite the fact that the  
order halting the operation was not rescinded."

And then they say that General Yaron said he was insensitive to this situation. Then they said that we sympathize with his insensitivity and it was a mistaken judgment on his part. But it's not a judgment. If you look, it's a non-sequiter. The conclusion is a non-sequiter. It does not follow. So he sent people in, he does not tell his bosses, he knows, he can hear. And earlier I had talked about how he said, "*visibility is not very good, but it is visible,*" and we have also heard evidence of the visibility. So what is the conclusion save that this man, with full knowledge, committed the massacre when they, Israeli Defence Forces, were in complete control and he was the Brigadier General. Even Kahan Commission report says this. And we rely on that save for the non-sequiter conclusion. He is guilty of this genocide at Sabra Shatilla.

Thank you.

**Judge Tunku Intan Mainura:**

Excuse me counsel. I need some clarification about the legal standing of Amos Yaron. Under international law there is a principle of superior order whereby a soldier could not be held liable if it can be proven that what he did was due to the order of his superior. Based on the Kahan report, in particular page 291, in the first paragraph there is mention of Amos Yaron having a superior. Why should Amos Yaron be charged, and not his superior?

**Prosecutor Gurdial Singh Nijar:**

The fact is, perhaps we should have charged Ariel Sharon, Menachem Begin and so on. First is the question of the superior, the principle. I think it was shown in the Nuremberg trial that you cannot plead superior orders. You cannot say I was acting on ... you know the Nuremberg trial, the judgment of the Nuremberg trial showed that you cannot plead superior orders - in fact, that was pleaded by a large number of them; they said they just carrying out the orders that were imposed upon them by law, actually. Some of them were judges, some were lawyers - the 20 people who were charged. And that was held to be not a defence, if I'm right in ... It's not a defence for crime of genocide.

For genocide also, if I'm not mistaken - I'm trying to locate

1 the exact provision - it's under the ICC there is a specific  
provision that you can be separately liable even though you  
act upon orders. That's my understanding. I can locate the  
exact provision in awhile both from the Nuremberg trial and  
5 from this - because this is essentially my colleague's task and  
I'm just coming in to supplement.

10 And why Ariel Sharon was not charged? I think in comatose.  
I think there is some divine intervention in ... affairs.

15 **Judge John Philpot:**

If you look at the conclusions of this report, the person who's  
most criticized is Yaron. And many people criticized the Kahan  
report because it didn't go after the top people, but it was an  
internal Israeli report. Maybe that explains it.

20 **Judge Shad Saleem Faruqi:**

I think it was an attempt to find a scapegoat.

25 **Prosecutor Gurdial Singh Nijar:**

Yes.

**Judge Shad Saleem Faruqi:**

But it doesn't matter ... if the wrong group, everyone ...

30 **Prosecutor Gurdial Singh Nijar:**

Thank you.

**Prosecutor Rafika Sharī'ah Hassan:**

35 Your Honours, if I may assist on this point? If we look through  
further on the Kahan report, we will be able to examine and  
ascertain that the presence of the Phalangist in the camp area  
was not entirely pursuant to the order given to Amos Yaron.  
However, we can see that the nature of the presence was  
committed by way of coordination that continuously happened  
progressively. So, we therefore conclude that Amos Yaron is  
therefore has the specific intent allowing the Phalangist to be  
present in the camp despite their combating nature.

40 If I may invite Your Honours to page 227 of the Kahan report,  
we can see from here that, "*The commanders of the Phalangists  
arrived for their first coordinating session regarding the entry of*

their forces into the camps at about 11:00 a.m. on Thursday, 16.9.82, and met with Major-General Drori at the headquarters of one of the divisions. It was agreed at that meeting that they would enter the camps and coordinate this action with Brigadier-General Yaron, commander of the division. This coordination between Brigadier-General Yaron and the Phalangist commanders would take place on Thursday afternoon at the forward command post."

And subsequently, we can also see Amos Yaron again met with the Phalangist commanders for the coordination as per paragraph 239, at the second last paragraph. So there is very active involvement and not mere execution of the order from his superior that reflects and illustrates specific intent on his part to execute genocide. Thank you.

Judge Shad Saleem Faruqi:

Professor Gurdial, 16th September, middle of the month of September - would it be very cold? Fog in Sabra and Shatilla at that time? I'm thinking of the issue of visibility. So the weather, middle of September, will there be lots of fog affecting visibility, or is it clear weather?

Prosecutor Gurdial Singh Nijar:

No. Absolutely clear weather.

(from the back, Dr. Dr. Ang Swee Chai: It was clear.)

She's a resident there. They had absolutely clear weather at that time. There's no question of fog or ...

Judge Lamin Yunus (President):

No further?

Prosecutor Gurdial Singh Nijar:

No further submissions. This is the prosecution's submission for this stage and for the final stage as well. This is our final submission.

Judge Lamin Yunus (President):

The defence, any respond?

Amicus Curiae Jason Kay:

At this point, no. We will respond after the Tribunal makes a ruling as to whether is or isn't a case to answer.

1    **Judge Lamin Yunus (President):**

We have a short adjournment of 20 minutes.

*Amicus Curiae Jason Kay:*

5    Your Honours, may I just pre-empt? Due to the hour, may I suggest that if there is a ruling that there is a case to answer, I request that our submissions be taken tomorrow morning.

**Prosecutor Gurdial Singh Nijar:**

10    I've not serious objections to that, but wondering if we can wrap it up today? We can sit a little later. Tomorrow is a Sunday. If we sit a little later, then there is more time given to Your Honours to conclude, to at least reflect on it. We're quite prepared to sit until quite late.

15

*Amicus Curiae Jason Kay:*

20    We will be taking a considerable amount of time to reply to the case that has been presented by the prosecution; if it is determined that we have a case to answer. I do not think we should impose too much on the Tribunal till the late hour today.

**Prosecutor Gurdial Singh Nijar:**

25    I really want to make a plea, if it is possible, because I think we were trying to manage the time - sorry that we took much longer than we should have - perhaps the fault lies with us. But if we can, if the panel is prepared to sit until a little later for today, then perhaps we can wrap it up today and it will be useful for the panel to have at least two clear days in view of the complexity of the matter.

30

**Judge John Philpot:**

We will discuss and come back.

**Judge Lamin Yunus (President):**

35    We will adjourn now.

**Registrar Musa Ismail:**

All rise.

40

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23 November 2013  
(Afternoon session 2)

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**Judge Lamin Yunus (President):**

Having considered the evidence of the witnesses and the learned submissions on both sides, the Tribunal unanimously rules that there is a *prima facie* case to answer in respect of both charges.

5

The proceedings for today is postponed and will commence at 9.30 tomorrow morning. I'm sorry that we spoiled your Sunday. We come here anyway.

10

Thank you very much.

15

**Registrar Musa Ismail:**

All rise.

(6.25pm)

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1                   24 November 2013  
5                   (Morning session 1)

Ms. Fiffy Armiza Muhammad Sahit (Assistant Registrar):

5                   All rise.

Amicus Curiae Jason Kay:

May it please the Tribunal, I have prepared a written submission  
that will be the guide for my submissions this morning.

10                  It has been 4 long days. And as much as I would wish to be  
brief, the 2 charges that are before this Tribunal cover such a  
breadth that I cannot but take a few hours to go through the  
issues. I will try to keep it short.

15                  The Prosecution has presented the evidence. The Tribunal  
has ruled that there is a case to answer. This is, therefore, the  
defence that the *Amicus* team presents on behalf of the State  
of Israel, and Amos Yaron. No witnesses were called for the  
20                 defence. Both accused have chosen to not participate in this  
case. We are submitting on their behalf as a friend of this  
Tribunal, as *Amicus Curiae*.

25                  First, we reiterate all we have said and presented before during  
our submissions that there is no case to answer and adopt it  
as part of our closing submissions now. In addition, we now  
formally present to the Tribunal additional Defence-Amicus  
bundles numbers 5, 6, 7 & 8 which contain the documents that  
will be referred to during these submissions. We ask that they  
30                 be marked as exhibits.

35                  The issues are as follows: One: Is Amos Yaron guilty of war  
crimes, crimes against humanity and genocide? Issue number  
two: Is the State of Israel guilty of war crimes, crimes against  
humanity and genocide?

Has the prosecution proven the above 2 cases beyond a  
reasonable doubt to the point that if one were to ask a  
reasonable man, his answer would be, "*of course it is possible  
40                 that the accused could be innocent, but not in the least probable.*"  
That was the standard that was adopted in the case of Delalić.

Only if that can be said, then can there be a conviction. The burden rests and always remains with the prosecution. A failure to challenge witnesses does not relieve the prosecution of this burden. Unlike civil trials where if a fact is not challenged it is deemed admitted, this is a criminal trial, and in a criminal trial if a fact is not proven, it cannot be considered by the tribunal. Most of the witnesses have made bare assertions.

To highlight a glaring oversight: The witness Dr. Walid, yesterday, his testimony, his statutory declaration, should have been supplemented by documents backing up his claims - the facts and figures, the percentages - documents that Defence-Amicus has, in a way, assisted the Tribunal with by putting it in our Bundle number 7, pages 1-13. Without those pages - that was unfortunately overlooked in the prosecution's presentation of its case - Dr. Walid's testimony was a mere quoting of figures from the air. Pages 1-13 of our bundle number 7 grounded the testimony of Dr. Walid in reality. And of course, and we trust that the Tribunal can see that we were using pages 1-13 yesterday for an entirely different purpose during cross-examination. I will not dwell on this any longer.

Alan Dershowitz, in his book, "The Case for Israel," wrote,

*"The truth is that I support Israel precisely because I am a civil libertarian and a liberal. I also criticize Israel whenever its policies violate the rule of law. Nor do I try to defend egregious actions by Israelis or their allies, such as the 1948 killings by irregular troops [paramilitary] of civilians at Deir Yassin, the 1982 Phalangist [not Israelis] massacre of Palestinians in the Sabra and Shatilla refugee camps, or the 1994 mass murder of Muslims at prayer by Baruch Goldstein."*

This is found at page 12 of his book, and it has been appended to the back of the submission, page number 2.

I stand here to defend both Israel AND Yaron, something which probably Dershowitz would not do. This is the defence. But before I go to the heart of the matter, I cede the podium to Dr. Matthew Witbrodt to address the Tribunal on some points of law that were raised by the prosecution yesterday in its closing.

1   **Amicus Curiae Dr. Matthew Witbrodt:**

May it please the court. Your Honours, I have 6 brief points.

The first issue: In relation to the charges brought against Amos Yaron and the State of Israel, the prosecution has listed war crimes and crimes against humanity alongside genocide for Charge 3; and war crimes, crimes against humanity and crimes against peace for Charge 4. The prosecution has effectively abandoned these charges during the submission offered yesterday. It has failed to identify or argue on the elements of any individual action that amounts to a war crime, crime against humanity or crime against peace, nor proven the elements of such crimes existed. As a result, the prosecution is effectively asking the Tribunal to determine the charges as well as whether the elements of any such charges can be proven.

Secondly, in the written outline of the submission at section 2(a), the prosecution points to the ICJ case, Bosnia & Herzegovina, in relation to whether a State can be charged directly for the acts specified in Article 3 of the Genocide Convention. It's important to note on this matter that in the ICJ case, Bosnia & Herzegovina, which I will refer to as the Genocide case; the ICJ ruled that Bosnia & Herzegovina were NOT directly responsible but attribute them State responsibility. They were not found to be guilty on the commission of genocide nor were they found to be guilty of complicity in the commission of genocide.

In particular, in relation to 2(b), it is argued that State responsibility can arise in regards to complicity. The threshold, however, mandates that there must be some type of positive action on behalf of the respondent. In particular, at paragraph 413 of Bosnia & Herzegovina, or the Genocide case, the ICJ found that the activities were not committed by the actors or the organs of the respondent. The massacres were not committed under the instructions or direction of the respondent. There was no effective control - which I will return to later - and there was no evidence of specific intent, which would have had to be present in order for the State to be held responsible on this basis. In this particular instance, there were no instructions offered by Belgrade or the Federal Republic for Yugoslavia organs to commit massacres. The threshold for complicity, as

enunciated in this case at paragraph 432, requires, "positive actions to furnish aid or assistance to the perpetrators of genocide." The prosecution has not, in fact, proven that this was the case in regards to either the charge against Amos Yaron or the charges against the State of Israel.

The third point, in regards to superior responsibility. I personally am assuming that it is superior responsibility that the prosecution is arguing in the present case because no other issue of responsibility was raised. It requires first, effective command. Effective command is similar to command responsibility as adopted in the international ...

**Judge John Philpot:**

Can I ask you a question?

**Amicus Curiae Dr. Matthew Witbrodt:**

Yes sir.

**Judge John Philpot:**

It can be superior responsibility, but if they incited or instructed, that's individual responsibility, is it not? They encouraged.

If there is evidence that Mr. Yaron was working directly with the Phalange person in his office, there's a representative, and that he encouraged him to do this, is that not individual responsibility? Because superior responsibility is responsibility for acts that are accomplished by the underlings for which they have control, which he should have known about.

Maybe the prosecution will clarify in its summing up.

**Amicus Curiae Dr. Matthew Witbrodt:**

Your Honour, to my awareness, the only issue that was effective raised by prosecution in its submission yesterday pertained to command and/or superior responsibility. The issue of individual responsibility was raised by the Bench.

Continuing on, the second component required is effective control, in which case it would have to be proven that in the case of Amos Yaron, or in regards to the State of Israel - effective control was exercised over the Phalangist or any other non-

1 State party in any of the acts that are alleged to amount to  
genocide. Whether or not Amos Yaron or the State of Israel,  
particularly in relation to the Phalangist, whether or not Amos  
Yaron exercised authority to order, direct, and/or punish  
5 the actions of subordinates remains in question. Again, the  
prosecution has not proved this element of the case.

10 Moving on to the fourth point: In the Prosecution v. Halilović  
decision before the International Criminal Tribunal for  
the former Yugoslavia, the decision issued by the Appeals  
Chamber on 16 October 2007 sheds further light on the notion  
of complicity. At paragraph 59,

15 *'a police officer may be able to "prevent and punish" crimes  
under his jurisdiction, but this would not as such make him  
a superior vis-à-vis any perpetrator within that jurisdiction.'*

20 The accused must be, by virtue of his position, senior in  
some form of formal or informal hierarchy to the perpetrator.  
Essentially, this emphasizes the necessity for effective control  
over the action of another, and positive actions being taken  
in regard to - in order to be charged for a crime of genocide.  
The failure to prevent and/or failure to punish is a separate  
issue altogether.

25 Fifthly, in regards to the legal status of the General Assembly  
Resolutions, and in regards to ethnic cleansing specifically,  
raised in the prosecutor's submission: firstly, the prosecutor  
contended yesterday that General Assembly resolutions are  
30 a source of law. This is not entirely true. General Assembly  
resolutions in international law are recognised as soft law. They  
are typically interpreted as a means by which to interpret the  
law. In so far as they constitute hard law - effectively binding  
provisions - remains questionable. Generally speaking, General  
Assembly resolutions are used primarily in relation to the  
determination of custom, and whether or not obligations, *Erga  
omnes*, exists, and whether or not a specific offence has reached  
35 the status of *jus cogens* under international law.

40 In regards to the General Assembly resolutions concerning  
ethnic cleansing specifically, the prosecution submitted that  
ethnic cleansing is equivocal to genocide. Yes, in the Bosnia

Herzegovina case, at paragraphs 189-190 if I'm not mistaken, 1  
the ICJ ruled that ethnic cleansing is NOT genocide. It can  
be viewed as an action that gives rise to genocide, but can  
be distinguished from genocide on the basis of *dolus specialis*,  
i.e. intent. Ethnic cleansing merely involves the removal and  
transport of individuals - effectively deportation. During  
instances of ethnic cleansing, history demonstrates there are  
instances of murder and that these are grievous. However the  
intent behind the murder must be proven. Ethnic cleansing in  
and of itself is not sufficient to support a charge of genocide.  
10

Finally, point six: the prosecution yesterday submitted in  
regards to the issue of *mens rea*, regarding statements made  
by Israeli officers and Israeli governmental officials regarding  
instances which allegedly amount to genocide and their  
instructions regarding clean-up operations - one such instance  
was "mopping up". In regards to genocidal intent, these  
statements do not reflect a specific genocidal intent and should  
not be read as such.  
15

In the case - again before the International Criminal Tribunal  
for the former Yugoslavia - in the case of Prosecutor v. Goran  
Jelisic, in both the Appeal Chambers whose judgment was  
issued on 5 July 2001 and in the Trial Chambers whose  
judgment was issued on 14 December 1999, the tribunal in  
that case was called to draw a line between sadism - which is  
essentially indifference towards the death of another human  
being - and genocide. Again, in Trial Chambers they ruled  
that while the defendant was a sadist and had committed  
murders - 20 to 30 per day in a camp before breakfast; this was  
what he actually required before he sipped his coffee - 20 to  
30 murders in the morning before breakfast. The tribunal in  
the Trial Chambers held that he was a sadist. His actions were  
unreasonable and he was guilty, but it was murder.  
20  
25  
30

In the Appeal Chambers, however, the ruling was overturned  
solely on the basis that his comments, the defendant's  
comments and statements, to other people and other persons  
present had indicated a racist intent behind his actions.  
Therefore, the Appeal Chamber recognised that sadism is  
distinct from genocidal intent. They relied solely on the  
threshold established by *dolus specialis* which requires a specific  
35  
40

1 intent to kill or destroy a group in whole or part based solely  
on the individual's membership.

5 If there are no further questions, I will conclude my submission.

5 **Amicus Curiae Jason Kay:**

Your Excellencies, if I may draw the tribunal's attention to page 4 of the written submissions, I will continue from there.

10 Let's start with genocide, specifically relating to the charge against the State of Israel. In law, genocide is defined in Article 2 of the Genocide Convention 1948. Key portions are as follows:

15 "... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (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 intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."

25 The Oxford English Dictionary defines it simply as this: "*the deliberate killing of a large group of people, especially those of a particular nation or ethnic group*".

30 The charge against Israel is for the crime of genocide. This charge of genocide is unique. By both definitions, genocide requires a decrease in population of the victim nation/group. That's how genocide works. You don't like a group, you kill them. You kill them in a grand manner. That's what the Nazis did to the Jews. That's what the Hutus did to the Tutsis in Rwanda. That's what Pol Pot did to the "*educated, the wealthy, Buddhist monks, police, doctors, lawyers, teachers, and former government officials*".

40 Genocide means that at the end of the act, you have a lesser number of victims than when the genocide started. Simple mathematics.

Judge Shad Saleem Faruqi:

Is that in the Genocide Convention, that interpretation? 1

Amicus Curiae Jason Kay:

That is my interpretation. Now, if Your Excellencies will turn 5  
with me ...

Judge Shad Saleem Faruqi:

As long as the population rises, there is no genocide possible? 10

Amicus Curiae Jason Kay:

It is a logical problem.

Judge Shad Saleem Faruqi:

I'm not so worried about the logic. So, if I kill 10,000 people, 15  
but the population increase by 12,000, therefore there is no  
genocide?

Amicus Curiae Jason Kay:

Logically, yes. 20

If Your Excellencies will turn with me to Bundle number 5, page 25  
413, the Progress Report Of The Acting Mediator For Palestine  
Submitted To The Secretary-General For Transmission To The  
Members Of The United Nations dated 18/10/1948 found at  
the UNISPAL website (United Nations Information System on  
the Question of Palestine). It states that in 1948, the population  
of Palestine was about 500,000 Arabs - this is the high figure.  
The low figures are somewhere between 472,000 and 360,000.  
If I may quote, at the last paragraph of page 413, "*The situation* 30  
*of the Palestine refugees is now critical ...*" This is in 1948. UN  
document.

If Your Excellencies will turn with me to page 414, at the 4th 35  
paragraph, item (c), "*Thirdly, as a result of careful investigation*  
*of the numbers involved, the immense scope of the problem has now*  
*become more apparent. Part Three of the Mediator's progress report*  
*tentatively placed the total number of Arab refugees at 360,000,*"  
and two lines under that, it quotes, "472,000", and the link is  
"see Appendix A". 40

There's a chart in the middle. Below that, the highlighted

1 part, "a figure of 500,000 has been accepted here as a basis for  
calculation."

5 At the lowest portion, point number 6, the last paragraph,  
"These figures for Arab and Jewish refugees do not include the large  
number of persons who have not left their own districts but who are,  
nevertheless, totally destitute as a result of military operations."

10 From this report, the high figure is half a million. The current  
population of Palestine, the Palestinians, according to the  
ESCWA (Economic and Social Commission for Western Asia)  
report, Bundle number 8 at page 41, at the first paragraph, the  
population size of Palestine was 1.5 million in 1980, and 4.0  
million in 2010, with a projection to 9.7 million in 2050.

15 Without belabouring the point, our submission is that there  
is no genocide in Palestine. If indeed Israel, the State of Israel,  
is committing genocide in Palestine, they are doing a terrible  
job because the Palestinian population IS increasing. The UN  
20 says so.

When we talk about genocide, we talk about big numbers. We  
talk about huge numbers. Some of the examples:

25 Armenia 1915-1917, 1 million dead.

The Holocaust 1938-1945: about 6 million

30 Rwanda 1994: 800,000. That's the Human Rights Watch  
estimate, (although some claim up to 1 million) in 100  
days

Bosnia Herzegovina, former Yugoslavia, 1991-1993: at  
35 least 96,000 people. That was called ethnic cleansing.

Cambodia 1975-1979: between 2 and 2.5 million (most  
likely the figure is 2.2 million)

Darfur, from 2003 and it is continuing: 300,000.

40 When one talks of 'massive killing', it is about many hundreds  
of thousands, to millions. To suggest that an isolated event,

which was most unfortunate, the moist unfortunate murder of about 3,000 people in Sabra and Shatilla, is the same as massive killing is almost disrespectful to the true horror of massive killing.

True horror means, for example, in Rwanda: 800,000 people in 100 days. That's an average 8,000 people a day for 100 days.

**Judge John Philpot:**

I think in the partition of India, and I can be corrected on the figures, there were a million dead and 11 million displaced. That wasn't called a genocide. Would you call that a genocide? My question is: not based on the number of dead, is it not intention?

**Amicus Curiae Jason Kay:**

Yes.

**Judge John Philpot:**

If we even take this case further: Suppose the Israeli Defence Forces entered into Sabra and Shatilla and killed all males who were present in the camp, is that not an act of genocide, if they wanted to eradicate that part of the population?

**Amicus Curiae Jason Kay:**

Genocide requires a systematic policy. It requires a pattern. You have ...

**Judge John Philpot:**

You've answered my question. Thank you.

**Amicus Curiae Jason Kay:**

Thank you.

When we quote numbers, it goes towards the term 'massive killing'. Is 3,000 massive? Because 1 million is massive. 6 million is massive. Is 3,000 massive?

The true horror of a systematic policy of genocide - let's take the most obvious one, Nazi Germany. What does it mean to have a policy?

1 It means you to put people on a train, you corral them into  
camps, you separate them into lines to march to their deaths,  
you allocate them uniforms and you tag them with yellow  
stars or pink triangles to show that they are degenerates in  
5 your eyes, and then you burn them away.

10 That is an example of massive killing. Every step was a clear  
step to deliberate and knowing extermination. And the Nazi's  
even made the victims of the holocaust burn and dispose the  
bodies of those who died before them.

15 I have some photos of what has been referred to as genocide:  
That's genocide. Next photo please. That's genocide. Next  
please. That's genocide. Next please. That is a watch tower -  
when you put people into a camp like cattle to be slaughtered.  
Next please. That's when you burn them like fuel - when you  
take their fat and you make soap out of it. Next please. That's  
20 when you bring people to their deaths - you make train lines  
into a camp with no other purpose than to kill them. That's  
genocide.

25 The massive magnitude of Rwanda, the Holocaust, and the  
lengthy continuing time frame of each, is very different in  
criminal nature to an isolated act over 2-3 days that resulted  
in the albeit terrible murder of at most 3,000 people.

30 To speak of an intention of committing massive killing by  
way of systematic pattern one need look no further than the  
images of the rail tracks heading into Auschwitz, Buchenwald,  
and Dachau. Tracks leading the unfortunate into the camps,  
to death, to oblivion. They even built the fundamental  
infrastructure to deliver their victims right to the door: that is  
massively planned killing.

35 Specifically for Yaron now: None of the prosecution witnesses  
identified Amos Yaron in any way as directly responsible for  
the deaths that occurred in Sabra and Shatilla in September  
1982.

40 **Judge John Philpot:**

On this question, please address the documentary evidence,  
which is evidence before the court. Could you identify again?  
I understand that I could be wrong.

**Amicus Curiae Jason Kay:**

I was referring to the witnesses when they gave testimony.  
Chahira Abouardini gave testimony ...

1

**Judge John Philpot:**

I agree with you. What difference does that make? This court has received evidence other than simply eye-witnesses.

5

**Amicus Curiae Jason Kay:**

It was referred to in the Kahan report.

10

**Judge John Philpot:**

The prosecution gave examples, and the both are marked in yellow. Could you address that please?

15

**Amicus Curiae Jason Kay:**

The word that was used was that they "heard" the killings. That was the most that linked Yaron from the evidence that has been presented. I will address this later when I specifically refer to the Kahan report, which is the next page.

20

No witnesses saw him do anything. Now, the Kahan report was cited, but it was selectively cited. If we just turn to page 227 of Prosecution Bundle 3, 11 lines from the top,

25

"Brigadier-General Yaron spoke with the Phalangists about the places where the terrorists were located in the camps and also warned them not to harm the civilian population."

That is in the Kahan report.

30

The Kahan report also identifies other people. At page 267, the heading starts with "Personal Responsibility". A sub-heading is the "the Prime Minister". If we flip a few pages, the sub-heading is Minister of Defence. Flip a few more pages, Foreign Minister. A few more pages, Chief of Staff. Flip a few more pages Director of Military Intelligence. After that, the Head of Mossad, no name is given. Next, the GOC Northern Command Amir Drori. Only when we reach page 289 do we see Amos Yaron, Division Commander.

35

40

There are 9 names listed.

- 1        1. Prime Minister Menachem Begin (deceased 09 March  
1992),  
2. Minister of Defence Ariel Sharon,  
3. Foreign Minister Yitzhak Shamir (deceased 30 June 2012)  
5        4. Chief of Staff Rafael Eitan (deceased 23 November 2004)  
5. Director of Military Intelligence Yehoshua Saguy  
6. Head of Mossad - not named (page 284) - we don't know.  
7. GOC Northern Command Amir Drori (deceased 12  
March 2005)  
10      8. Division Commander Amos Yaron, he is alive.  
9. Personal aide to Minister of Defence, Avi Dusal, I do not  
know.

15      The dead cannot be prosecuted. But Yaron's name is number  
8 on the list. 2 other names above him are still alive.

20      Why only charge Yaron? Why spare Ariel Sharon? This very  
same prosecution team that charged George W Bush - they  
went right to the top - for the invasion of Iraq in Case no. 1  
precisely because he was president of the USA at that time.  
Colin Powell was not charged in case no. 1.

25      Yaron's position in the chain of command is clear. Sharon  
was above him. Why is the prosecution paying lip service to  
command responsibility in this charge against Yaron? Is there  
a personal axe to grind against Amos Yaron? A cynic may use  
the word scapegoat. A conspiracy theorist might go further. I  
will stop here.

30      I move the Tribunal for a verdict of not guilty for the accused  
Amos Yaron.

35      For the defence of Israel. We had made this point on the first  
day. By allowing the charge against the State of Israel to stand  
and calling for the defence, this Tribunal has impliedly accepted  
the right of the State of Israel to exist in the community of  
nations. This is contrary to the stand taken by the Palestinian  
National Council and Hamas (the government of Gaza), all the  
witnesses for the prosecution, and even of Malaysia .

40      If Your Excellencies will turn to our Bundle number 6 at page 160, Article 19 of the Palestinian National Charter, the second

paragraph, "The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time,..." 1

At page 162, the Hamas Charter, "Israel will exist and will continue to exist until Islam will obliterate it, ..." 5

Even Malaysia does not recognize the State of Israel. A hypothetical cynic might say that this is already a 'win' for the State of Israel: to be recognized by an International Tribunal 10 as VALID whilst sitting in Malaysia.

I now move to specific instances. The prosecution in its charge cites the incident at Deir Yassin. This was in 1948. The answer to it, I am quoting verbatim from the book "The Case for Israel" 15 by Alan Dershowitz, and it can be found at the back of this submission and it starts at page 3.

"Although it was not the policy of the Haganah to encourage the flight of local Arabs, that certainly seems to have been the policy of the Irgun (or Etzel), the paramilitary wing of the revisionist movement headed by Menachem Begin, and Lechi (or the Stern gang) headed by Yitzhak Shamir. On April 9, 1948, paramilitary units fought a difficult battle for control of Deir Yassin, an important Arab village 20 on the way to Jerusalem. The battle was fierce, with Etzel and Lechi forces losing more than a quarter of their fighters. The Jewish fighters were pinned down by sniper fire and threw grenades through the windows of many of the houses from which the snipers were firing. Most of the villagers eventually fled. An Etzel armored car with a 25 loudspeaker demanded that the remaining villagers lay down their arms and leave their houses. [Benny] Morris [the historian] reports that "the truck got stuck in a ditch" and the message was not heard. The fighting continued, and when it was over, 100 to 110 Arabs 30 were dead.

Many of the dead were women, because Arab fighters dressed as 35 women and shot Israelis to whom they had "surrendered" — a tactic employed by some Iraqis in 2003. Some children and old people were also killed. Although there was and continues to be considerable dispute surrounding the circumstances of these deaths, the event was called a massacre, and as word spread, it clearly contributed to the flight of Arabs in surrounding villages. "Everyone had an interest" 40

1        *in publicizing and exaggerating the number of people killed and the  
brutality of the killings."*

5        **Judge Shad Saleem Faruqi:**

Your page 12 of your submission. I'm just interested in your use of language, page 12, line 3, "Deir Yassin remained an isolated although tragic and inexcusable blemish on Israeli paramilitary actions ..."

10      So those went around killing were paramilitary. But just down below, 6 lines, you say, "*the policy of Palestinian terrorist groups*"

15      So the Palestinian groups are terrorist groups but Israeli terrorist groups are paramilitary, on page 13, 9th line, "*But by Palestinian terrorist standards*"

20      So I'm a little bit disappointed that one set of killers a paramilitary but another set of killers are terrorists. All along it is like that, actually. What's going on here?

25      **Amicus Curiae Jason Kay:**

It's probably I have quoted verbatim from the book, they are not my words.

30      **Judge Shad Saleem Faruqi:**

I see.

35      **Amicus Curiae Jason Kay:**

Allow me to jump straight to the end of my submissions to explain this point - the second last page, page 22, the last paragraph.

This trial and the preparation of it has taught me a lot. Words are important - words are our stock in trade, for lawyers - we define them, we explain them. In a cross-cultural context, this is even more so. I have just learned only yesterday that the suffix "lah" has different meanings. In Malaysia, we use it as a form of invitation to someone - come lah, c'mon lah. To my pleasant surprise, I was informed yesterday that in Arabic "can lah" means "cannot".

40      A simple word, and these are the things that ... words. Let's

take the most obvious example. IDF officially means Israel DEFENCE Force. I don't believe any Palestine would refer to it as a "defence" force. It always is referred to as Israeli THEFT Force or Israeli OCCUPATION Force. Words will be used by both sides differently.

Professor Shad, I believe you often quote the example, "*One man's terrorist is another man's freedom fighter.*" I remember that. And that is true. Which side of the wall you're on will colour your use of nouns and adjectives.

So yes, I do apologise if they are not quoted verbatim from the source from which they are quoted - if they are indeed my words.

If I may return to my page 10 at paragraph 2. The incident at Deir Yassin.

*"Many of the dead were women, because Arab fighters dressed as women and shot Israelis to whom they had "surrendered"—a tactic employed by some Iraqis in 2003. Some children and old people were also killed. Although there was and continues to be considerable dispute surrounding the circumstances of these deaths, the event was called a massacre, and as word spread, it clearly contributed to the flight of Arabs in surrounding villages. "Everyone had an interest" in publicizing and exaggerating the number of people killed and the brutality of the killings. The Arab side wanted to discredit the Jews by arguing—quite hypocritically, in light of their own policy over the decades of deliberately massacring civilians—that the Jews were worse than they were. The British also wanted to discredit the Jews. Etzel and Lechi wanted to "provoke terror and frighten Arabs into fleeing." And the Haganah wanted "to tarnish" Etzel and Lechi.*

*The Haganah and the Jewish Agency—the official organs of the state-to-be—immediately condemned the massacre and those who had participated in it. A formal note of apology and explanation was sent to King Abdullah. Indeed, the Deir Yassin massacre certainly contributed to the controversial decision by David Ben-Gurion—Israel's first prime minister—to disarm, by force, these paramilitary groups in June 1948. But the effect of Deir Yassin, and the publicity surrounding it, was clearly to provoke even more flight by Arabs.*

1 Some Palestinian leaders actually circulated false rumors that women  
had been raped. When confronted with the reality that no rapes had  
taken place, Hussein Khalidi, a Palestinian leader, said, "We have to  
say this, so that Arab armies will come to liberate us from the Jews."  
5 Hazam Nusseibi, who was a journalist at the time, told the BBC  
years later that the deliberate fabrication of the rape charge "was our  
biggest mistake ... as soon as they heard that women had been raped  
at Deir Yassin, Palestinians fled in terror."

10 Deir Yassin stands out in the history of Arab-Jewish conflict in  
Palestine precisely because it was so unusual and so out of character  
for the Jews. No single Arab massacre of Jews has that status,  
because there are too many to list. Yet every Arab schoolchild and  
15 propagandist knows of and speaks of Deir Yassin, while few ever  
mention Hebron, Kfar Etzion, Hadassah Hospital, Safad, and the  
many other well-planned Arab massacres of Jews to come, except  
when extremists proudly take credit for them.

20 The Arabs retaliated for the Deir Yassin massacre not by attacking  
those responsible for perpetrating it—Etzel or Lechi military  
targets—but rather by deliberately committing a far more  
premeditated massacre of their own. In a well-planned attack four  
25 days after Deir Yassin, Arab forces ambushed a civilian convoy  
of doctors, nurses, medical school professors, and patients headed  
toward the Hadassah hospital to treat the sick, murdering seventy of  
them. To assure there were no survivors, the Arab attackers doused  
the buses and cars containing the medical personnel with gasoline,  
"setting them alight."

30 No apologies or excuses were offered for this carefully planned  
massacre of medical noncombatants. Israeli forces did not retaliate  
for the Hadassah ..."

35 **Judge Shad Saleem Faruqi:**  
Your footnote 21?

**Amicus Curiae Jason Kay:**  
It is the footnote in Dershowitz's book.

40 "Israeli forces did not retaliate for the Hadassah massacre by targeting  
Arab civilians. They went after those armed murderers who had  
perpetrated the massacre. Deir Yassin remained an isolated although

tragic and inexcusable blemish on Israeli paramilitary actions in defense of its civilian population, while the deliberate targeting of civilians remained—and still remains—the policy of Palestinian terrorist groups, as well as of many Arab governments.”

I end my reading from the book by Dershowitz. That concerns Deir Yassin.

Sabra and Shatilla. Nothing was said so far that the PLO, at that time, was attacking Israel from Lebanon. I have quoted a short article and it is found at the back of the submission, page 9,

*“The PLO repeatedly violated the July 1981 cease-fire agreement. By June 1982, when the IDF went into Lebanon, the PLO had made life in northern Israel intolerable through its repeated shelling of Israeli towns.*

*In the ensuing 11 months, the PLO staged 270 terrorist actions in Israel, the West Bank and Gaza, and along the Lebanese and Jordanian borders. Twenty-nine Israelis died, and more than 300 were injured in the attacks. The frequency of attacks in the Galilee forced thousands of residents to flee their homes or to spend large amounts of time in bomb shelters.*

*A force of some 15–18,000 PLO members was encamped in scores of locations in Lebanon. About 5,000–6,000 were foreign mercenaries, coming from such countries as Libya, Iraq, India, Sri Lanka, Chad and Mozambique. The PLO had an arsenal that included mortars, Katyusha rockets, and an extensive anti-aircraft network Israel later discovered enough light arms and other weapons in Lebanon to equip five brigades. The PLO also brought hundreds of T-34 tanks into the area. Syria, which permitted Lebanon to become a haven for the PLO and other terrorist groups, brought surface-to-air missiles into that country, creating yet another danger for Israel.*

*Israeli strikes and commando raids were unable to stem the growth of this PLO army. Israel was not prepared to wait for more deadly attacks to be launched against its civilian population before acting against the terrorists.*

*After Israel launched one such assault on June 4–5, 1982, the PLO responded with a massive artillery and mortar attack on the Israeli*

1      population of the Galilee. On June 6, the IDF moved into Lebanon  
to drive out the terrorists.

5      Former Secretary of State Henry Kissinger defended the  
Israeli operation: "No sovereign state can tolerate indefinitely  
the buildup along its borders of a military force dedicated to  
its destruction and implementing its objectives by periodic  
shellings and raids."

10     That is the background that which was missing in the  
presentation on Sabra and Shatilla.

15     I will move now to the incident of Jenin and Nablus in 2002.  
This again, is quoted from Dershowitz's book, page 3, at the  
back of the submission.

20     "Palestinians initially claimed that Israel had "massacred" 3,000  
civilians. Then they reduced their number to 500. The U.N. secretary  
general found the total number of Palestinians killed to be 52, many  
of whom were armed combatants. There is no evidence that Israeli  
soldiers deliberately killed even a single civilian, despite the fact  
that armed fighters shooting from among civilians in Jenin and  
booby-trapping civilian homes killed 23 Israeli soldiers. This willful  
exaggeration is all too typical, even among Palestinian academics."

25     **Judge Tunku Intan Mainura:**

Excuse me counsel, sorry to interrupt. I realise that many  
references have been made to the book by Alan. Can you give  
me a brief summary of who he is.

30     **Amicus Curiae Jason Kay:**

Alan Dershowitz is the Harvard law professor and he has  
written and spoken publicly on behalf of Israel. He has  
compiled them into the book, "The Case for Israel" - the  
35     explanations.

**Judge Tunku Intan Mainura:**

Is he an Israeli?

40     **Amicus Curiae Jason Kay:**

He's an American, and of course, from his name ...

Judge Tunku Intan Mainura:  
Dershowitz?

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*Amicus Curiae Jason Kay:*  
He's a Jewish American.

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Judge Tunku Intan Mainura:  
Thank you.

Judge Shad Saleem Faruqi:  
America does allow dual citizenship. Is he by any chance an  
Israeli citizen?

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*Amicus Curiae Jason Kay:*  
I'm sorry, I would not be able to answer that at this point.

15

If I may continue. Page 12, final paragraph.

*"In April 2002, following hundreds of suicide bombings that culminated in the Passover seder massacre of twenty-nine Jewish women, children, and men at prayer, the Israeli army entered the Jenin refugee camp, which has become a bomb-making factory and terrorist centre. Instead of bombing the terrorists' camp from the air, as the United States did in Afghanistan and as Russia did in Chechnya, with little risk to their own soldiers but much to civilians, Israeli infantrymen entered the camp, going house to house in search of terrorists and bomb-making equipment, which they found. Twenty-three Israeli soldiers and fifty-two Palestinians, many of whom were combatants, were killed. This is now called a massacre by Palestinian propagandists. By Israeli standards, the deaths of fifty-two Palestinians, some of whom were not combatants, were a deviation from the norm, even though they placed their own soldiers at risk to minimize Palestinian civilian casualties. But by Palestinian terrorist standards, the killing of only a few handfuls of noncombatants is just another average day for their terrorism! Yet the hypocritical Palestinian cry of a Jenin massacre persists, and it is supported by the head of the United Nations Refugee Agency (UNRWA), Peter Hanson, a longtime apologist for, and facilitator of, terrorism. He characterized Israel's actions in Jenin as a "human rights catastrophe that has few parallels in recent history."*

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1 At this point may I just point out this. This issue inflames people, and inflammatory language will be used.

Judge Shad Saleem Faruqi:

5 Just to clarify. Surely we are aware this is not an issue between angels and devils. I think wrongs and atrocities have been committed on both sides. But I've noticed that how ... I'm trying to weigh the veracity, reliability, of the evidence of this learned Harvard professor - Is he a balanced person or is he 10 totally partisan? So that's why I noticed how within the same lines, the same paragraphs

Judge Salleh Buang:

The language used

15 Judge Shad Saleem Faruqi:

The language he used. That goes to show how balanced, how much we can rely on his testimony.

20 Amicus Curiae Jason Kay:

Thank you for that point. To an earlier point - Dershowitz is American and he has been quoted as saying, "*Were I an Israeli, I'd be a person of the Left and voting the Left.*" That's his quote.

25 Without breaking privilege and confidentiality, we do know that this issue inflames people. And sometimes intemperate words are used. And I thank Judge Shad for pointing out that it is not a contest between angels and devils. Thank you for that.

30 I was about to go on and on ... That's the elephant in the room. Israeli keeps saying, "*terrorist, human shield, attacking civilians,* ..." Suicide bombings is the elephant in the room. Where do we go from here? Who is more bad? Is it an issue about land purely, or is it a religious issue? I wish I could answer better, but I will be getting to that at page 18 of my submissions; but I think I better stay on track with the flow that I have prepared.

35 In the Irish experience, the IRA call themselves paramilitary; the UK calls them terrorist.

40 Judge Shad Saleem Faruqi:

Semantic. Yes. But there should be consistency of usage.

*Amicus Curiae Jason Kay:*

Yes, if were to say that Dershowitz is inflamed, yes. From his words, clearly. But he is writing the book titled, "The Case for Israel," obviously he is going to structure it as an advocate would. I wouldn't structure it like that, but he did.

If I just may continue.

So the Israel's position is that in Jenin, they were trying to protect civilians by going house to house, rather than carpet bomb from the top.

*"Not only was Jenin not a massacre or an unparalleled catastrophe but it is regarded by many as a model of how to conduct urban warfare against terrorists hiding among civilians. A New York Times story of April 1, 2003, reported that the U.S. military has studied Israel's experience "in close-quarter fighting":*

*United States Army officials have said they were particularly interested in how the Israeli Army used specially loaded tank rounds to blast holes through walls, without collapsing buildings, during fighting last year in the Jenin refugee camp. In Jenin, Israel also used bulldozers and wire-guided missiles fired from helicopters to overwhelm about 200 gunmen holed up inside the camp.<sup>6</sup>*

*The Times story quoted Israeli military historian Martin van Creveld stating that when he visited an American military camp, the Marines were "interested in what it would be like fighting a guerrilla war, especially urban warfare of the kind we were conducting in Jenin."*

The piece went on to say:

*"Twenty-nine Israeli soldiers were killed in these battles, all but six of them in the battle for the Jenin refugee camp. Although the number of Palestinian deaths is, of course, hotly debated, the Israeli estimate is 132 killed in Nablus and Jenin. Compared with casualty figures from urban combat in recent years—such as the fighting in Chechnya, where Russia's army lost at least 1,500 soldiers during its first assault on Grozny—these numbers are astonishingly low."<sup>35</sup>*

That's Jenin-Nablus 2002.

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1 Specifically going into the Al-Sammouni incident in the  
neighbourhood district of Zeitoun, Gaza. Bundle number 5,  
page 224. This is the Military Advocate General of Israel's legal  
opinion on the Al-Sammouni family incident. It is dated 01  
5 May 2012. Second paragraph, "*twenty-one Palestinian residents  
were killed and a number injured...*"

10 "The findings of the Command Investigation and the Criminal  
Investigation were submitted to the IDF Chief of General Staff, who  
determined that the Incident revealed professional shortcomings  
in the conduct of the Commander of the Givati Infantry Brigade  
(the "Brigade Commander"). As a result, the Chief of General  
15 Staff imposed a command sanction on the Brigade Commander,  
preventing him from future promotion to a command position in  
an operational environment." There was action taken against the  
commander involved.

20 "In parallel, on the basis of the findings of the Criminal Investigation,  
the MAG assessed the criminal responsibility of the Brigade  
Commander for the death of Palestinian civilians not taking a  
direct part in the hostilities, following the determination that the  
strikes in question were carried out on the orders of the Brigade  
Commander."

25 Two paragraphs down, "In a recently issued legal opinion, the  
MAG found that the Criminal Investigation comprehensively refuted  
the serious allegations cast against the IDF, according to which  
the strikes were directly and intentionally aimed at civilians ... no  
30 grounds to the allegation that IDF forces directed civilians to gather  
in the house which was later struck. As a result, the MAG concluded  
that there are no grounds for the allegation that the Incident involved  
the commission of war crimes, which according to international law  
require a mental element constituting criminal intent."

35 The next page at paragraph 2, line 4, "prior to the Incident, RPG  
fire was directed towards the IDF ground forces in the area..."

And the conclusion, at the next paragraph:

40 "... the MAG found that there were no grounds for employing  
criminal or disciplinary measures against any of those involved in  
the Incident, and instructed that the file be closed. In doing so, the

MAG also took note of the aforementioned command sanction taken against the Brigade Commander.

Aside from the above, the MAG emphasized that as a result of the Incident, lessons needed to be drawn in order to prevent the reoccurrence of similar incidents in the future; and to this effect made a number of recommendations to the Chief of General Staff. The process for implementing these recommendations has already begun."

This was in May 2012.

Let me just speed up things. Cast Lead 2009. I could go through it, but I have included it in my Bundle number 5 which are the IDF reports. The IDF came up with 2 reports for Cast Lead - first one starts at page 3, The Operation in Gaza: Factual and Legal Aspects (July 2009) - the second is, Gaza Operation Investigations: An Update, January 2010.

I could bore the panel reading the parts, but the point I want to make is this. After Cast Lead, they made a report. They reported what they did. If you're gonna kill people willy-nilly, you don't report it. And part of the reason for us knowing so well about the details of the Holocaust is because of German efficiency. Having known that example, who would do that if an atrocity was intended?

The Goldstone report. Generally it was against Israel. In response to the Goldstone report, there is an official Israeli Ministry of Foreign Affairs statement. That is found at Bundle number 5, page 1.

I will read out the parts highlighted to give grounding before I go to the quote. "At the same time the Report all but ignores the deliberate strategy of Hamas of operating within and behind the civilian population and turning densely populated areas into an arena of battle. By turning a blind eye to such tactics it effectively rewards them. ... These concerns were exacerbated by the conduct of the Mission itself, including reports in the Palestinian media that, throughout its visits to Gaza, it was continuously accompanied by Hamas officials..."

1    **Judge Salleh Buang:**

Jason, can I ask you to go back to the IDF report. Could you give us a couple of sentences of what those report contain?

5    **Amicus Curiae Jason Kay:**

Yes. If I may turn Your Honours' attention to page 8, Bundle 5.

10    This is the executive summary, paragraph 3, "*The Paper addresses the context of the Gaza Operation and notes that Israel had both a right and an obligation to take military action against Hamas in Gaza to stop Hamas' almost incessant rocket and mortar attacks upon thousands of Israeli civilians and its other acts of terrorism. Israel was bombarded by some 12,000 rockets and mortar shells between 2000 and 2008, including nearly 3,000 rockets and mortar shells in 2008 alone. Hamas specifically timed many of its attacks to terrorise schoolchildren in the mornings and the afternoons."*"

20    Paragraph 4, four lines down, "*Hamas also orchestrated numerous suicide bombings against Israeli civilians and amassed an extensive armed force of more than 20,000 armed operatives in Gaza.*"

25    Page 59 of the same Bundle, from paragraph 145: "... for many years Hamas engaged in deliberate, systematic and widespread use of rocket attacks, mortar attacks and suicide bombings intentionally directed at civilian targets in Israel. The international community, including the United Nations, the Quartet of Middle East mediators, the European Union, the United States, the United Kingdom and many other States and international bodies, have condemned Hamas' rocket attacks." The citations are in the footnotes.

30    Paragraph 146: "*Hamas' rocket attacks directed at Israel's civilian population centres deliberately violated the basic principles of distinction. Any doubt about this is resolved by the fact that Hamas itself has boasted of its intention to hit population centres. It is well accepted in customary international law that "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities" constitutes a war crime."*"

35    Paragraph 147: "*The United Nations Under-Secretary General for Humanitarian Affairs stated that "there's no justification" under the*

law for the firing of the rockets, because "[t]hey are indiscriminate, there's no military target."

At page 62 of Bundle 5, at paragraph 151: "The Law of Armed Conflict not only prohibits targeting an enemy's civilians; it also requires parties to an armed conflict to distinguish their combatant forces from their own civilians, and not to base operations in or near civilian structures, especially protected sites such as schools, medical facilities and places of worship." This is the position of Israel; that this is what is being done against them - that the attacks are from those sites.

From page 63 onwards, there are, in the IDF report, specific photographs, evidence of launching of such attacks from civilian structures: at 63, 64, 65. And at page 66, paragraph 158, this is a report from a Hamas operative, "admitted that Hamas operatives frequently carried out rocket fire from schools (for example, the Sakhrin school in the area of Abu Halima, and another school in the area of the al-Amal neighbourhood), precisely because they knew that Israeli jets would not fire on schools."

Human Rights Watch in a letter to the EU Foreign Ministers, paragraph 159, fourth line. I will refer to that letter later in my submissions.

I continue to page 67, the IDF report. Paragraph 163. "Hamas conducted much of its fighting during the Gaza Operation from bases within private residences and public facilities, which Hamas assumed the IDF would be reluctant to attack. As documented further detailed in subsection V.B(3) below, Hamas' main base of operations during the Gaza Operation was located inside Shifa Hospital in Gaza City ..." This is what the Israelis say.

Paragraph 164: "Similarly, Hamas abused the protection accorded to places of worship, making a practice of storing weapons in mosques. During the Gaza Operation, the IDF found repeated and conclusive evidence of such use. For instance, as the photographs below demonstrate, IDF forces discovered weapons in a mosque in Jabaliya" There are 5 photos there. Yes, the first answer to it would be, "planted" - that's the standard answer for someone who wishes to dispute.

1 I'm reading on from paragraph 165: "*R.A., a Hamas activist arrested by the IDF during the Gaza Operation, revealed his knowledge of Hamas storage places for weapons, including the houses of activists, tunnels, orchards and mosques. In particular, he indicated, the Salah al-Din Mosque served as a storage site for rockets and other weapons.*"

5 To the point that when these places were attacked, there were "secondary explosions," that's in paragraph 166.

10 Paragraph 167: "*I.Y.H., a resident of Beit Hanoun, was arrested by the IDF during the Gaza Operation. I.Y.H. told IDF investigators about a Hamas training camp in Khan Younis that was located in a sports complex behind the Omar Ibn Abd al-Aziz Mosque, across from the municipality, as well as rocket firing from a grove in the area of Beit Hanoun and tunnels dug in the area of Khan Younis. He also revealed knowledge of a laboratory for manufacturing explosives and rockets, located in the civil administration complex in the Jabaliya refugee camp.*"

15 20 The relevant parts to my submission in both reports are underlined, and I hope the underlining is obvious in Your Honours' copy of the bundles.

25 To not go on and on over a point which I hope has been made, may I now turn specifically to the Goldstone report and the answer to it. I am at page 15 of my submissions.

30 Subsequent to the **Goldstone Report**, Richard Goldstone wrote 2 articles, one in the Washington Post, one in the New York Times. I will first refer to the Washington Post article. That can be found at Bundle 5, page 219.

Judge Shad Saleem Faruqi:

35 These were both subsequent to the Goldstone report?

Amicus Curiae Jason Kay:

40 Yes. This is from Richard Goldstone. The article appeared in the Washington Post titled "Reconsidering the Goldstone Report on Israel and war crimes".

"We know a lot more today about what happened in the Gaza war

of 2008-09 than we did when I chaired the fact-finding mission appointed by the U.N. Human Rights Council that produced what has come to be known as the Goldstone Report. If I had known then what I know now, the Goldstone Report would have been a different document. ... That the crimes allegedly committed by Hamas were intentional goes without saying — its rockets were purposefully and indiscriminately aimed at civilian targets.

The final report by the U.N. committee of independent experts ... found that "Israel has dedicated significant resources to investigate over 400 allegations of operational misconduct in Gaza" while "the de facto authorities (i.e., Hamas) have not conducted any investigations into the launching of rocket and mortar attacks against Israel." 10

Our report found evidence of potential war crimes and "possibly crimes against humanity" by both Israel and Hamas. That the crimes allegedly committed by Hamas were intentional goes without saying — its rockets were purposefully and indiscriminately aimed at civilian targets." 15

The next page, page 220. "...the most serious attack the Goldstone Report focused on was the killing of some 29 members of the al-Sammouni family in their home. The shelling of the home was apparently the consequence of an Israeli commander's erroneous interpretation of a drone image, and an Israeli officer is under investigation for having ordered the attack." We know what happen to it. It was already reported what happened to him. 20

"While the length of this investigation is frustrating, it appears that an appropriate process is underway, and I am confident that if the officer is found to have been negligent, Israel will respond accordingly. The purpose of these investigations, as I have always said, is to ensure accountability for improper actions, not to second-guess, with the benefit of hindsight, commanders making difficult battlefield decisions." 30

It has to be admitted that it is a battlefield. If that context is removed, or overlooked, or conveniently avoided then ... It's not black and white.

I continue reading at page 220, second-last line. "Although the Israeli evidence that has emerged since publication of our 40

1 report doesn't negate the tragic loss of civilian life, I regret that  
our fact-finding mission did not have such evidence explaining the  
circumstances in which we said civilians in Gaza were targeted,  
because it probably would have influenced our findings about  
intentionality and war crimes."  
5

I skip one paragraph.

10 "The purpose of the Goldstone Report was never to prove a foregone  
conclusion against Israel. I insisted on changing the original mandate  
adopted by the Human Rights Council, which was skewed against  
Israel."

I'm reading the fourth line from the end.

15 "I had hoped that our inquiry into all aspects of the Gaza conflict  
would begin a new era of even-handedness at the U.N. Human Rights  
Council, whose history of bias against Israel cannot be doubted."

20 This is what Goldstone says.

25 Page 222: "Indeed, our main recommendation was for each party to  
investigate, transparently and in good faith, the incidents referred to  
in our report. McGowan Davis has found that Israel has done this  
to a significant degree; Hamas has done nothing."

30 "At minimum I hoped that in the face of a clear finding that its  
members were committing serious war crimes, Hamas would curtail  
its attacks. Sadly, that has not been the case. Hundreds more rockets  
and mortar rounds have been directed at civilian targets in southern  
Israel. That comparatively few Israelis have been killed by the  
unlawful rocket and mortar attacks from Gaza in no way minimizes  
the criminality. The U.N. Human Rights Council should condemn  
these heinous acts in the strongest terms."

35 I move on to the next page, page 223, second paragraph, the  
underlined portion: "The Palestinian Authority established an  
independent inquiry into our allegations of human rights abuses  
... perpetrated by Fatah in the West Bank, especially against  
40 members of Hamas. Most of those allegations were confirmed by  
this inquiry. Regrettably, there has been no effort by Hamas in Gaza  
to investigate the allegations of its war crimes and possible crimes  
against humanity."

And he concludes: "Only if all parties to armed conflicts are held to these standards will we be able to protect civilians who, through no choice of their own, are caught up in war."

Goldstone also wrote another article, in the New York Times. It can be found at the back of the submissions, at page 12, and this is on the allegation that Israel is an apartheid State. He had this to say - and Richard Goldstone is from South Africa, so he should know a thing or two about apartheid.

"In Israel, there is no apartheid. Nothing there comes close to the definition of apartheid under the 1998 Rome Statute: "Inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime." Israeli Arabs — 20 percent of Israel's population — vote, have political parties and representatives in the Knesset and occupy positions of acclaim, including on its Supreme Court. Arab patients lie alongside Jewish patients in Israeli hospitals, receiving identical treatment."

I move on now to the issue of **water**. On the issue of water, I have only one point to make, really. I refer to my Bundle 6, page 174. This is a report from the Ma'an News Agency. The Ma'an News Agency, this can be found at page 175. It was "Launched in 2005, Ma'an News Agency (MNA) publishes news around the clock in Arabic and English, and is among the most browsed websites in the Palestinian territories ... Ma'an Network is the largest independent TV, radio and online media group in the West Bank and Gaza Strip."

The report, at page 174. It's a short report, so I'll read the whole thing. This report from May 18, 2010.

"Gaza opens first Olympic-size swimming pool. Gaza's first Olympic-standard swimming pool was inaugurated at the As-Sadaka club during a ceremony on Tuesday held by the Islamic Society."

*Gaza government ministers, members of the Palestinian Legislative Council, leaders of Islamic and national governing bodies, as well as club members and athletes were among those at the opening ceremony, where Secretary-General of the Islamic Society Nasim Yaseen thanked the donors who helped realize the project.*

1 Yaseen praised the As-Sadaka club for a number of wins in international and regional football, volleyball and table tennis matches.

5 As-Sadaka athletes performed a number of swimming exercises in the new pool to mark its opening."

I shall leave it at that.

10 **The Wall:** When the issue of the Wall comes up, first thing that is always mentioned is that there's an ICJ decision against it. Fine. And the ICJ ruled against Israel. Fine.

15 But what is less known is that there are 2 decisions by the Israeli Supreme Court - whether or not it is recognised, I leave it at that - on the issue of "the Wall", and I'm using "the Wall" in inverted commas because apparently it's not a wall throughout. It's not like the Great Wall of China where it looks pretty much the same at any portion you visit - where it has a structure, a system, the towers - it's not like that. At some portions it is a wall - very imposing wall, I have to admit - and at certain portions it's a fence and barb-wires.

20  
25 The chronology of the cases: The Israeli Supreme Court had the case of Beit Sourik, the ICJ decision, then after that the Israeli Supreme case of Mara'abe. The 2 Israeli Supreme Court decisions can be found at Bundle 6 - Beit Sourik at page 1-47, and the case of Mara'abe at page 48-113.

30 I will quote the important parts from the 2 cases which would explain the position that has been held by the Israeli Supreme Court on this issue of the Wall.

35 Page 16 of the Bundle. This was Beit Sourik.

Paragraph 28: "We examined petitioners' arguments, and have come to the conclusion, based upon the facts before us, that the fence is motivated by security concerns."

40 Paragraph 29: "... The commander of the area detailed his considerations for the choice of the route. He noted the necessity that the fence pass through territory that topographically controls

its surroundings, that, in order to allow surveillance of it, its route be as flat as possible, and that a "security zone" be established which will delay infiltration into Israel. These are security considerations par excellence. In an additional affidavit, Major General Kaplinsky testified that "it is not a permanent fence, but rather a temporary fence erected for security needs." (affidavit of April 19, 2004, section 4). We have no reason not to give this testimony less than full weight, and we have no reason not to believe the sincerity of the military commander."

This is also echoed in the statement of Ariel Sharon at the time who said, "A fence is not a political border. It is not a security border but rather another means to assist in the war against terror, and greatly assist in stopping illegal aliens."

**Judge John Philpot:**

Could you clarify the use of the word "aliens"? Are the people on the other side of the fence aliens?

**Amicus Curiae Jason Kay:**

This was taken from the Guardian ...

**Judge John Philpot:**

What is the defence position as to the Palestinian at the other side of the fence? Are they aliens?

**Amicus Curiae Jason Kay:**

We are silent on the issue.

**Judge Shad Saleem Faruqi:**

I think that is very significant issue. The Palestinians on this side of the wall, the Palestinians on the sides - are they aliens? Are they foreigners, or are they on their own land?

**Judge John Philpot:**

We have to understand your point of view. What is your position? Is the defence position that Palestinians on the other side of the border / fence are aliens? I think you have to make up your mind on that.

**Amicus Curiae Jason Kay:**

Legally, an alien is someone who is not allowed to cross

1 a border as aliens are non-citizens. Are Palestinians  
aliens? No.

Judge John Philpot:

5 In that case, are you abandoning the evidence that you're  
bringing on that?

Amicus Curiae Jason Kay:

10 Aliens are someone who has no citizenship. That is how they  
are described in official documents.

Judge John Philpot:

I'm referring to the use that you made of it in the quote.

15 Amicus Curiae Jason Kay:

The quote, as it stands, it is not security border. It is a means  
to assist in the war of terror.

Judge Salleh Buang:

20 Are you citing it as something that you're citing or as something  
that you're adopting?

Amicus Curiae Jason Kay:

It's just to illustrate the Beit Sourik point.

25 At page 16, paragraph 30: "Petitioners, by pointing to the route  
of the fence, attempt to prove that the construction of the fence is  
not motivated by security considerations, but by political ones.  
They argue that if the fence was primarily motivated by security  
considerations, it would be constructed on the "Green Line," that  
is to say, on the armistice line between Israel and Jordan after the  
30 War of Independence. We cannot accept this argument. The opposite  
is the case; it is the security perspective – and not the political one  
which must examine the route on its security merits alone, without  
regard for the location of the Green Line. The members of the Council  
for Peace and Security, whose affidavits were brought before us by  
agreement of the parties, do not recommend following the Green  
Line. They do not even argue that the considerations of the military  
commander are political. Rather, they dispute the proper route of  
35 the separation fence based on security considerations themselves."

40 Beit Sourik lays down the proposition - whether it is accepted

or not, it's up to the Tribunal - that "the Wall" is based on security considerations.

I move on now to the case of Mara'abe which was decided after the ICJ decision. I turn to Bundle 6, page 62, paragraph 21:

*"The second reason which justifies our conclusion that the military commander is authorized to order the construction of a separation fence intended to protect the lives and ensure the security of the Israeli settlers in the area is this: the Israelis living in the area are Israeli citizens. The State of Israel has a duty to defend their lives, safety, and well being."*

I skip a few pages to page 73, paragraph 37, 6 lines from the end:

*"Two questions stood before the ICJ. The first question was whether it has jurisdiction to give the requested opinion, and if the answer to that question is positive, are there reasons not to exercise that jurisdiction. The second question was the question posed to it by the General Assembly, on the merits. The Advisory Opinion was handed down on July 9 2004."*

Paragraph 63, page 86. This comments on the ICJ decision:

*"The security-military necessity is mentioned only most minimally in the sources upon which the ICJ based its opinion. Only one line is devoted to it in the Secretary-General's report, stating that the decision to erect the fence was made due to a new rise in Palestinian terrorism in the Spring of 2002. In his written statement, the security-military consideration is not mentioned at all. In the Dugard report and the Zeigler report there are no data on this issue at all. In Israel's written statement to the ICJ regarding jurisdiction and discretion, data regarding the terrorism and its repercussions were presented, but these did not find their way to the opinion itself. This minimal factual basis is manifest, of course, in the opinion itself. It contains no real mention of the security-military aspect."*

I have 4 photographs to illustrate the Wall. The first is a calculation of victims of suicide attacks before and after the security fence. In 2003, in the areas with the fence, 6 were killed, and 221 were wounded. In 2003, in areas without the fence,

1        89 were killed, and 411 were wounded. Between the period  
of January to June 2004, in areas with the fence, nobody was  
killed, nobody was wounded; in areas without the fence, 19  
were killed and 102 were wounded.

5        Could we move to the next. This is not that clear but it shows  
what the fence looks like at some portions. We could say it's  
the wall/fence, but I will use the term "the Wall" in inverted  
commas.

10      Next, some portions of it look like this.

15      And the final - this illustrates why there's a need for a Wall:  
to prevent sniper fire because a wall would reduce the line of  
sight of a sniper with a rifle.

20      Now I come to the elephant in the room which I had already  
alluded to just now, very emphatically: Suicide bombers,  
attacks on civilians, self-defence, and human shields being  
used.

25      I will refer mainly to Bundles 5 and 6. I will try to go as fast  
as I can through these materials. They are before the court  
and I hope the Tribunal have a look at them at the parts that  
I have underlined, and I hope to illustrate the points I'm  
making.

30      First, I refer to Bundle 5, page 227: Of course these can be  
disputed, but I present them as they are. Most of the authorities  
I've cited, the URL source can be found at the top.

35      At page 227, this is comprehensive listing of fatalities from the  
present and it goes all the way back to August 30, 1999, page  
252. This is the list of fatalities in Israel. If I may highlight a few.

40      In November 11, 2013, a private was killed after being stabbed  
in the neck by a 16-year-old Palestinian.

On 30 April, 2013, a father of 5 stabbed to death at a bus stop  
by a 24 year old Palestinian.

September 23, 2011, a father and 1-year-old son were killed

when their car careened after being struck by stones thrown  
by Palestinians.

August 18, 2011, 5 civilians killed when terrorists fired upon  
a passenger bus.

April 7, 2011, anti-tank missiles fired at a school bus.

And the most horrific one, March 11, 2011, the Fogel family  
where mother and father and 3 children were stabbed to death  
at their home in Itamar, northern West Bank on Shabbat night.  
Anyone who does a little bit of criminal law will know that  
stabbing is a personal way of violence.

The list is there. I put it as it is.

I continue with the same Bundle 5 at page 253. This is a report  
from the Los Angeles Times: '*An Israeli man at work on a kibbutz  
and an 8-year-old Palestinian girl at play in the Gaza Strip died  
Thursday in aerial attacks by Hamas and Israel, an increase in cross-  
border violence that could set back Egypt's effort to forge a truce. ...  
Hamas, an Islamist group that advocates Israel's destruction, claimed  
responsibility for firing three mortar rounds, calling the attack an  
answer to "nonstop aggression against our people."*'

Page 255: List of rocket attacks against Israel, from page 255  
to page 263, from 2009 up to the present.

I move on to page 264, Bundle 5. This is a list of suicide attacks  
and other bombing attacks in Israel since the declaration of  
principle in September 1993. The source is from the Israeli  
Ministry of Foreign Affairs. It's from April 6, 1994 until  
November 21, 2012, page 264 to 272.

Human Rights Watch has also come up with a whole paper  
titled - Erased In A Moment: Suicide Bombing Attacks Against  
Israeli Civilians - page 273 to 396.

I move to Bundle 6, page 158. I have referred to this before.  
That is the Palestinian National Charter. We are referring  
specifically to Articles 9 and 10: "*Armed struggle is the only way  
to liberate Palestine.*"

1    Judge Lamin Yunus (President):  
Counsel, ... how many minutes?

5    Amicus Curiae Jason Kay:  
I have about half an hour more. I will try to wrap it up in 20  
minutes.

10   I'm drawing attention to Article 9: "Armed struggle is the only way to liberate Palestine. This it is the overall strategy, not merely a tactical phase." Article 10: "Commando action constitutes the nucleus of the Palestinian popular liberation war."

15   May I point out Bundle 6, page 193 - the Israeli Ministry of Foreign Affairs, The Nature and Extent of Palestinian Terrorism 2006; and the report of the Ministry of Foreign Affairs at page 199 - Hamas Exploitation of Civilians as Human Shields. That's the position of Israel.

20   On the issue of borders and checkpoints. We were shown the video yesterday - I will comment on it. The analogy is to immigration laws. Countries have a right to say who can come in, who can come out. That's what we go through at immigration - you show your passport, and such. An analogy can also be made from the laws of Malaysia whereby a person from Peninsular can be prevented from going into Sabah and Sarawak by those two respective state governments.

25   If we can still remember that video yesterday showing what really happens at a checkpoint - it was obviously filmed surreptitiously. The sequence about the man with the yellow car who was going to his wedding and the Israeli soldier stops him. There was the normal pleading ... the soldier was not abusing him. He was just being a normal person standing guard. Even when that man's red pass falls down, the soldier picks it up for him. If the soldier had treated that Palestinian man in the car who was going to his wedding with contempt he would say, "Pick it up yourself."

30   The sequence directly after the one with the yellow car. The soldiers were, in my opinion, were reasonable as members of a security force as any guard would be. The person was quite irate.

Judge Shad Saleem Faruqi:

The fact is that there are checkpoints to go from one village to the other, one town to the other. Surely that appears to me a violation of basic human rights.

Amicus Curiae Jason Kay:

Malaysian context again - Sabah and Sarawak has in recent memory prevented people from entering their borders.

Judge Shad Saleem Faruqi:

That should be challenged in a court.

Amicus Curiae Jason Kay:

I will not name those persons.

The sequence at the Khan Yunis, Gaza Strip. The point I'm trying to make: We always see Palestinians, the photographs that emerge from Palestine - occupied Palestine, if you like - are always children behind barb wires, they are holding on like prisoners behind a cell, they are looking out through bars, they are looking forlorn. I have included Bundle 8, and it's a series of articles titled "Shattered Lens". It is a critique of how photographs that report what is happening in Palestine have been framed - because we know that photography is an art - it's a lot of science too, but it's a lot of art - and as with all art, the artist can shift the perception of the viewer based on how the photograph is taken. We know this because if we take photographs and if we give that same camera to a person who does it for a living, the photos will come out much better. And, of course, if much better equipment is used, the photos come out astoundingly great.

I am at Bundle 8, page 16 where it shows Palestinian children behind bars - their hands are through the bars. At page 17, "*This is but one example of how wire agency photographers,*" in this case AFP, "*resort to using camera angles and staging techniques to present a distorted (and worse) picture of a given situation. In the example above, it is clear that the photographer used this technique to project an image of Gazan children imprisoned. However, the sequence of photos taken from the same scene at the time illustrates how the effect was achieved.*"

1 At page 25,

5 "On June 25, a power plant in Gaza was shut down despite Israel's willingness to send the necessary fuel. Instead Hamas and Fatah argued over who should pay. Gazans then protested the shutdown. Getty," - the picture agency - "filed the following photo and caption of the protest: Palestinian girls hold candles during a march in protest against the lack of fuel to Gaza's power station, and the continued power outages in the city, on June 25, 2010 in Gaza City. Reuters covered the same protest and issued photos of the same girl as above, but the caption expressed a radically different motive for the protest: Palestinian children hold candles during a protest in Gaza City calling for an end to Israel's blockade on the Gaza Strip."

15 There is a war of perception going on. We should not be blind to that.

20 I move on to the point of life in Gaza. I return to Bundle 6, page 177. The photographs that appear in pages 187-192 are what is supposed to be life in Gaza. At page 187 it shows a fruit and vegetable market. At page 188 it shows sweets on sale at an outdoor market. At page 189 it shows toys on sale at an indoor market, and a cake shop and a bakery. On page 190 it shows another shop selling what looks like sweets. Page 191, 25 3 photographs, a bakery, somewhat like a bakery and a barber shop. Page 192, a children's clothing store and a market. And at page 184 there are three photographs, there's a ferris wheel at the back, it looks like a funfair; there's a new shopping mall at the town of Jenin, ....

30 **Plan Dalet.** The witness Ilan Pappé explained quite a lot about Plan Dalet. Dalet was "D", so it was the fourth plan. The intent of Plan Dalet is subject to diverging opinion, with historians on one side asserting that it was entirely defensive, while other historians assert that the plan aimed at an ethnic cleansing.

35 We can obtain Plan Dalet from the web. The ease of which we can obtain the whole actual Plan Dalet on the web, from a joint America-Israeli website, shows that there is nothing to hide about it. If it was a secret plan about killing people, you probably would want to hide it. It is merely how the plan was interpreted. And that depends on whether you are a traditional

historian, or a *new* historian, as Ilan Pappé have said he was, and where your political leanings are.

This links up with the statement by Richard Goldstone in the Washington Post article referred to earlier, I quote again,

*"Indeed, our main recommendation was for each party to investigate, transparently and in good faith, the incidents referred to in our report. McGowan Davis has found that Israel has done this to a significant degree; Hamas has done nothing."*

and the statement of witness Dr. Walid who referred that his source for his figure of 730 checkpoints. He said the source was Israeli.

Mohammad al-Durrah incident in September 2000 - some would say that was the catalyst for the 2nd Intifada. Yes, the report was 12 years late, coming out only in May this year. That entire report from Israel of the incident can be found at Bundle 6, starting at page 114. What is significant to my point is that Appendix 5 of the report, at page 151 is the full statement of the photographer which is against the IDF. The Ministry of International Affairs and Strategy of the State of Israel publishes these.

Such a pattern of open disclosure by Israel on facts that are clear, or could go against, or be construed against them is inconsistent with the assertion that it is a State bent on committing war crimes, crimes against humanity or genocide, especially since the experience of Nazi Germany has proven to any potential war criminal that German efficiency in record-keeping is the worst thing to have for someone committing war crimes. Cast Lead 2009 had 2 full reports published - pages 3 and 167 Bundle 5.

The conclusion: Are the Palestinians pure civilian victims? No. They support Hamas, the government of the Gaza. And Hamas has been implicated for numerous acts that could be considered crimes against humanity, even war crimes. My reference is that UNRWA - the refugee agency - itself condemns Hamas for confiscating food aid - at Bundle 5, page 409 and 410.

1      The letter that was referred to, from Human Rights Watch to  
EU Foreign Ministers - Bundle 5, page 403. Since this is the  
submission of Defence-Amicus, I'll just highlight the parts  
about Hamas. Human Rights Watch is concerned about  
5      Hamas' rocket attacks on civilians, use of 'human shields',  
and violence against other Palestinians.

10     The simple point is this: The law does not distinguish between  
well-armed combatants or badly armed combatants - whether  
you have big rockets, tanks or you're just using stones or a gun  
or two. It distinguishes between civilians and non-civilians. If  
you do harm to civilians, you are potentially a war criminal. It  
is well-established that there are among Palestinian population  
15     those who are combatants who either target or don't care if  
they accidentally target civilians in Israel.

20     Acceptance of the fact that killing Israeli civilians is wrong  
needs to be the first step in healing - especially for the civilian  
victims who are Palestinians.

25     I hope I am not out of line to quote the two verses, which I  
think are very important and relevant here. The first is from  
the Quran, Surah al-Ma`idah, 5:8

30     *"O you who believe! Always be upright for Allah, bearing witness  
in justice, and do not let hatred of a people incite you to be unfair to  
them. Be fair! That is the nearest to taqwa. Fear Allah! Indeed, Allah  
is aware of what you do."*

35     The second verse, from Surah al-Baqarah, 2:190

40     *"Fight in the cause of God those who fight you, but do not transgress  
limits; for God loveth not transgressors."*

35     The cycle of violence must end. The conclusion of this trial may  
or may not bring closure for the Palestinian victims. But justice  
must be even-handed. I therefore urge the Kuala Lumpur War  
Crimes Commission to consider investigating reports or claims  
of war crimes violations committed against the Israeli civilian  
40     population. Because that is wrong too.

Before I end, allow me to say, in my personal capacity, that this

trial and the preparation of it has taught me a lot. Words are important, and in a cross-cultural context - my colleagues are from various nations - and where the Bench and the Bar and the witnesses are composed of various ethnicities, nationalities and languages, the possibility for confusion is lurking in every corner. An extreme example would be IDF. To the Israelis, it means Israeli Defence Force. To the average Palestinian, it means Israeli Theft Force.

To everyone who have followed this trial, if I have offended by word or deed, I apologise.

I offer my sincere thanks to my co-counsels for their assistance. I have been blessed to head this *Amicus Curiae* team.

I move the Tribunal for a verdict of not guilty against the accused, the State of Israel.

**Judge Shad Saleem Faruqi:**

Before you sit down I need some verification. Is Israel a signatory to the Convention against Genocide? 20

*Amicus Curiae Jason Kay:*

Yes.

**Judge Shad Saleem Faruqi:**

Has it ever repudiated it?

*Amicus Curiae Jason Kay:*

Not that I'm aware of.

**Judge Shad Saleem Faruqi:**

Has Israel ever prosecuted any Israeli citizen for genocide?

*Amicus Curiae Jason Kay:*

Not to our knowledge.

We object any reply from the prosecution.

**Prosecutor Gurdial Singh Nijar:**

I wish to reply but they are objecting that I reply to any of these comments that they have made quoting all these, Alan

1 Dershowitz and all these. According to the Charter, we are entitled to respond, and they have a right of reply.

5 I'll be very short, about 20 minutes.

Judge John Philpot:

I will also have some brief questions for both parties.

*Amicus Curiae Larissa Cadd:*

10 Your Honours, I would refer you to Article 31 of the Charter and in light of the consistent application of this Charter in this Honourable Court - Article 31 and Article 30, which must be read together say, "*The Prosecution shall thereafter close the case, followed by a reply from the accused or his counsel, where present,*" - that doesn't apply because the accused or counsel  
15 is not present.

20 In Article 31 it says, "*In the absence of the accused or his counsel, the Amicus Curiae shall assist the Tribunal by replying to the Prosecution Team.*"

25 Two things must be considered from the way this is structured. First, it is the *Amicus* that replies to the Prosecution, not the other way round. And the second thing is this Charter is silent on whether the Prosecution can reply to the Defence, and in these circumstances and in consistency with the rulings of this Tribunal so far in this particular matter, we would submit and urge this Honourable Tribunal to not hear any further submissions in reply.

30 I am also requested, on behalf of my co-counsel, you may have noticed that he is wearing dark glasses at the Bar table. He has a rare condition of photosensitivity to fluorescent light and he apologises for the need to do that - if he doesn't, it will result  
35 in a debilitating headache.

**Prosecutor Gurdial Singh Nijar:**

40 I think, Your Honour, the position, Article 29 is very clear. It says that if there is a *prima facie* case then there will be submissions from the *Amicus Curiae*. That's Article 29. Then Article 30 says, "*The Prosecution Team shall thereafter close the case.*"

Judge Shad Saleem Faruqi:

Yesterday you did say, Professor, that you have said all that needs to be said.

1

Prosecutor Gurdial Singh Nijar:

Yes.

5

Judge Shad Saleem Faruqi:

You did say that.

10

Prosecutor Gurdial Singh Nijar:

I did. Yes. And that was because I'm going to adopt - because this Prosecution Team shall thereafter close the case, and in the closing, I'm gonna adopt the arguments that are made and supplement them with a response to the defence, and then after that, they are entitled to a reply on the counsels for the *Amicus*, that's Article 30. So Article 30 makes it very clear. After *prima facie* case, submissions, then Prosecution closes the case with the submission.

15

20

Judge Lamin Yunus (President):

When are you going to make your submission to close the case?

Prosecutor Gurdial Singh Nijar:

I'm adopting the arguments that I made earlier, and I want to supplement them with short responses to the statements make, some of the evidence made, just to put it in context, by the defence.

25

*Amicus Curiae Larissa Cadd:*

If the Honourable Tribunal proceeds with that course then we would reserve the right under Article 31 to reply to that as well Your Honours.

30

Judge Salleh Buang:

If I may assist everyone here. I'm inclined to agree with the Prosecution because on past practices, when we called for the defence, defence will present its case, which you have done I think most admirably, and my understanding of the Articles is that the Prosecution will then close, adopting your earlier submission and maybe responding a bit to what Jason has said and then finally, of course, the last word to them.

35

40

1        That was my understanding of these Articles and the fact is,  
in the past ...

5        **Judge John Philpot:**

Mr. President ...

10      **Judge Salleh Buang:**

The point is whether you would like to do it now or you want  
to do it after lunch break.

15      **Prosecutor Gurdial Singh Nijar:**

I'm happy to do it now because it's quite short.

20      **Judge John Philpot:**

Mr. President ...

25      **Judge Lamin Yunus (President):**

How short is it?

30      **Prosecutor Gurdial Singh Nijar:**

20 minutes at most. I'll close definitely before one. Between  
ourselves, we'll close before one.

35      **Judge John Philpot:**

Mr. President,

40      **Judge Lamin Yunus (President):**

Yes,

30      **Judge John Philpot:**

I would like to ask questions of both parties now, brief ones.  
And I think it would be better to do it before they close than  
if I wait and it comes as a surprise later. The questions will  
be short.

35      My first question to both parties is: Is there evidence which I  
haven't seen - or made arguments or discovered evidence - as  
to the murder of Bachir Gemayal the day before the invasion,  
and whether or not Israel was responsible for that, or could  
have been responsible for that, since he had stepped over the  
line for not following directly the Israeli orders? The answer  
may be "No" from both of you - that there is evidence on the  
case.

**Prosecutor Gurdial Singh Nijar:**

I think there is evidence which was read out - I read it out. It is in the Kahan Commission Report, we referred to it in passing. On the part whether Israel is responsible, it is beyond our knowledge. We have no answer on that.

1

5

**Judge John Philpot:**

Thank you. Second question: We heard conflicting evidence - or maybe supplementary evidence - as to the vantage point over Sabra and Shatilla, and they talked about the military headquarters - the first witness she talked about a military headquarters - and Dr. Ang mentioned the former Kuwaiti Embassy whether it was five or seven floors, we know there's some confusion there. Were they involved? Or were they ... ? What's the position of the parties to that effect? I cannot understand.

10

15

**Prosecutor Gurdial Singh Nijar:**

Yes, the Kuwaiti Embassy was used as a command post. And it was seven floors, as suggested by Dr. Ang, and confirmed by the Kahan Commission Report - seven storeys.

20

25

**Judge John Philpot:**

Because your map, which you filed, does not follow that. You have the command centre which is not at the same place as the Kuwaiti - towards the stadium. But now your position is that it is the Kuwaiti Embassy which ...

25

**Prosecutor Gurdial Singh Nijar:**

I will confer and get back on that point.

30

**Judge John Philpot:**

The third question, with respect to the State committing genocide. The Bosnia and Herzegovina judgment talks about State Responsibility being incurred when a group or an act which has the power to ... the State commits an act of genocide that implies that the State is committing genocide. We're discussing among ourselves as to whether an overall policy is genocidal, and maybe the parties could tell us what are the factors which incur state responsibility for genocide.

35

40

Bosnian case, paragraph 179, "Thus if an organ of the State, or

I      *a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred."*

5      And Article III are the different types of crimes relating to genocide - complicity, inciting, and et cetera. Is that your position?

10     **Prosecutor Gurdial Singh Nijar:**

Yes.

Judge John Philpot:

15     I thought it would be. And is there also a position defendable where a policy, a long-term policy which is genocidal, for example, ethnic cleansing in the extreme - cause we know that there's two versions of it - or destroying or killing or maiming or making living conditions unliveable; is that also a way also to incur responsibility for genocide? What would you say to that?

20     **Prosecutor Gurdial Singh Nijar:**

25     Our answer is "Yes" and I think we can get it from our Bundle 2B, page 1056 and 1057. This is the question of establishing the specific intent by looking at the series of inferences from policies, from acts, from the scale. And if I could also - that is on the question of deducing an inference - this actually responds to the points raised by the defence about how you raise specific intent, you have to show positive actions, but these positive actions ...

30     **Judge John Philpot:**

I'm going to interrupt you because we're discussing and I'd like to hear - is this not referring to individual responsibility and not State responsibility, this case law? I think it is.

35     **Prosecutor Gurdial Singh Nijar:**

40     It is talking about the offender's specific intent. So if, on the one hand, you find that the State is the offender, then how do you - this is on the question of how do you establish specific intent. And, of course, it says very difficult to find specific intent because, as has been said, "*even the mind of the Devil is not triable,*" so how do you then deduce what the intent is

other than by looking at the acts, the scale of acts and so on; and those paragraphs at page 1056 lay out the whole range in which you can therefore deduce the mind.

It say, in fact, on the issue of determining the offender's specific intent, "*the Chamber considers that intent is a mental factor which is difficult, even impossible to determine.*" This is why, "*in the absence of a confession,*" his intent can be inferred from a certain number of presumptions of fact. And it goes on to talk about inference. And although it talks about the specific, but it also must therefore be attributed to the whole.

Judge John Philpot:

But a State doesn't have a brain.

Prosecutor Gurdial Singh Nijar:

Yes. Therefore ...

Judge John Philpot:

We ruled that a State can be liable. This is the position of the Tribunal. But how can it be incurred?

Prosecutor Gurdial Singh Nijar:

In my submission where we talked about proof is usually through speeches, public declarations, meetings, statement, the context of the crime, its massive scale, elements of its perpetration that suggests the particular animus towards the group. And then, we also quoted the Akayesu's case. It talked about factors such as culpable act systematically directed against that same group whether these acts were committed by the same offender or by others, and scale of atrocities and region, act or deliberately and so on. So obviously this is talking about the complicity of a State because when you talk about this kind of - in other words, if we can, like Cast Lead, for example, or Sabra and Shatilla - if we can come within the first part of the quote that you made with regard to the State being attributed with powers and then talk about establishing specific intent, then this is how you derive that specific intent.

And also the repetition. In Simba's case, we talked about the repetition of destructive and discriminatory acts. Of course, if we show a plan, a direct plan and policy, that's the end of the

1 matter. That's most useful. But if we look at our submission,  
a declaration of a plan or policy is not ... the Karadzic and  
Mladic case, which was the case on genocide talked about  
5 intent inferred from a number of facts such as general political  
doctrine, repetition and so on.

**Judge John Philpot:**

Actually, those are only pleadings because they haven't been  
10 found guilty yet. For Karadzic and Mladic. They're still on trial.

**Prosecutor Gurdial Singh Nijar:**

That's right. I stand corrected. So therefore, to sum up: We are  
entitled to infer even without showing an official plan. And if  
15 you look at these acts and infer logically, then the inference is  
very clear that these were acts perpetrated in pursuance of a  
policy that started as long ago as 1947. That is our contention.

**Amicus Curiae Dr. Matthew Witbrodt:**

Your Honours, if it may please the Court. In regard to the  
20 first question of the appropriate manner in which to deduce  
whether State Responsibility has in fact been triggered, I would  
invite the Bench to read paragraph 413 of the Genocide Case  
which shows the actual application of the rules. It demonstrates  
the various levels by which the International Court of Justice  
25 deduced that Bosnia and Herzegovina were not liable for the  
acts themselves.

In particular, Article 3(a) of the Genocide Convention, the  
activities were not committed by actors or organs of the  
30 respondent. The massacres were not committed under the  
instructions or direction of the respondent; no effective control  
and no evidence of specific intent which would have had to  
be present for the State to be held responsible on this basis.

35 Additionally, in regards to the appropriate test to be applied  
to ethnic cleansing, I would invite the Bench to refer to  
paragraphs 189 to 192 where the International Court of Justice  
deliberates upon this matter.

**Judge John Philpot:**

Have we reached a conclusion as to the Kuwaiti Embassy?

**Prosecutor Gurdial Singh Nijar:**

Yes. I've been informed that according to Bayan, there were several operational areas from which Israel IDF forces operated, and the Kuwaiti Embassy was one of those.

**Judge John Philpot:**

I sort of thought that's was it was, but I wasn't sure. Thank you very much.

**Prosecutor Gurdial Singh Nijar:**

Your Honours, very quickly, I'm only going to respond in very short responses.

As far as the legal points that were made, I think with regard to State of Israel it's quite clear that we are only going on the question of genocide.

As regards positive actions, how specific intent can be proved, I've already referred to Bundle 2B, 1056, as well as complicity, Bundle 2B, 1059. I shall not delve further on that matter.

On this point, on the defence submission by Mr. Jason, Tan Sri will respond to that; but just to respond to that immediate point about command and superior responsibility, I will say that both are being raised because one is his location in the hierarchy of events, that's one - to the command. But it's also individual because if you recall yesterday, when we talked about the fact that Yaron did not disclose, as he should have, to his superiors and that action by itself would suggest that it is not just the command responsibility we are talking about; also individual responsibility.

**Judge John Philpot:**

Were the militia his subordinates? That's my preoccupation. And that's where I think the defence raised the issue. Were they just people following orders or being incited, or were they subordinates? Were they integrated into the Israeli command? That's the kind of thing I'm concerned about.

**Prosecutor Gurdial Singh Nijar:**

We appreciate that point. But if you look at the Kahan Commission Report, it will show that there was complete

coordination and that the Phalangist forces were acting at the direction and behest of Amos Yaron. I think they have made it very clear that prior to and during the event, they were acting at the direction, behest and control of the defendant.

### Judge John Philpot:

So, is the Prosecution invoking personal liability of Yaron because he ordered and participated and cajoled and incited and et cetera et cetera, or are you saying he is responsible because he's a commander and the case of Yamashita in US law? And there is also cases in international criminal law which we call ... - "responsibility of the commander" - even though he didn't commit it. Which are you invoking?

## 15 Prosecutor Gurdial Singh Nijar:

At the first level, we are invoking command responsibility and we look at the whole series of event. But we recognise that there could be gaps in establishing command responsibility, vis-à-vis the Phalangists who actually perpetrated the actual acts itself. Therefore we are also looking at the fact that he, with knowledge, and with an ability to - with his authority to direct and control and failure to act after being informed also incurred individual responsibility. We are having a fall-back position, in other words.

So our first line is command.

Judge John Philpot:

Thank you. I'm not sure which is stronger. I think the second is stronger. I'm not sure what to think of it.

## **Prosecutor Gurdial Singh Nijar:**

On the question of ethnic cleansing, yes, of course we agree General Assembly resolution is soft law, it's not law. But we cited authority to suggest how it provides a persuasive guide to determining what the attitude of the whole community was. That basically is my response to the legal points that were raised.

The point with regard to ethnic cleansing is that we agree the judgment did not find ethnic cleansing equals genocide but they raised the fact that ethnic cleansing can amount to

genocide in certain circumstances, and that was our point.

As far as the submission of defence is concerned, I'll run through some of the points very quickly. The point about the population, it's not about a numbers game to see how many were killed and divide, and multiply and subtract. This is an absurd proposition, if I could say so, with respect. If that is the case, then I think there is no Holocaust because today the Jewish population is far higher than it was in Germany. I only have to state this to know how ridiculous it is to suggest that today the Palestinians by the census of 2010 and 2050 are more therefore no genocide. It's not a numbers game. It's not about big numbers or small numbers. Even if you kill one, and I've cited authority, with intent to proceed to kill others, that suffices. That's not a big number. So that is the point.

As far as Yaron's case is concerned, I will leave it to Tan Sri Aziz to deal with it. I will just quickly run through the other points that suggested. They talked about Palestinian National Council, Hamas and what their charter and stuff is that they don't recognise the existence of Israel. I think it's common knowledge that now they are engaged in a very active peace process in trying to establish a two-State nation. Everybody knows that. I think the defence should also try to keep up the current affairs that will demolish this point.

As far as whole explanation by Dershowitz is concerned, I think we know who Dershowitz is. He is an unashamed apologist for the supremacy of Israel come what may. And don't take my word for it. I just have here a report which says, "Alan Dershowitz's Zionist Views: Unwelcome in Norway". His views, not him as a person.

"In a recent article, notorious Zionist Alan Dershowitz reveals the scale of rejection he faced on his recent visit to Norway."

*Ahead of his visit to the country, Dershowitz' lectures were offered (without any charge) at the three leading Norwegian universities. These universities, who on earlier occasions had been happy to host Harvard Scholar Stephen Walt and Israeli historian Ilan Pappé, clearly said 'no' to Dershowitz."*

1 They explained why of the fact that he establishes this kind  
of - because of his reputation as being entirely unashamed  
biased proponent of the Jewish State come what may. I'll just  
leave that and give copies. So that's so much for Dershowitz's  
5 credibility. And therefore I suggest we reject that.

As far as the Sammouni-Zeitoun incident is concerned, you're  
10 talking about the Military Advocate General. You are talking  
about people who are part of that military organization.  
Therefore I would suggest, with respect, and I've read out the  
Jerusalem Post itself, which is a post that is from Israel itself  
15 which says this is a terrible incident that requires investigation  
and for the MAG to suggest that no action should be taken was  
something that is entirely unacceptable. And I also submitted  
articles from Guardian and Al-Jazeera to much the same effect.

20 And also the Cast Lead operation must be put in its context. We  
are looking at genocide. There's a whole Sammouni incident  
must be put in the context of Cast Lead as a whole. It was not  
just Sammouni.

25 As far as Goldstone report is concerned, you know, Israeli  
Ministry of Foreign Affairs issued a statement. It's very  
interesting. They issued a statement about how Richard  
Goldstone, how he's retracted. But that's not the point. What  
the Commission said and heard and decided upon the evidence  
30 that was presented to them. Not an afterthought by him,  
because we don't know why that afterthought came about.  
We don't know the circumstances as to why. We're looking at  
the report itself.

35 Apartheid state. All I've got to do is refer you to - there's a  
book by Jimmy Carter who actually went there and it's called  
"Palestine: Peace Not Apartheid" published in 2006 by Simon  
& Schuster, who makes out a very clear case of the fact that  
there is apartheid. But our case goes beyond apartheid, of  
course. We are talking about genocide. So I don't want to  
detain ourselves here.

40 With regard to water and Olympic-size swimming pool, I  
think this misses the whole point. We are looking at ICRC  
report. We are looking at UN reports that talk about the dire

situation in Gaza and West Bank in relation to water. So I think one Olympic-size swimming pool cannot demolish the detailed findings by these bodies and I've already referred in my submission to these independent bodies that have talked about the water. I think the United Nations, the water is, this is the report by the UN report Centre on Housing Rights and Evictions which I've cited and a report of the Special Rapporteur on the situation of Human Rights in the Palestinian Territories. And they talk about the effect of water on the Israeli population as a whole. So I don't think this one Olympic swimming pool is going to solve that problem.

As far as the Wall is concerned, you can call it what you want, we have no objections to you labelling it any which way, but it clearly is in occupied territory. It's at least 190 kilometres long. Whatever it is you are presenting a position now, it was suggested that the Israeli Supreme Court has made some comments about how it is security and they have criticized the ICJ but I would suggest we stick to international jurisprudence on issues which involve international law and the ICJ has very clearly repudiated the question of security, the question of necessity. They considered these questions. There were written submissions by Israel on that point as well as oral submissions and they have made a very clear pronouncement that it is not justifiable either by necessity or security reasons. So I would prefer that to these two Supreme Court decisions.

Now, as far as suicide bomber is concerned - We here are talking about genocide. We have given specific instances of genocide. What are they suggesting? That we can commit genocide because we have a reason to commit genocide? If that's the case then we must exonerate Nazi Germany because Nazi Germany also had a reason. They said they were also subject to this, that and the other. That is not the point. The point now is: Was this act genocide within the meaning of the Genocide Convention? And that is the key point. And we have established, with respect, this fact.

As far as border checkpoints are concerned, it was also suggested that Malaysia also has - you know, these are immigration controls - but we saw the pictures, the videos, I think they speak a thousand words, if not more. We are talking

1 about 730 checkpoints in a small occupied territory like this and  
what it's subject to. I've nothing more to say. I'm not blaming  
those young boys who are trying to give a good image, you  
know, "*please don't take pictures of us, put us in a bad light,*" and  
5 they're not cruel people as such. But we're talking about the  
concept of checkpoints which hinders movement at every  
stage and its impact upon conditions of life. That is what it's  
about. Not about whether the soldier was dealing with irate  
10 customer. This is not about buying and selling of stuff. This is  
something far more serious than that.

Photographs. It is suggested Shattered Lens photographs are  
15 - they also presented photographs so I'm not going to say too  
much because I don't want to disqualify their photographs by  
their own submission that therefore we will reject them because  
Shattered Lens says you can put a gloss on photographs.  
20 Photographs sometimes speak the truth. I'm reminded of, I  
think it was the French producer Millieu(?) - I can't remember  
his name - who presented a 6-hours series on India and then  
the Indian government was very angry, condemned him for  
25 that. And he says, "*all I'm doing is depicting the truth through  
these films. Look at the source materials from where I'm getting this  
rather than condemn the depiction of it.*" So photographs are an  
attempt to depict. Videos are an attempt to depict what we  
sometimes can't get to see. I've tried to go to West Bank, but  
30 the Israeli government rejected the application by some of us  
from the Prosecution to go there.

Now, as far as life in Gaza. We're not saying that life has come to  
35 a standstill. But we're talking, and I refer you to the reports by  
the UNWRA who say that it is not going to become habitable at  
all. That is the point. All that is going to disappear if this goes  
on. All those pictures that were shown at one section. Going  
to disappear. It's not going to be habitable at all. And this is  
not us saying. It's not the defence trying to refute something  
that is being predicted by a Commission of experts. There are  
two reports on that.

As far as Plan Dalet is concerned, I think Ilan Pappé made it  
40 quite clear and put it in very clear historical perspective.

There was a reference to "*do not let hatred of a people incite you*

*to be unfair to them*". That's suggesting that to the Palestinians. Suggest that to Chahira whose family was slaughtered in this way. Suggest that to Nabil. Suggest that to Taghreed. Speak to all the witnesses and talk about what fairness and unfairness is in this world as far as it affects them. That puts things in clear perspective.

It was suggested that the Holocaust is so different. I just want to show very short photographs - to show the comparison. These are the comparison of the Holocaust and what Palestinians are subjected to. It's Germany 1940 on the left, Israel 2009 on the right, talking about the situation in the occupied territories as well.

(photo slide show)

Children... barb wires ... barricades ... soldiers ... population ... migration of people ... the wall ... the gates ... Israeli children signing on the bombs ... children ... bodies ...

This is it. This is what we're taking about. We don't want to show these images, but only because it was suggested that you must not compare with the ... I concluded that this is a modern day Holocaust with the most advanced weaponry we saw. Rain of fire, white phosphorus. People every day, every moment, and even as we speak now.

Thank you.

**Prosecutor Tan Sri Dato' Abdul Aziz:**

Your Honours, I want to respond to the defence closing submission. The written submission. Page 7 and 8. I go just very quickly. The first comment that they made: Yaron should not have been charged - he was not directly responsible for the deaths that occurred in Sabra and Shatilla. And then they went on to say they did not see him do anything. Of course they did not see him do anything because he did nothing. He was supposed to stop all the killing. He did not do.

The charge is that Amos Yaron perpetrated all these crimes in his capacity as commanding officer when he knowingly - he didn't do it himself, he knew what other people were

1 doing - for knowingly causing the death. That's the first point.

5 The second one. They mentioned why only Yaron was charged when there were 8 other people who should be charged - more senior to him. The issue here is that Yaron was charged because he was the commanding officer solely responsible to keep peace, to ensure that there is law and order and no killings or torture of any kind in that place. He was the only  
10 one responsible. Nobody else. And that's why he alone was charged. The others may be responsible for other things. Directly responsible to ensure that there is law and order in that place. That's why he alone was charged. There was mention about George Bush and I think that is irrelevant. Different  
15 issues entirely.

I think that's about all I want to say.

20 Yaron was correctly charged - being the commanding officer - and he knowingly facilitated and permitted the massacre taking place in the two camps. I pray that he be found guilty as charged.

***Amicus Curiae Jason Kay:***

25 Dr. Matthew will take the first portion and I will continue. Very short points.

***Amicus Curiae Dr. Matthew Witbrodt:***

30 May it please the Court, Your Honours, I have three specific points, and these will be brief - I assure you.

35 Firstly, in response to the last argument put forward by the prosecution that Amos Yaron did not do anything. He was supposed to do something. He was supposed to maintain law and order. I noted earlier - earlier I referred to Prosecution v. Halilović decided before the ICTY on 16 October 2007. At paragraph 59 they deliberately and explicitly considered this issue. Again, I quote,

40 '*a police officer may be able to "prevent and punish" crimes under his jurisdiction, but this would not as such make him a superior vis-à-vis any perpetrator within that jurisdiction.*'

The accused must be, by virtue of his position, senior in some form of formal or informal hierarchy to the perpetrator. If the Prosecution is maintaining that Amos Yaron is accountable on the basis of superior responsibility, this governs. If the Prosecutor is maintaining individual criminal responsibility, his position does not actually play a role.

Secondly, in regards of individual responsibility. Since the Prosecution has now included this in their arguments - which had not been included as of yesterday - two things must be specifically considered by this Tribunal. First, what was the precise role of Amos Yaron in the acts that occurred in 1982? And secondly, what was his specific intent? And again, the Prosecution has failed to prove its case. They have proven that his statement were callous, reckless and indifferent. But this does not engage the threshold required under *dolus specialis* for proving or substantiating an act of genocide. Furthermore, to clarify that matter, I invite the Tribunal to refer to the Jelisic decision before the ICTY.

Thirdly, and lastly, the Prosecution ...

**Judge Shad Saleem Faruqi:**

Is there a reference for that?

**Amicus Curiae Dr. Matthew Witbrodt:**

The reference was Prosecutor v. Goran Jelisic. The trial chambers judgment was released on 14 December 1999. The appeal chambers decision was rendered on 5 July 2001 and at the heart of the appeals ...

**Judge Shad Saleem Faruqi:**

Is it in your Bundle of documents?

**Amicus Curiae Dr. Matthew Witbrodt:**

No sir.

**Prosecutor Gurdial Singh Nijar:**

Maybe I can help. It is in our bundle of document. Bundle 2D(i).

**Amicus Curiae Dr. Matthew Witbrodt:**

In particular, I would like to invite the Court's attention to paragraphs 42 to 64 in the appeals decision.

1 Finally, in regards to the case as a whole. It is true that this  
Tribunal may infer intent. However, in the present situation,  
the Prosecution is calling upon this Tribunal to infer a policy as  
well as making inference of intent, which is effectively asking  
5 this Tribunal to render a decision based upon an inference  
which is based upon an inference and attempt to justify this  
as beyond reasonable doubt.

10 With that, I rest my submission.

15 *Amicus Curiae Jason Kay:*

I will just continue. 5 minutes.

20 First, I will respond on the Yaron charge. Learned counsel for  
the Prosecution stated that, "Yaron was charged because he  
was the commanding officer to keep the peace. He was the  
only one responsible, that's why he alone was charged." That  
was their answer as to why only Yaron was charged for this  
particular case, charge 3.

25 If we look at the Kahan Report, 4 pages from the end states,  
*"The Minister of Defense, Mr. Ariel Sharon: We have found, as  
has been detailed in this report, that the Minister of Defense bears  
personal responsibility. In our opinion, it is fitting that the Minister  
of Defense draw the appropriate personal conclusions arising out of  
the defects revealed with regard to the manner in which he discharged  
the duties of his office - and if necessary, that the Prime Minister  
consider whether he should exercise his authority under Section  
21-A(a) of the Basic Law: the Government, according to which "the  
Prime Minister may, after informing the Cabinet of his intention to  
do so, remove a minister from office."*

30 The BBC reports on the 8th of February 1983, "Sharon resigns."  
Sharon was looking at a dismissal. Why wasn't Sharon  
charged? The Kahan Report which they themselves have cited  
35 puts the blame on Sharon. They cannot have it both ways. They  
cannot say, *"Look at the Kahan Report to see everything bad about  
Yaron but ignore the part of the Kahan Report which says Sharon  
bears personal responsibility."* You cannot have your cake and  
eat it too.

40 For the submissions by the Learned Counsel for the Prosecution

that to say that because a population is increasing there is no genocide and say, "oh now there are so many Jews, does it mean there was no Holocaust in 1939 to 1945?" That's the whole point. The Holocaust happened from 1939 to 1945. There was a time period - 6 years. 90% of Polish Jews died. That is a Holocaust. When 90% of your people die, that's a Holocaust.

If the Prosecution maintains its charge, and I'm reading from the charge itself, the 4th charge,

"*The cumulative intent and the effect of the serial pattern of acts of the Defendant as hereinbefore outlined and particularised amount to the initiation, intensification and continuation of a settler colonisation genocidal process begun in 1948 and continuing even to date.*"

If they are asserting that there is a continual genocide, there has to be less Palestinians today than in 1948. That is not the case. UN says it so. That is the answer to the first point.

Keeping up with the news: Prosecution suggests that we keep up with the news; we suggest that the Prosecution stops citing the incidence of the keys and Pope John Paul II, that was two popes ago.

**Dershowitz.** Is he an unashamed apologist for Israel? I'm not going to break privilege. I cannot comment further on Alan Dershowitz. I am sorry. And I am sure the meaning of my statement is known to all, or almost all.

**Goldstone.** There's a suggestion that what Goldstone wrote in the Washington Post and New York Times was an afterthought. Well, we don't really know. Perhaps he say the light or he understood things better.

**Apartheid State.** They quoted Jimmy Carter's book. Well, Dershowitz, in his other book, "The Case Against Israel's Enemies" has an appendix dedicated to this - "Why Jimmy Carter is Wrong" and it starts from page 229 of that book. It's there.

The photos that were shown comparing the Jewish Holocaust to the Palestinian "Holocaust". Our point that was made - by

1 the articles referred to in Shattered Lens - photos can be posed.  
After the photographs from the Jewish Holocaust came out,  
and they were shocking, we knew what Holocaust meant. We  
knew what bodies piled one above another meant - what it  
looks like. Could it not be that the photographs of the guards  
5 and the barb wires are all posed for propaganda purpose?  
Were they propaganda photos? They could be.

10 Is the State of Israel killing the Palestinians in an industrial  
manner that was done by Nazi Germany against the Jews? NO.  
There was no such thing as a Nazi Germany citizen who was  
also a Jew. It was not possible. Is there a Palestinian in Israel  
who hold Israeli citizenship? Yes - 20 percent of the population.  
The comparison is not the same. It's not the same.

15 That is all. Thank you.

**Judge Lamin Yunus (President):**

20 I wish to thank both sides in making your submissions at  
length. We feel that looking at the case, we would like to  
adjourn till tomorrow 3 o'clock when we will deliver our  
verdict.

We are now adjourned.

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25 November 2013  
(Afternoon session)

1

Judge Lamin Yunus (President):

I shall now read the findings of the Tribunal.

5

The Kuala Lumpur War Crimes Tribunal (Tribunal) reconvened<sup>1</sup> on 20 November 2013 to hear two charges against Amos Yaron (first Defendant) and the State of Israel (second Defendant). The first Defendant was charged with war crimes, crimes against humanity and genocide, whilst the second Defendant was charged with the crime of genocide and war crimes.

10

The charge against the first Defendant is as follows –

15

*"The Defendant Amos Yaron perpetrated War Crimes, Crimes Against Humanity, and Genocide in his capacity as the Commanding Israeli General in military control of the Sabra and Shatila refugee camps in Israeli occupied Lebanon in September of 1982 when he knowingly facilitated and permitted the large-scale Massacre of the Residents of those two camps in violation of the Hague Regulations on Land Warfare of 1907; the Fourth Geneva Convention of 1949; the 1948 Genocide Convention; the Nuremberg Charter (1945), the Nuremberg Judgment (1946), and the Nuremberg Principles (1950); customary international law, jus cogens, the Laws of War, and International Humanitarian Law"*

20

25

The charge against the second Defendant is as follows –

*"From 1948 and continuing to date the State of Israel (hereafter 'the second Defendant') carried out against the Palestinian people a series of acts namely killing, causing serious bodily harm and deliberately inflicting conditions of life calculated to bring about physical destruction."*

30

35

*The conduct of the second Defendant was carried out with the intention of destroying in whole or in part the Palestinian people.*

*These acts were carried out as part of a manifest pattern of similar conduct against the Palestinian people.*

40

*These acts were carried out by the second Defendant through the*

1        *instrumentality of its representatives and agents including those listed in Appendices 1 and 2.*

5        *Such conduct constitutes the Crime of Genocide under international law including the Convention on the Prevention and Punishment of the Crime of Genocide 1948 ('the Genocide Convention') in particular Article II and punishable under Article III the Crime of the said Convention. It also constitutes the crime of genocide as stipulated in Article 10 of the Charter.*

10      *Such conduct by the second Defendant as an occupying power also violates customary international law as embodied in the Hague Convention of 1907 Respecting the Laws and Customs of War on Land, and the Fourth Geneva Convention of 1949.*

15      *Such conduct also constitutes War Crimes and Crimes against Humanity under international law."*

20      The charges (together with the particulars of the charges) had been duly served on the Defendants, and were read in open court by the Registrar as these proceedings commenced.

25      Neither Defendant was present in these proceedings, but both were represented by the *Amicus Curiae* Team.

30      The *Amicus Curiae* Team filed two preliminary objections to these proceedings – the first contending that there are defects in the Charges preferred against the first Defendant, and the second contending that the State of Israel cannot be impleaded in these proceedings on the grounds of State Immunity.

35      In respect of its **first preliminary objection** the *Amicus Curiae* Team contends that the trend in modern international criminal tribunals is either to have jurisdiction for acts that have been committed after these tribunals have been constituted such as the International Criminal Court (ICC), or alternatively its jurisdiction is for a limited duration of time such as the International Criminal Tribunal for Rwanda (ICTR) or the Extraordinary Chambers in the Courts of Cambodia (ECCC).

40      The *Amicus Curiae* Team submits that this Tribunal came into existence on 6 June 2008, whilst the various acts allegedly

committed by the first Defendant in charge no. 3 occurred in the month of September 1982, while the acts allegedly committed by the second Defendant in charge no. 4 occurred since 1948 and continue up to the present day.

In respect of its second preliminary objection the *Amicus Curiae* Team submits that there is no authority conferred by the Charter to hear any action against the government of a country, for example, the government of Israel. The *Amicus Curiae* Team also argued that international law does not allow the "State of Israel" to be impleaded as an accused. The State of Israel is a nation State, recognised by the United Nations, and as a nation State, it has rights under international law.

The *Amicus Curiae* Team further submits that the State of Israel has not entered appearance in these proceedings and has therefore not submitted to the jurisdiction of this Tribunal. The *Amicus Curiae* Team submits that the State of Israel enjoys immunity for the crimes of genocide and war crimes and therefore Charge 4 should be dismissed.

On behalf of the Prosecution Team, it was argued that with regard to the first preliminary objection, the jurisdiction issue must be established by reference to the Charter that sets up the Tribunal. The Charter states that the jurisdiction of the Tribunal shall be governed by the provisions of this Charter: Part 1, Article 1. There is no temporal limit. In particular, Article 7 sets no time limit. In this sense the Charter is identical to the 'open ended' temporal jurisdiction of the Military Tribunal at Nuremberg or the International Military Tribunal for the Far East.

The Prosecution Team also submitted that the Tribunal had convicted Bush and Blair of war crimes committed in 2003 – which also predates its setting up: *KL War Crimes Commission v George W. Bush and Anthony L. Blair*, KLWCT Reports 2011, p. 1. The verdict by the KLWCT against Bush, Cheney, and Rumsfeld *et al* went back to torture committed from 2001.

With regard to the second preliminary objection, the Prosecution Team submits, *inter alia*, that these two Charges are international criminal war crimes being adjudicated by

1 an international tribunal. States have no immunity for such  
crimes before such tribunals.

5 Before these proceedings began, the *Amicus Curiae* Team  
had also submitted two (2) applications to quash the charge  
against the two Defendants. The grounds of applications were  
as follows:

- 10
1. The charge is defective for duplicity, and / or latent  
duplicity.
  2. The charge is defective for uncertainty.
  - 15 3. The charge is an abuse of process and / or  
oppressive.

On behalf of the two Defendants, the *Amicus Curiae* Team  
sought for the Tribunal to make the following orders:

- 20
1. That the charge against the two Defendants be  
quashed.
  2. That the Prosecution against the two Defendants be  
permanently stayed.

25

  3. In the alternative, that the Charges be redrafted  
according to the principles of criminal law.

30 The *Amicus Curiae* Team contends that there were multiple  
offences within one charge and multiple forms of alleged  
instances of criminal conduct within one charge. The *Amicus  
Curiae* Team submits that the Rules against Duplicity must be  
strictly adhered to in a criminal proceeding.

35 In rebuttal, the Prosecution Team submits that this Tribunal  
is governed by its own Rules and these Rules are silent on the  
application of the Rule against Duplicity in drafting charges.  
This rule against duplicity, as it exists in national legal systems,  
does not, and cannot, apply in the same way in proceedings  
40 before international criminal courts. More importantly, the  
Tribunal should take into account the heinous nature of these  
crimes and the scale they were alleged to be perpetrated.

On the *Amicus Curiae* Team's submission that the charge is defective due to uncertainty, the Prosecution Team submits that it is premature for anyone to say so without appreciating the particulars contained in the charge. The particulars in the charge are facts that the Prosecution seeks to prove in the course of the proceedings.

Having considered the Preliminary Objections raised by the *Amicus Curiae* Team and the Two Applications filed by the *Amicus Curiae* Team and the submissions by both the *Amicus Curiae* Team and the Prosecution Team in the several documents already filed with this Tribunal, and having considered further oral submissions by both parties, the Tribunal unanimously ruled that the Preliminary Objections and Two Applications have little merit and were accordingly dismissed.

A written ruling of the Tribunal was read out by Judge Tunku Sofiah Jewa on 20 November 2013.

The Prosecution's case against the first Defendant is that the first Defendant had committed War Crimes, Crimes Against Humanity and Genocide in his capacity as the Commanding Israeli General in military control of the Sabra and Shatila refugee camps in Israeli-occupied Lebanon in September of 1982 when he knowingly facilitated and permitted the large-scale Massacre of the Residents of those two camps. These crimes were in violation of, *inter alia*, the Fourth Geneva Convention of 1949, the 1948 Genocide Convention, *jus cogens*, International Humanitarian Law; and Articles 9, 10, and 11 of the Charter.

The Prosecution's case against the second Defendant is that from 1948 and continuing to date the State of Israel had systematically carried out against the Palestinian people a series of acts namely killing, causing serious bodily harm and deliberately inflicting conditions of life calculated to bring about physical destruction – with the intention of destroying in whole or in part the Palestinian people.

These acts constitute the Crime of Genocide under international law including the 1948 Genocide Convention in particular Article II and punishable under Article III of the said

1 Convention. It also constitutes the crime of genocide as  
stipulated in Article 10 of the Charter.

5 In his opening statement, the Chief Prosecutor Prof Gurdial Singh said that the Prosecution will adduce evidence to prove the counts in the indictment through oral and written testimonies of victims, witnesses, historical records, narrative in books and authoritative commentaries, resolutions of the United Nations and reports of international bodies.

10 The Prosecution Team called 11 witnesses to testify on its behalf.

15 The Prosecution's first witness (PW1) was Chahira Abouardini, a 54 year old resident of Camp Shatila, Beirut, Lebanon.

20 She testified that when the Israelis invaded Lebanon in May 1982, they attacked the area near Camp Shatila, which was then the base of the Palestinian resistance. She also testified that her father and sister were shot and killed by the Lebanese Phalangist militia.

25 She also said that there were a lot of dead bodies everywhere, strewn all over – bodies of men, women, children and even animals. Armed militiamen had started the killing from the houses near the sports complex where the Israeli forces were based. They entered homes and killed people. Anyone who moved was killed.

30 PW1 also testified that at one location on the way to the stadium, she saw her cousin's daughter's body. The killers had opened her body and taken out her baby and then placed the baby on her dead body. PW1 testified that the victim was actually deaf and dumb and was living in a home for the disabled.

35 PW1 testified that there were bodies piled up everywhere because the militiamen had collected the people together and then shot them all at one time. As a result it was difficult to identify the dead victims, and families had to dig between dead bodies to find their relatives.

40 PW1 said that in the 36 hours of the attack, some 3,500 people

from Shatila and Sabra had been massacred. She said that the Phalangist militia who committed these atrocities worked together with the Israelis. They were puppets of the Israeli forces.

When PW1 was offered by the Prosecution to the *Amicus Curiae* Team for cross-examination, the *Amicus Curiae* Team declined to cross-examine the witness.

The second Prosecution witness (PW2) called by the Prosecution Team was Bayan Nuwayhed al-Hout. She gave her testimony as an expert witness through Skype. She was not physically present before the Tribunal.

The Prosecution tendered (as an exhibit) excerpt of a book titled "SABRA AND SHATILA – SEPTEMBER 1982" written by PW2 where she said "*For 40 continuous hours between sunset on Thursday 16 September and midday on Saturday 18 September 1982, the massacre of Sabra and Shatila took place, one of the most barbaric of the twentieth century*".

When asked by the Prosecutor to give her comments on the published figure of 3,500 being the number of people killed, PW2 said that according to her research she estimated the figure to be around 1,350. She said that she had approached various international organisations to collect the list of victims, but she never received them.

When PW2 was offered to the *Amicus Curiae* Team for cross-examination, the latter also said that they have no desire to cross-examine the witness.

The Prosecution's third witness (PW3) was Mahmoud A.H. al Sammouni, a 15 year old resident of Sammouna Street, Gaza Zaitun, Gaza City. He gave his testimony through Skype.

PW3 testified that the Israeli forces attacked his place on January 3, 2009 with bombs and missiles. He said that he saw parachutists coming down and landing on the highest buildings.

He testified that more than 50 soldiers came to his house, all

1 with weapons. They shot at the inner walls of the house and  
all over his home. They demanded the owner of the house to  
come out and when PW3's father came out, the soldiers shot  
him, killing him on the spot. The soldiers continued shooting  
5 into the house for 15 minutes, injuring his brother Ahmad and  
5 other members of his family, including his sister Amal – who  
sustained serious injuries, including a shrapnel in her head.  
His brother Ahmad subsequently died.

10 PW3 was not cross-examined by the *Amicus Curiae* Team.

The Prosecution's fourth witness (PW4) was Salah Al  
Sammouni, a 34 year old resident of al-Zaytoun neighbourhood  
in Gaza City. He gave his testimony through Skype.

15 He said that on January 3, 2009, he received information from  
his father's cousin that Israeli military tanks had entered Gaza  
City and surrounded the al-Zaytoun neighbourhood and the  
surrounding areas.

20 He further testified that 21 members of his family were killed  
by the Israelis on January 5, 2009. He tendered as an exhibit a  
list of the names of these dead family members.

25 When this witness was offered to the *Amicus Curiae* Team for  
cross-examination, the *Amicus Curiae* Team declined to cross-  
examine him.

30 The Prosecution's fifth witness (PW5) was Paola Manduca,  
currently residing in Genova, Italy. She gave her testimony as  
an expert witness through Skype.

35 She told the Tribunal that she had conducted and co-ordinated  
in 2011 two research projects relating to the impact of weapons  
on reproductive health arising from the Israeli attacks on  
Gaza. The outcome of her research reveals the degradation  
of the reproductive health and increase in major structural  
birth defects.

40 She also testified that 66% of Gaza parents with a birth defect  
child had been exposed to bombing or white phosphorus  
shelling during Operation Cast Lead in 2008/2009.

Her research led her to the conclusion that there is a long term effect on reproductive health associated with metal contamination by exposure to weaponry during the war and by war remnants.

When PW5 was offered to the *Amicus Curiae* Team for cross-examination, the *Amicus Curiae* Team declined to cross-examine her.

The Prosecution's sixth witness (PW6) was Dr Ang Swee Chai, a consultant orthopaedic and trauma surgeon, currently residing in London, England. She was physically present during the proceedings and was orally examined by the Chief Prosecutor and subsequently cross-examined by the *Amicus Curiae* Team.

She testified that she arrived in Beirut in August 1982 as part of a British medical team, volunteering her services as an orthopaedic surgeon. She started work as an orthopaedic surgeon in Gaza Hospital on August 22. The Hospital was an 11 storey building in the Sabra and Shatila Palestinian refugee camps, officially opened on August 23, 1982.

PW6 gave a detailed account of the events that took place from 15-22 September 1982.

On 15 September, Israeli planes flew from the sea towards the direction of the camps, and then the shelling began in all directions, clearly seen from the Gaza Hospital. On 16 September, casualties poured into the hospital, whilst shootings and shelling continued outside. Shootings continued into the night.

On 17 September, the witness said that she operated on an eleven year old boy, shot with 27 members of his family. All 27 died, but the boy survived.

On 19 September PW6 said members of the hospital medical team were able to return to Sabra and Shatila camps, where they saw dead bodies everywhere, whole families obviously shot together. She said that according to the International Red Cross, the total number of dead people was 1,500.

- 1      The witness testified that from the Israeli headquarters in  
the Kuwait Embassy most of the area of the massacre in the  
two camps could be easily seen. She was told by Palestinian  
survivors that they could not escape during the massacre  
because the Israelis had sealed off the camps. When the  
5      Norwegian Ambassador came in to try to evacuate the  
Norwegian medics, he told the witness that he had to get the  
Israeli authorities to agree.
- 10     The witness also said that from recently declassified materials  
from the British National Archives, she discovered that the  
death toll in the two camps was 3,500 people. When the Israelis  
surrounded and invaded the Akka Hospital on 15 September,  
they killed patients, nurses and doctors.
- 15     PW6 was cross-examined by the *Amicus Curiae* Team, but her  
testimony remained intact and unshaken.
- 20     The Prosecution's seventh witness (PW7) was Nabil Alissawi,  
a resident of Karkfa Street, Bethlehem.
- 25     The witness said that whilst he was a student of Ahliya  
University in 2008, he took part in a peaceful street  
demonstration near the Azah Refugee Camp and Paradise  
Hotel. At about 12.30pm whilst the demonstrators were thus  
engaged, he was shot by a sniper. He passed out and was  
taken to a hospital.
- 30     He later discovered that a dum dum bullet had pierced his  
stomach and then broke into 3 pieces, going into 3 different  
directions – 2 exiting his body but the third remained stuck  
in his bladder. He was hospitalised for 2½ months where he  
underwent 3 operations. He subsequently received treatment  
35     for another 2½ months where he underwent more surgical  
operations to repair his intestines.
- 40     As a result of his injuries, his life had been totally altered. He  
carried an abdominal scar, he cannot sit upright, nor can he  
swim competitively. He is prohibited from entering Israel, and  
is always in a state of fear and anxiety. He is a victim with no  
freedom in his own country.

The Prosecution's eighth witness (PW8) was Ilan Pappe, an Israeli historian and social activist. He gave his oral testimony via Skype. Author of 15 books, including "The Ethnic Cleansing of Palestine" (2006), "Gaza in Crisis" (co-authored with Noam Chomsky, 2010) he is one of Israel's New Historians who have been rewriting the history of Israel's creation in 1948 and the expulsion of 700,000 Palestinians in the same year. He has written that the expulsion was not decided on an *ad hoc* basis as other historians had argued, but constituted the ethnic cleansing of Palestine in accordance with Plan Dalet, which was drawn up in 1947 by Israel's future leaders.

The witness testified that the people behind Plan Dalet was a small group of people (about 30) comprised of generals in the Jewish military outfit, experts on Arab affairs, with the Chairman who would be the first Prime Minister of Israel. They turned this plan into a Master Plan with a blueprint for the systematic expulsion of the Palestinians from their country.

When asked by the Chief Prosecutor what happened to those Palestinians who refused to move, the witness said that in certain places, elder villagers were executed to intimidate the rest. And in some places, all male members were massacred. Palestine had some 800 villages. 530 villagers had their residents expelled.

The witness also testified that the villages that were occupied were wiped out physically and on the ruins they built settlements or recreational places. In the cities, the Palestinian neighbourhoods were repopulated by Jewish immigrants from Europe or from other countries.

Asked about Gaza, the witness said that Gaza is a huge prison, incarcerating 2 million people.

Cross-examined by the *Amicus Curiae* Team whether he would agree that the body of his work and his views "could be to assuage the guilt of being alive because of Zionism", the witness replied that he does not feel that way. He said that because his parents were victims of genocidal policies of the Nazi, he does not want be part of the new genocide.

1        Responding to another question from the *Amicus Curiae* Team,  
the witness said that the Jews who escaped from Germany  
and Europe in the 1930s were indeed refugees looking for safe  
haven, but the Jews who came in 1982 and in subsequent years  
5        came as colonisers.

10      The Prosecution's ninth witness (PW9) was Taghreeb Khalil  
Nimat, a resident of Nablus, West Bank. She lives with her  
parents and 9 siblings.

15      The witness testified that in 1979 or early 1980, her father was  
arrested by the Israeli forces and detained in prison for 18 days  
for singing a song about Palestinian freedom. A year later, he  
was again arrested and detained in prison for 21 days for the  
same offence.

20      In 1987 the witness applied for employment at the government  
office but her application was rejected. It was commonly  
understood that if any family member has a history of being  
detained by the Israeli government, it would be difficult to  
seek employment at the government office.

25      The witness testified that on 15 April 2004, whilst travelling  
from Nablus to Bethlehem (a distance of 80 km) she was  
stopped by an Israeli military car and then detained for 29  
hours without food or water. During detention, the witness  
was put under interrogation and insulted verbally. Following  
the incident, the witness was stigmatised by her community,  
including her friends and colleagues.

30      The Prosecution's tenth witness (PW10) was Dr. Walid Elkhatib,  
a resident of Beit Jalla City, Bethlehem District, West Bank. He  
is a qualified medical doctor, specialising in public health.

35      The witness testified that as a general practitioner, he  
worked at an emergency clinic during the first *intifada*,  
where he saw many patients with different kinds of injuries  
as a result of Israeli violence – gun shot wounds, exposed  
40      to tear gas and physically abused by Israeli soldiers. Over  
the last 17 years he had been in charge of child health and  
protection, social health and Palestinian child law and  
rights.

He also testified that the invasion of Palestinian cities by Israeli forces (including the shelling and bombing, usage of tear gas, the building of walls to separate Jerusalem and the West Bank, check points which restrict the movement of the Palestinian people) have affected Palestinian health and education, especially that of children.

The witness said that the first *intifada* (1987-1993) was not military in nature. It involved demonstrations against the Israeli occupation. There were then no roadblocks, no wall, no shelling and no airplane bombings.

The second *intifada* (2000-2009) began when Ariel Sharon went to the Al-Aqsa Mosque. The Palestinians protested against this visit. On that day, Israeli soldiers killed 20 people outside a mosque.

During the second *intifada*, the witness said that 77.8% of Palestinian families suffered mental problems. From 2001-2011, there were 2,282 cases of disability – mostly due to injuries sustained by those involved in the *intifada*, caused by live ammunition, shrapnel, rubber bullets and explosions. Disabilities means that many of these people have less opportunities for work and they end up in poverty.

The witness testified that poverty is rife in the West Bank and Gaza, increasing from an average of 20% (prior to *intifada*) to 51% (during the *intifada*). Anemia became prevalent amongst the children (42%) as a result of imbalanced diet and amongst pregnant women (21%).

On the subject of checkpoints, the witness testified that there were about 730 checkpoints between cities, towns and villages in the West Bank. There had been many cases of pregnant women (forced to stop and wait at these places) delivering their babies at these checkpoints. There had also been many emergency cases who had been stopped at these checkpoints and prevented from going through to hospitals. In such cases, people had died at these checkpoints.

The witness also testified that before the second *intifada*, he believed that Israel was looking for peace with

1 Palestinians. After the second *intifada*, he no longer had  
that belief.

5 The Prosecution's eleventh witness (PW11) was Jawad  
Musleh, a resident of Beit Sahour, Bethlehem District. He is a  
programme co-ordinator in a travel agency.

10 The witness, a Christian, testified that he was arrested in  
August 1985 by the Israeli authorities and released 20 months  
later, in March 1987. He was first detained at a prison in West  
Jerusalem, and later transferred to another prison in Haifa and  
finally to another prison in the West Bank. He was then only  
15 years old, a student of a Catholic School at Beit Sahour.

15 The witness testified that he was tortured in the first prison in  
West Jerusalem, during interrogation. The Israelis used mental  
and psychological torture to make him confess to crimes he did  
not commit – that he was a member of the Palestine Front for  
20 the Liberation of Palestine (PFLP). He refused to confess but he  
continued to be beaten, and if not beaten, put in confinement  
with his hands tied behind his back and a hood over his head.

He finally confessed, after which he was detained for 20  
months. He continued to be tortured when he was incarcerated.  
25 He said that there are now more than 5,000 prisoners in Israeli  
prisons.

30 The witness also testified that more Israeli colonies are being  
built on lands in the West Bank and Jerusalem. There are now  
700,000 Jewish settlers living in the West Bank and Jerusalem.

35 The West Bank is now divided into 3 Areas – A, B and C. Area  
A are lands under the Palestinian authority and cover main  
cities and towns like Bethlehem, Hebron, Nablus, Ramallah,  
Jenin and others. Area B are small villages surrounding the  
main cities, where Israel is in control of security whilst civil  
services like health and education are the responsibility of  
the Palestinian authority. Area C, which is the rest of the West  
Bank, is under the complete control of the Israeli authorities.  
40 Checkpoints and roadblocks are set up throughout Areas A,  
B and C. These checkpoints are often closed arbitrarily and  
without prior notice, for long hours.

The witness further testified that Area C is the richest source of water supply. Water supply is therefore under the complete control of the Israeli authorities. Water is supplied to the Israeli settlers at a cheaper price, and 5 times more in volume, compared to water supplied to the Palestinians – which is often inadequate for their daily use, causing great hardship and suffering.

In his closing submission, the Chief Prosecutor said that he had called 11 witnesses (some of whom had testified through Skype), tendered 15 exhibits and furnished several documents and reports to the Tribunal during the course of the proceedings.

He urged the Tribunal to bear in mind that this is a Tribunal of Conscience and the case before it is an extraordinary case, which Winston Churchill used to call as a "crime without a name".

He said that the Prosecution had provided evidence of facts which, examined as a whole, will show that the perpetrators had committed acts against the Palestinians, with intent to kill, cause serious bodily or mental harms and deliberately inflict conditions of life calculated to bring about the physical destruction of the Palestinians as a whole or in part.

From the testimony of Prof Pappe (PW8) the Prosecution had shown that before 1948, before UN Resolution 47, there was already a plan in place to take over the Palestinian territory, and this plan would be activated the moment the British relinquished its mandate over the territory.

At that point in time, the Palestinians were on 94% of the land, with the Jewish population settling over a mere 6% of the land. Under the UN partition plan, more than 50% of the land was to be given to the Jews.

Plan Dalet might not legally be genocidal in form at its inception, but as it took shape the ethnic cleansing metamorphised into killing, massacre and creating impossible conditions of life for the Palestinians – either they leave or they die. The Prosecution

1 submits this is genocide within the meaning of Article 2 of the  
Genocide Convention.

5 On Sabra and Shatila, prosecution witnesses (PW1 and PW6)  
had testified that the Palestinian refugees in those camps had  
been killed by the Phalangists, aided and abetted by the Israelis  
who were in complete control of the two camps.

10 According to the Kahan Report, all of Beirut was under Israeli  
control, and there was clear symbiotic relationship between  
Israel and the Christian forces (the Lebanese Maronite  
Christian militia or the Phalangists or Keta'ib).

15 On Operation Cast Lead in 2008, the Chief Prosecutor said  
that the IDF had used all kinds of weapons, including white  
phosphorus – which is an incendiary weapon. The use of  
incendiary weapons is prohibited under Protocol III on the  
Prohibitions or Restrictions on the Use of Incendiary Weapons.

20 As a result of the Israeli occupation of Gaza, nowhere in Gaza  
is safe for civilians. 1.5 million Palestinians are now trapped  
in despair, their fragile economy ruined. Under the Dahiya  
Doctrine (October 2008), the complete destruction of Gaza is  
the ultimate objective, the whole place must be flattened.

25 The Prosecution submits that the cumulative effect of the  
actions taken by the Israeli government, as shown by the  
Prosecution witnesses and the several documents tendered  
to the Tribunal, have shown beyond reasonable doubt that  
30 Israel is guilty of the crime of genocide under the Genocide  
Convention and the Charter.

35 Co-Prosecutor Tan Sri Abdul Aziz, submitting on the first  
charge against Amos Yaron, said that Amos Yaron was the  
commanding officer in charge of the IDF, in charge of the area  
of Beirut, and camps Sabra and Shatila. He said that there were  
two issues which he had to deal with – first, whether or not  
40 there was a large scale massacre of the residents of the two  
camps, and second, whether or not Amos Yaron facilitated and  
permitted such massacre, in violation of international law and  
Articles 9, 10 and 11 of the Charter?

On the first issue, he submitted there was a large scale massacre, as testified by PW1. She was there, and she saw the massacre with her own eyes. There was corroborating testimony by PW6, and further acknowledged in the Kahan Report.

On the second issue, Amos Yaron was in charge, to ensure that there would be peace, law and order. The Kahan Report itself concluded that anybody who knew about Lebanon would know that by releasing the Phalangists into Beirut, there would be massacre. Surely, Amos Yaron, the General in charge, must have known that by allowing the Phalangists to go into the two camps, the massacre would take place. But he decided to do nothing.

He received the reports of the killing of women and children, but he did not check the report. He did not pass the report to his superiors. The Co-Prosecutor submits that by ignoring all these despite knowing the circumstances, he himself had the intention of causing the deaths of the people in the two camps.

After the Prosecution Team had submitted its closing submission, the *Amicus Curiae* Team submitted there is no case to answer – as provided in Article 28 of Chapter VII (Mode of Proceedings) of Part 2 of the Charter.

The Tribunal then had a short recess to enable the Judges to deliberate and consider the totality of the evidence adduced by the Prosecution.

When the Tribunal reconvened a short while later, the President of the Tribunal ruled that the Tribunal had unanimously agreed that a *prima facie* case had been established in both charges and the *Amicus Curiae* Team is therefore invited to present the Defence case.

Mr. Jason Kay Kit Leon of the *Amicus Curiae* Team submitted that in the charges against the two Defendants, the Prosecution had listed war crimes, crimes against humanity and crimes against peace. Apparently the Prosecution had abandoned these charges, concentrating only on genocide.

1 He said that the offence of genocide is defined in Article 2  
of the Genocide Convention 1948, whilst the Oxford English  
Dictionary defines it simply as "the deliberate killing of a  
large group of people, especially those of a particular nation  
5 or ethnic group".

10 He submitted that the charge of genocide is unique; it means  
that you don't like a group, you kill them; you kill them in  
a grand manner. Genocide means that at the end of the act,  
you have a lesser number of victims than before the genocide  
started.

15 He further submitted that when one talks of "massive killing",  
it is many hundreds of thousands to millions of people. To  
suggest that an isolated event, the unfortunate murder of 3,000  
people (Sabra and Shatila) is the same as massive killing is  
almost disrespectful of the true horror of massive killing (as  
in Rwanda, where 800,000 people were killed in 100 days).

20 With regard to the Kahan Report, the *Amicus Curiae* Team said  
that it also identified other people as being responsible, with  
two other names other than Yaron still alive. The question is  
why only Yaron was charged? Why was Defence Minister  
Ariel Sharon spared.

25 He also submitted that the PLO had repeatedly violated the  
July 1981 cease-fire agreement. By June 1982, when the IDF  
went into Lebanon, the PLO had made life in northern Israel  
intolerable through its repeated shelling of Israeli towns.

30 On Operation Cast Lead, the *Amicus Curiae* Team submitted  
that the IDF had come out with two reports. The point is if  
you are going to kill people nilly willy, you do not report it.

35 On the issue of the wall, the *Amicus Curiae* Team submitted  
that the primary consideration is one of security of the Israeli  
settlers. The State of Israel has a duty to defend their lives,  
safety and well-being.

40 On the issue of checkpoints, the *Amicus Curiae* Team said  
countries have a right to immigration laws.

With regard to Plan Dalet, the *Amicus Curiae* Team said that it is subject to divergent opinions, with historians on one side asserting that it was entirely defensive, while other historians assert that the Plan aimed at an ethnic cleansing.

Under Charge 3, the Defendant Amos Yaron is charged with War Crimes, Crimes against Humanity, and Genocide. As the Commanding Israeli General in military control of the Sabra and Shatila refugee camps in Israeli occupied Lebanon in September of 1982, he knowingly facilitated and permitted the large-scale Massacre of the residents of those two camps in violation of the Hague Regulations on Land Warfare of 1907; the Fourth Geneva Convention of 1949; the 1948 Genocide Convention; the Nuremberg Charter (1945), the Nuremberg Judgment (1946), and the Nuremberg Principles (1950); customary international law, *jus cogens*, the Laws of War, and International Humanitarian Law; and their related provisions set forth in Articles 9, 10, and 11 of the Charter.

Israel invaded Lebanon beginning June 6, 1982. The Israeli siege and bombardment of West Beirut continued throughout the summer of 1982. In spite of the devastation caused to Lebanon and the civilian population, Israel did not succeed in its goal of defeating or dislodging the Syrian and P.L.O. forces.

An agreement was brokered on August 19, 1982 between Lebanon, the United States, France, Italy, Israel, and the P.L.O. for the evacuation of the P.L.O. and Syrian forces under the auspices and protection of a multi national force. The agreement further provided that the IDF would not attempt to enter or occupy West Beirut following the evacuation of the P.L.O. and Syrian forces.

Pursuant to that agreement, the multinational American, French, and Italian forces oversaw the evacuation of the P.L.O. and Syrian forces until completed on September 1, 1982. The multinational forces left Lebanon from September 10-12, 1982, after the completion of the evacuation.

On September 14, 1982, Lebanese President Bashir Gemayel, a Phalangist, was assassinated in Beirut.

1 Israeli Prime Minister Begin, Prime Minister of Defense Sharon, and Chief of Staff Eitan decided that the IDF would immediately enter and occupy West Beirut.

5 Pursuant to the decision, on September 15, 1982, the IDF entered West Beirut under the command of Defendant Brigadier General Amos Yaron, the Defendant in this case. The IDF established a forward command post on the roof of a seven-story building southwest of the Shatila camp, and  
10 Defendant Brigadier General Yaron commanded the IDF from that post. The area surrounding the two camps, Sabra and Shatila, was thereafter under the command and control of the IDF, and all forces in the area, including the Phalangists, were considered to be operating under the authority of the IDF and  
15 acting according to its instructions.

20 The Tribunal heard detailed testimony about the events occurring between September 16 and September 18, 1982. A horrible systematic massacre of defenceless Palestinian refugees occurred with the deaths of up to 3,500, largely women and young children in the two camps.

25 Brigadier General Amos Yaron was commander of the operation in Beirut. He was asked by Major General Drori to coordinate the entry of Phalangist force at the forward command post.

30 After these massacres, the Israeli government was under immense pressure to set up a commission of enquiry under the chairmanship of Yitzuk Kahan ('the Kahan Commission'), to enquire into the massacre. This Commission held 60 sessions hearing 58 witnesses.

35 The Kahan Commission made the following observations:

(a) Defence Minister, Ariel Sharon and Chief of Staff, Eitan declared on Sept 16 1982 before the massacres began that all of Beirut was under Israeli control and the camps were closed and surrounded.

(b) There was a clear symbiotic relationship between Israel and the Christian forces (the Lebanese Maronite

Christian militia) known as the Phalangists or Keta'ib assisted by the Israeli Mossad. Even the uniforms of the South Lebanese Army (SLA) and the Phalangists were the same as those of the IDF – and provided by Israel.

(c) The Israelis exercised some degree of control of the SLA. 5

(d) The Phalangists' plan to use force to remove Palestinians was discussed at several meetings with Israel. 10

(e) Three key officials of the Israel Cabinet decided that the IDF under the command of Brigadier General Amos Yaron would enter West Beirut: the PM Begin, Defence Minister Sharon and Chief of Staff Eitan. The IDF would not enter the camps but rather would delegate the entry into the camps to the Phalangists. Eitan said that he and Sharon agreed on the entry of the Phalangists into the Sabra and Shatila camps: the operational order provided: "...Searching and mopping up of the camps will be done by the Phalangists-Lebanese army". Also a summary of the Defence Minister's instructions: "Only one element, and that is the IDF, shall command the forces in the area. For the operation in the camps the Phalangists should be sent in". 15 20

(f) The use of terms such as: 25

"purifying and purging" (*NY Times*, Sept 20 1982 at A6, col 5; *Washington Post* Sept 21 at A14, col 6); 30

"mopping up" (*NY Times*, Sept 23, 1982 at A8, col 4); and

"cleaning up" (*NY Times*, Sept 23 1982 at A8, col 6; Sept 26 1982, A11, col 2) the camps 35

shows the actual intent of the Israeli officials and its commanders.

(g) The camps were surrounded and under the complete control of the Israelis, preceding the killings. 40

- 1                   (h) The Chief of Staff Eitan, after acknowledging that the Phalangists 'had gone too far' gave the thumbs up to continue the "mopping up".

5                   An International Commission was set up to enquire into the reported violations of international law by Israel during its invasion of Lebanon.

10                  It produced a Report in 1983: *Israel in Lebanon: Report of the International Commission to Enquire into Reported Violations of International Law by Israel during its Invasion of Lebanon 1982* (1983):

- 15                  (a) The Commission was chaired by Sean MacBride, former Irish Foreign Minister, and former United Nations Commissioner for Namibia and Nobel Peace Prize winner in 1974.

- 20                  (b) Four of the Commission's six members concluded that Israel embarked on "deliberate destruction of the national and cultural rights and identity of the Palestinian people amounting to genocide".

- 25                  (c) It concluded that:

The massacres that took place at Sabra and Shatila in September 1982 can be described as genocidal massacres, and the term "complicity in genocide" is wide enough to establish the responsibility of Israel for these acts."

- 30                  (d) The Report placed the massacre in context:

"[Sabra and Shatila] massacres were low-technology sequels to earlier high-technology saturation bombardment by Israel from land, sea and air of every major Palestinian camp situated anywhere near the combat zone throughout southern Lebanon. The underlying Israeli objective seems clearly directed at making the Palestinian camps uninhabitable in a physical sense as well as terrorizing the inhabitants and thereby breaking the will of the Palestinian national

movement, not only in the war zone of the Lebanon, but possibly even more centrally, in the occupied West Bank and Gaza": p. 121,

- (e) That this represents a comprehensive policy to destroy an entire ethnic group is again illustrated by Amnon Kapeliouk, Sabra and Shatila (p. 45-6):

"Since the beginning of the war in June 1982, the Israelis have repeatedly used bulldozers to destroy homes and force the residents to flee. The refugee camps of South Lebanon were bombarded and then destroyed with explosives and bulldozers. In Israel, this operation was known as "the destruction of the terrorist infrastructure." The objective was to prevent the Palestinians from forming a national community in Lebanon. Therefore, it was necessary to destroy not only homes, but also Palestinian institutions such as schools, hospitals, and social service centres. In addition, the Israelis sought to deprive the Palestinian population of all males by arresting thousands of men and forcing thousands more to flee."

The Commander, Brigadier General Yaron, and the Phalangists agreed that a Phalangist Liaison Officer with communications equipment would be present at all times in the IDF command post with a Mossad Liaison Officer at the Phalangist headquarters.

Yaron knew about Phalangist combat ethics. He was pleased with his decision and was quite content to have the Phalangists participate and not leave the operation up to the IDF.

Yaron could not explain his lack of action or intervention by the Israeli army to protect civilians when he learnt on the first night, September 16, after the intervention of the Phalangists that massacres were occurring.

Even when Israeli military authorities were well aware of the exactions by the Phalangists on Friday 17 September, they did not intervene to protect the Palestinian civilians but rather allowed them to bring in tractors to do what they wanted.

The following testimony confirms that from the command

1 posts, the Israelis, including of course Brigadier Commander Amos Yaron, could see into the camps and observe the massacres:

- 5 (a) From the command post, it was possible to see into the camps, even into the narrow alleys. One could see the mass grave 300 meters away dug by the Phalangists and the bulldozer used to bury the hundreds of victims.
- 10 (b) Similarly, the testimony of Dr Ang Swee Chai.
- (c) Reports of Senior Journalists.

15 *Washington Post*, senior foreign correspondent, Jonathan Randal: noted this as an 'obviously wrongheaded factual error';

20 Israeli journalist, Amnon Kapeliouk;

25 Israeli newspaper *Yedi'at Aharonot* ridicules finding;

30 *A New York Times* article Sept 26 1982 at A9, col 2.

35 Loren Jenkins, *Washington Post* Beirut correspondent, Sept 20 1982: Israel aided and abetted.

- 40 (d) Doctors and nurses testified they heard constant shooting and shelling from Shatila and knew later that a massacre might be taking place: *New York Times* Sept 20 1982 at A6, cols 3-4.
- (e) Leila Shahid quotes an Israeli officer saying that watching from the roofs of one of the buildings occupied by the Israelis was like watching 'from the front row of a theatre'.
- (f) Israeli soldiers prevented Palestinian refugees from fleeing and returned them to the camps. Soldiers reported to their superiors that massacres were taking place.

The United Nations condemned the Sabra Shatila killings...  
Security Council Resolution S/RES/521(1982): 19 September  
1982 condemned the criminal massacre. The General assembly  
went much further than the Security Council. In the General  
Assembly Resolution 37/123: on 16 December 1982, it held:

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Section D.1: Condemned in the strongest terms the large  
scale massacre of Palestinian civilians in the Sabra and  
Shatila refugee camps (Vote: 123 -0; 23 abstentions).

10

Section D.2: Resolves that the massacre was an act of  
genocide (vote: 98-19; 23 abstentions).

5

The burden of proof in this Tribunal is beyond all reasonable  
doubt. All elements of an infraction must be proven beyond all  
reasonable doubt. This applies to War Crimes, Crimes against  
Humanity and the Crime of Genocide.

15

A person is guilty of genocide if he acts with an intention as  
described in the Genocide Convention at Article 2.

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In the present Convention, genocide means any of the  
following acts committed with intent to destroy, in whole or  
in part, a national, ethnical, racial or religious group, as such:

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- (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 intended to prevent births  
within the group;
- (e) Forcibly transferring children of the group to  
another group.

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This intention is known as the *mens rea* of specific intention in  
criminal law as opposed to the concept of general intention.

1      The expression *dolus specialis* has been adopted by the *ad hoc* Tribunals to describe this requirement with respect to the criminal state of mind. To convict, an accused must have the intention to destroy, in whole or in part the group described  
5      in the Convention.

10     Proof of genocidal intent can be done by inference in the light of all the facts and does not require a specific plan. This intent must be proven beyond all reasonable doubt. If there is any alternative interpretation of the state of mind of the Defendant, the Prosecution will fail. The inference must be the only reasonable inference available on the evidence.

15     State liability is incurred if an organ of the State or a person or group whose acts are legally attributable to the State commits any of the acts described in Article III of the Convention.

20     The findings below are only made if the Tribunal is convinced beyond all reasonable doubt of the finding.

25     The evidence described above shows that Israel had invaded Lebanon illegally and had become an occupying force for part of Lebanon. Defendant Yaron was in charge of the occupation. As discussed below, this amounts to a Crime against Peace incurring the criminal responsibility of the State of Israel and the Defendant Yaron.

30     The evidence described above shows without doubt that the first Defendant and the IDF collaborated with the Phalangist militias and used the militias to carry out Israeli policy of destroying the Palestinian people. The first Defendant Yaron worked with the militias personally.

35     The evidence shows that a large number of men woman and children were killed. Most were Palestinian. There was little or no resistance to the invaders. This is a part of the Palestinian nation and as such satisfied the requirements of the Genocide Convention.

40     There is no room for doubt that the first Defendant Yaron had a thorough knowledge of the exactions being committed by the associated militias. The first Defendant actively sent these

militias into the Sabra and Shatila camps knowing what they would do. As reports emerged of their killings of unarmed civilians: men, woman and children, he failed in his duty as commander of an occupying and invading force to protect civilian population.

This evidence shows beyond all reasonable doubt that the first Defendant Yaron consciously refused to protect the Palestinian population in the Sabra Shatila camps. His responsibility however goes much farther. He and the Israeli army used the militias to destroy the Palestinian population in the camps. There was almost no resistance. The massacres were fully observed by the Israeli army from its vantage points. No persons could escape from the area cordoned off by the Israeli army. He was informed throughout about the progress of the massacre. The only inference reasonably possible is that Amos Yaron intended mass murder and that the Palestinian population be destroyed.

The Defence argued that Yaron did nothing to commit the crimes in Sabra and Shatila and cited exculpatory findings of the Kahan commission to attempt to clear Yaron for the charges.

This Tribunal is not bound by the Kahan Commission but its factual observations are useful in the search for truth. The Kahan Commission findings were made in Israel whereas the Tribunal is an international tribunal of opinion independent of Israel and the major powers. The Tribunal does not accept Defence arguments concerning the acts and omissions of the first Defendant Yaron.

The Defence argued that the Prosecutor erred in not accusing Ariel Sharon. As for the failure to accuse Ariel Sharon, it is up to the Prosecutor to decide whom to charge, and barring abuse or oblique motive by the Prosecutor, the Tribunal cannot intervene in Prosecutorial Discretion.

The Defence objected to the use of General Assembly resolutions to prove genocide. The finding of intent (to commit genocide) by the General Assembly is soft law but is useful in the context to help to evaluate the intention of Israel and Amos Yaron.

1      The Tribunal considers the actions of Amos Yaron as engaging his personal criminal liability.

5      Given the finding that the first Defendant Amos Yaron is personally responsible for the crimes committed, it declines to consider his liability for command responsibility.

10     The Tribunal will examine the facts proven in the light of the crimes provided for in the Charter, namely Crimes against Peace, Crimes against Humanity, Genocide and War Crimes, provided for in articles 8, 9, 10, and 11 of the Charter.

15     The Tribunal recalls the law with respect to cumulative convictions. The Appeals Chamber of the International Tribunal for former Yugoslavia held at paragraph 168:

20     168. The Appeals Chamber accepts the approach articulated in the *Ćelebići* Appeal Judgement, an approach heavily indebted to the *Blockburger* decision of the Supreme Court of the United States. The Appeals Chamber held that:

25     *"fairness to the Defendant and the consideration that only distinct crimes justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other."*

30     *Where this test is not met, the Chamber must decide on the basis of the principle that the conviction under the more specific provision should be upheld".*

35     The Tribunal will follow this principle.

40     Lebanon is a sovereign State which was invaded by Israel on 15 September 1982. The first Defendant Amos Yaron participated in this aggression of Lebanon and became Brigadier General of this occupation force. The Tribunal recalls the Nuremberg

## Principles I and VI

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Principle I states, "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".

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Principle VI states,

"The crimes hereinafter set out are punishable as crimes under international law:

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### (a) Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

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We recall the terms of the Nuremberg judgement under the pen of Mr Justice Birkett states:

"The charges in the Indictment that the Defendants planned and waged aggressive wars are the charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.

25

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from the other war crimes in that it contains within itself the accumulated evil of the whole".

30

The State of Israel has committed the mother of all international crimes by invading Lebanon and this has led the first Defendant Yaron to commit crimes against humanity and genocide.

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The Tribunal repeats the relevant parts of Article 9 of the Charter.

40

*Crimes against humanity*

For the purpose of this Charter, "*crime against humanity*" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- 10 (b) Extermination...;

The crime of extermination is the act of killing on a large scale. The expression "on a large scale" does not, however, suggest a numerical minimum. In addition to the threshold *mens rea* requirements for all crimes against humanity, the *mens rea* of extermination requires that the Defendant intend to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their deaths in a widespread or systematic manner.

20 The Tribunal has found above that the first Defendant Amos Yaron (and the second Defendant, the State of Israel) participated directly with the Lebanese militias in the mass murder and destruction of the Palestinians in Sabra and Shatila camps.

25 For this reason, the Tribunal finds the first Defendant Amos Yaron guilty of a crime against humanity as charged.

30 As found above, the first Defendant Yaron intended the mass murder and the destruction of the Palestinian population at Sabra and Shatila. This population constituted a national group as envisaged by the Genocide Convention. Not only did the first Defendant Amos Yaron intend the mass murder of these Palestinian refugees and their destruction as a group, he succeeded in killing of up to 3,500 Palestinians.

35 The first Defendant Amos Yaron intended the destruction of this part of the Palestinian people and therefore had the specific intent as required by Article 10 of the Charter.

40 The Tribunal notes that as Brigadier General of the Israeli Army

occupying force, the first Defendant Amos Yaron engages the criminal responsibility of the Israeli State implying the guilt of the Israeli State as was found in the Chapter of this Judgement on Charge 4.

The Tribunal finds the first Defendant Amos Yaron guilty as charged of genocide.

This Tribunal will decline to consider war crimes since the crimes against humanity are more specific. A war crimes conviction would be a cumulative conviction.

In relation to the charges against the State of Israel for genocide and war crimes, the Tribunal is conscious of the novelty of the issues raised. It wishes to confront these issues head-on with a view to furthering the ideals of international law and to interpret existing precedents in such a way as to make them as good as can be from the point of view of justice and morality.

We take note that the Prosecution did not pursue the charge of war crimes vigorously and instead concentrated on the charge of genocide. The Tribunal too will, therefore, confine itself to the issue of genocide.

The main legal points raised before us were the following:

Learned counsel for the *Amicus Curiae* Team argued that the general moral rule against retrospective laws prevents the Tribunal from hearing cases that occurred prior to its establishment on 6th June 2008. The charges against Israel relate to facts that occurred well before 2008.

This issue was raised by the *Amicus Curiae* Team as a preliminary objection and was unanimously rejected by the Tribunal for the following reason: the offences of genocide and war crimes for which the State of Israel is being charged were not created by the Charter. These offences have existed since the middle of the last century. The Charter sets up a machinery to investigate and prosecute these charges and to create a war crimes tribunal to adjudicate on them. The Charter does not specify any dates or time frames as was the case for the International Criminal Tribunal for the former Yugoslavia

(ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL).

Defence counsel was magnanimous to concede that open-ended temporal jurisdiction did indeed exist for the Nuremberg Tribunal, the Tokyo Tribunal and under the US Military Commission Act 2006 for the Guantanamo detainees.

The Tribunal holds that as our Charter does not confine the Tribunal to any time frame, it is not prevented from adjudicating on events that occurred decades ago. The Tribunal notes that almost all international tribunals that deal with genocide are created to exercise jurisdiction over crimes committed well before the creation of the tribunal. The Tribunal holds that the jurisdiction of the Tribunal is open-ended and not confined to any time period. The Tribunal has full jurisdiction to try this case.

Learned Defence counsel argued that there cannot be a charge against the State of Israel because under Article 2(1)(iii) of the Charter and the Rules of Procedure and Evidence in Articles 2, 3, 4, 5, 11 and 12, the Charter envisages jurisdiction only over natural persons and not against nation States. However, Defence counsel conceded that the Charter in Article 2(1)(ii) permits jurisdiction over a "government". The Tribunal is of the view that being a Tribunal of Conscience, and created to investigate serious crimes, it must reject such technical and esoteric distinctions as between a "state" and a "government". States operate through their governments. The Tribunal will not refuse jurisdiction simply on this technical ground.

Further, it rules that Chapter III Article 6(b) of its Charter explicitly lays down that "if the charge involves a sovereign state, a current head of state/government or a former head of state/government, service of a copy thereof to any relevant Embassy or High Commission shall suffice..." This is conclusive proof that under its Charter, the Tribunal is empowered to try States as well as individuals.

Defence counsel submitted that international law does not allow the State of Israel to be impleaded as an accused. It

was submitted that no matter what the facts may be and how serious the alleged crime may be, the State of Israel enjoys absolute immunity in international law from being impleaded in a domestic court or tribunal unless it voluntary subjects itself to such jurisdiction.

1

To our mind, the impugned preliminary objection of the *Amicus Curiae* Team raises the need for an appraisal of the dichotomy between the concept of State Immunity on the one hand and the doctrine of *jus cogens* on the other.

10

The concept of State immunity stipulates that a State is immune from jurisdiction in a foreign court unless it consents.

On the other hand, the doctrine of *jus cogens* refers to that body of peremptory principles or norms recognised by the international community as a whole as being fundamental to the maintenance of an international legal order and from which no derogation is permitted.

15

As corollary to a study of these two doctrines, the following three questions need to be considered, namely:

- (a) What principles of law, relevant to the issue at hand, constitute *jus cogens*?
- (b) Can the doctrine of State Immunity be considered as having acquired the status of *jus cogens*?
- (c) If there is a conflict between two principles of law, one being a *jus cogens* but not the other, which should prevail?

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Well into the middle of the twentieth century, nations had accepted the proposition that a sovereign State could not be sued before its own municipal Courts. When that dogma ceased to exist, e.g. in the UK with the passage of the Crown Proceedings Act 1947, it was replaced by the equally unhelpful doctrine that a sovereign State was exempt from the jurisdiction of a foreign municipal court. The Latin maxim upon which the proposition is based was *par in parem imperium non habet*, i.e. an equal has no power over an equal.

- 1 This practice which provided *carte blanche* immunity to foreign States became known as the "Absolute State Immunity principle".
- 5 Support for the *Absolute State Immunity* principle can be found in most, if not all, of the cases, appearing in Bundle 3 of the authorities submitted by learned *Amicus Curiae* Team in support of their preliminary objection application. These cases include *The Schooner Exchange; Mighell v. Sultan of Johore; The Porto Alexandre Case; Duff Development Co. v. Kelantan Government; The Cristina Case, Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor and Jurisdictional Immunities of the State (Germany v Italy).*
- 10
- 15 Jurisdictional Immunities of the State (*Germany v. Italy; Greece Intervening*) was a 2012 International Court of Justice case where the Court, *inter alia*, found by a 14 to one majority, that the Italian Republic had violated its obligation to respect the immunity which the Federal Republic of Germany enjoyed under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945.
- 20
- 25 At page 10 paragraph 31 of their notes on Preliminary Objection, Defence Counsel, quoted a passage from the second edition of Judge Tunku Sofiah's work, *Public International Law – a Malaysian Perspective*, as follows:
- 30 "Judgments... of the International Court of Justice are always considered as pronouncements of what the most authoritative international judicial body holds to be in international law on a given point, having regard to a given set of circumstances."
- 35 The learned Judge Tunku Sofiah, however, agrees with us that the outdated concept of Absolute State Immunity must be read along with other compelling considerations relevant to our times and especially to the situation before us.
- 40 Laws, unless they concern that of the Almighty, can neither be immutable nor static. And when justice so demands, through the passage of time, shifts and changes to laws that are unjust invariably take place.

In some countries, like China, for example, the State jealously guards the "absolute" concept of State Immunity and denies any attempt by anyone to implead a State unless that State consents.

Other States prefer a "restrictive" interpretation of the concept and allow immunity to States only in respect of the States' "public" acts as opposed to their "private" ones.

As evidence of State practice, one can point to the example of the United States. It is to the credit of the United States Government, that through a proposal made in a letter by the U.S. State Department's Acting Legal Adviser, Jack B. Tate, to the Acting Attorney-General dated 19 May 1952, there was a shift in policy of the U.S. Government from support for the absolute theory of State immunity to support for the restrictive theory.

Let us now briefly turn to the subject of *jus cogens*. What principles of law, relevant to the issue at hand, constitute *jus cogens*?

If one were to look into the jurisprudence of the ICJ as well as that of national courts, there are numerous instances where the prohibition on genocide as a *jus cogens* norm of international law has been recognised. See, for example:

- (a) the ICJ judgment in the *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6 at para 64;
- (b) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 26 Feb. 2007 (ICJ Judgment) at paragraphs 161, 162, 173 & 174. A historical account of the Convention reveals many currents and cross-currents. But what is clear is that obligations relating to the prevention and punishment of genocide are part of customary international law (para 161). The undertaking is unqualified (para 162). There is dual responsibility on the part of individuals as well as the State. "Genocide is an

international crime entailing national and international responsibility on the part of individuals and States" (A/RES/180(II)) (paras 161 &163). "Contracting parties are bound by the obligations under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred" (para 179).

- (c) "Duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law".
- (d) "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for international wrongful conduct by the Prosecution and punishment of the State officials who carried it out" (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10,2001 Commentary on Article 58, para 3).
- (e) *Requests for Provisional Measures*, 13 Sept. 1993 (ICJ Rep.325) Separate Opinion of Judge Lauterpacht at para. 100.

Eminent scholars of international law, such as M. Bassiouni<sup>42</sup>, too, have confirmed the prohibition on genocide as a *jus cogens* norm of international law.

So has the influential *Restatement on Foreign Relations of the United States.*

1

We can find no legal authority which states that the doctrine of State Immunity has acquired the status of *jus cogens*, that Latin tag which, in English, simply means "compelling law".

5

On the other hand legal authorities abound that as a source of law, *jus cogens* is hierarchically higher.

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It is also trite law that where there is a conflict between two principles of law, the one hierarchically higher in importance should prevail.

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To our mind the international law doctrine against impleading a foreign State, being hierarchically lower in importance than that of the prohibition against genocide, resulted in the Charge against the State of Israel to be maintained for full trial.

20

By the so-called "Tate Letter", the United States confers immunity on foreign States only for their public and governmental acts, but not their commercial activities. It is worth observing that the commission of a war crime or genocide or crime against humanity can never be a sovereign or governmental act.

25

This preference for restrictive State immunity was given statutory effect in the United States by the Foreign Sovereign Immunities Act of 1976.

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The United Kingdom came later in 1976 in adopting the restrictive immunity approach. That occurred in the case of *The Philippine Admiral*<sup>43</sup> where the Privy Council held that in cases where a State-owned merchant ship involved in ordinary trade was the object of a writ, it would not be entitled to sovereign immunity and the litigation would proceed.

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In 1978 the State Immunity Act of 1978, adopting a restrictive approach, was enacted by the United Kingdom. Since then, these two legislations have been served as a model for the national legislations of other countries including

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1 Australia, Canada, Pakistan, Singapore, South Africa  
and Malaysia.

5 The Tribunal finds it rather mind-boggling when some courts  
can consider commercial disputes as a reason for not allowing  
a State to be shielded by the State Immunity principle and  
yet strenuously protect such a State in cases of genocide or  
other war crimes. Human lives cannot be less important than  
financial gain!

10 There have been other inroads into the domain of the State  
Immunity principle including the following:

15 (a) In 1972, the *European Convention on State Immunity* 1972  
was executed. That became the first attempt to establish  
an international legal regime for State immunity on the  
basis of the restrictive doctrine. It is already in force  
amongst the signatory States.

20 (b) In 2004, the *United Nations Convention on Jurisdictional  
Immunities of States and Their Property* was adopted by  
the General Assembly but this has yet to come into force.

25 (c) And not too long ago, both the United States and Canada  
enacted legislation to permit their respective citizens or  
permanent residents to institute proceedings against  
States which harbour terrorists.

30 (d) In the law of the European Union, member States, can  
be subjected to hefty fines for violations of EU law.  
The consent or non-consent of the State is irrelevant.  
It is the State and not individual State actors who are  
defendants in EU courts. The subjection of the State to  
the jurisdiction of the EU courts flows automatically  
from membership of the EU.

35 (e) In a jurisprudential, Hohfeldian analysis, the concepts of  
legal right and legal duty are co-relatives of each other.  
If a State has legal duties under international law, then  
someone must have a corresponding legal right against  
the State. Defence counsel confirmed for us that the State  
of Israel is a signatory to the Genocide Convention. It

has never repudiated the Convention. In fact it has its own law on Genocide that it enacted to conduct genocide trials in Israel like the one in the Eichmann case. We hold that Israel's voluntary subjection to the Genocide Convention imposes on it enforceable duties that it cannot repudiate by simply refusing to give consent to a proceeding against it on a charge of genocide.

- (f) Like all other areas of law, international law is not static and is evolving to meet the felt necessities of the times. The Tribunal is conscious that the concept of State sovereignty is in decline. In the human rights era in which we are living, State sovereignty is a shield against foreign aggression. It cannot be used as a sword against one's own nationals or the nationals of another territory. If a sitting head of a sovereign State like the President of Sudan (who personifies the State of Sudan) can be indicted for certain heinous crimes against international law, then it does not make sense to submit that a sovereign State can never be held accountable in international courts without its consent. This will not be in line with modern developments in international law. Witness for example the opinion in the Bosnia case which the Tribunal referred to earlier.
- (g) It was submitted to us that the rationale for excluding the State from prosecution and instead directing the Prosecution at natural persons is that if a State is visited with a verdict of 'guilty' that verdict would be onerous to the entire, innocent population of the State. Touching though this argument is, it is not consistent with a large body of international law e.g. the Charter of the United Nations where measures are prescribed which would amount to collective punishment of the entire population. Under Article 41 the Security Council may authorise complete or partial interruption of economic relations. Embargoes that may devastate innocent lives may be imposed. Under Articles 42 and 44, war measures including the use of force may be employed against a nation. Under Article 5, membership of a nation to the General Assembly can be suspended. Under Article 6, a member can be expelled.

- 1 A system of law must have coherence. Its different parts must, in the words of the great jurist Ronald Dworkin, have a "fit".  
5 The idea of absolute State immunity from prosecution for grave crimes like genocide appears inconsistent with other wholesome developments in international law. Absolute State immunity is an antiquated doctrine and given the choice between precedents, this Tribunal is inclined to break free of the icy grip of this past dogma.
- 10 All these go to show that concerted efforts are taking place on the international scene to move towards a less restrictive State Immunity doctrine. In the words of Lord Denning:
- 15 *The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign State should not be impleaded in the Courts of another sovereign State against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilised nations of the world. All nations agree upon it. So it is part of the law of nations.*
- 20 To my mind [so Denning continued], this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The Courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law upon the subject.
- 25
- 30 It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the Courts of this country to define the rule as best they can, seeking guidance from the decisions of the Courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it.
- 35
- 40 Another reason why the Tribunal wishes to reject the doctrine of Absolute State Immunity from prosecution in matters of genocide, war crimes and crimes against humanity is

that the existing international law on war and peace and humanitarianism is being enforced in a grossly inequitable manner. Small, weak nations, mostly in Africa and Asia, are periodically subjected to devastating sanctions, military interventions and regime changes. At the same time, unbearable atrocities and brutalities that are inflicted on the militarily weak nations of Latin America, Africa and Asia by powerful nations in the North Atlantic and their allies go unscrutinised and unpunished.

We take note that the Israeli perpetrators of Sabra and Shatila were never punished and instead rewarded. We took note of the *Jerusalem Post* story of Nov. 22, 2013. On January 3, 2009, 100 members of the al-Sammouni family huddled inside a house. In the morning mist, an Israeli airstrike killed 21 people inside. Yet last week the Military Advocate General of the IDF informed *B'Tselem* (human rights group in Israel) that he had decided to close the investigation into this incident without taking any measures.

In the light of this reality that horrendous wrongs go unpunished and instead the victim is demonised and brutalised, we feel that it is time for the legal world to bring some juristic balance to our exposition of State immunity and international rights and wrongs and to expose the truth. This is what the Charter requires us to do.

Simply put, genocide means any designated acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group as such. The definition of genocide as given in Article 2 of the Charter is taken verbatim from Articles 2 & 3 of the Convention on the Prevention and Punishment of the Crime of Genocide which states that the following acts may by themselves or cumulatively constitute the international crime of genocide:

- (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.

- 1 (d) Imposing measures intended to prevent births  
within the group.  
(e) Forcibly transferring children of the group to  
another group.

5 No significant evidence was introduced by the Prosecution Team in relation to acts (d) & (e) above, but we heard 11 witnesses and examined thousands of pages of documents relating to acts (a)-(c). The Prosecution repeatedly used the words "ethnic cleansing" and the Tribunal regards ethnic cleansing as part of acts (a) to (c) above.

10 The central issue before us was whether genocidal acts took place contrary to Article 2 of the Convention (Part 1, Article 15 of the Charter).

15 The Tribunal heard 11 witnesses and examined documentary evidence that clearly indicated a long catalogue of incredible crimes conceived as long ago as 1945 and continuing till the present. What is significant is that these are not isolated acts in the heat of the moment but repeated pattern of atrocities committed against the inhabitants of Palestine.

- 20 • Forcible expulsion of more than 700,000 Palestinians from their homes.  
25 • Massacres of those who refused to abandon the land of their birth.  
• Repeated, periodic and massive killings through air and naval strikes using the most sophisticated weaponry over the last 65 years.  
30 • Brutal assaults on many refugee camps as for example in Sabra and Shatila. Israel's military action in Sabra and Shatila was condemned by no other than the 1983 Israeli Kahan Report. The report found Brigadier General Yaron to be complicit in the atrocities and massacres committed by the Lebanese Phalangists. As Brigadier General Yaron was a commanding officer of the IDF, his culpability has to be attributed to the State of Israel. The IDF sealed the camps and prevented any Palestinians from leaving. It allowed the Phalangist militias to enter the camp and to commit mass murders. The Kahan Report notes (Prosecution document volume 3, page 291)

that Brigadier General Yaron had no reservations about admitting the Phalangists into the camps; he testified that he was happy with his decision and explained his position in that "*We have been fighting here for four months already, and there is a place where they can take part in the fighting, the fighting serves their purposes as well, so let them participate and not let the IDF do everything*". Credible witnesses testified to us that women and children were shot in their homes; pregnant mothers were killed and their babies extruded from the wombs. Among the witnesses the Tribunal heard was the internationally respected medical doctor, Dr. Ang Swee Chai who testified to the magnitude of the atrocities and the fatalities that she witnessed first hand.

- Periodic seizure of Palestinian lands and farms and conversion of them into Israeli settlements. 15
- Building of a 190km long wall/fence which has been condemned by the ICJ (but whose construction has been rationalised by 2 Israeli Supreme Court decisions). 20
- Apartheid like conditions of affluence in the illegal settlements and extreme depravation in the Palestinian ghettos. Some roads are for the Jewish population only. 25
- Use of white phosphorus which tears out the insides of human bodies on the civilian population.
- Detention without trial and ill treatment of prisoners.
- Torture.
- Denial of adequate food, stealing of water resources, supply of inadequate quantum of water, and building materials.
- Land and sea blockades of Palestinian areas, especially in Gaza. 30
- Use of excessive force on Palestinian combatants armed with crude weapons and in some cases against children throwing stones.
- Siege and imprisonment of an entire nation.
- Daily humiliations at hundreds of checkpoints on Palestinian territory and impossible conditions of life. 35

The Tribunal heard moving testimony from credible witnesses that what has happened to them has happened to thousands 40 of their brethren.

1      The Tribunal also took note that many of the above atrocities committed by Israel over the last 67 years were, now and then, condemned by the UN Security Council, the UN General Assembly and other international organisations.

5      Chief Counsel for the *Amicus Curiae* Team presented to us an ingenious argument that there is no genocide in Palestine because the population of the Palestinians is continuing to grow. Unless there is a significant decrease in population, 10     there can be no genocide he asserted. The Tribunal finds this submission totally insensitive and inhuman. It is internationally documented that nearly 700,000 Palestinians were driven from their homes to lead nomadic and deprived lives in neighbouring lands where they are not generally welcomed. The fact that the remaining population of Palestine 15     after the ethnic cleansing in the mid 1940s continues to show modest growth has not disproved the existence of periodic killings, humiliation, and dehumanisation.

20     In determining whether genocide has been committed, one cannot play a game of numbers. Even if one person is killed on account of his race, ethnicity or religion with intention to kill others for the same reason, that is genocide.

25     It is impossible for the members of the Tribunal to disregard clear cut evidence of brutalisation, demonisation and dehumanisation of an entire population. It is incredible that in an age of human rights, such atrocities can continue to rage for more than 6 decades and that there are people in nations 30     who trivialise such inhumanity. The Tribunal unanimously holds that the acts committed against the Palestinians amount to genocide over the last 67 years.

35     The Tribunal must however clarify that it takes note of the violations of international humanitarian law by some members of the Palestinian community. Their prosecution and guilt is a separate matter.

40     As the Tribunal has stated earlier, the Tribunal heard 11 witnesses and examined documentary evidence that clearly indicated a long catalogue of incredible crimes conceived as long ago as 1945 and continuing till the present. What is

significant is that these are not isolated acts in the heat of the moment but repeated pattern of atrocities committed against the dispossessed inhabitants of Palestine.

What is also significant is that the above culpable acts are systematically directed against the same group and by the same offender over the last 67 years. The scale of atrocities committed and their general nature indicate a clear genocidal intention.

Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia stated that the specific intent of the crime of genocide "... may be inferred from a number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article IV or the repetition of destructive and discriminatory acts". The Tribunal accepts evidence from various internationally respected social scientists among them Prof Ilan Pappe and John Pilger and Prof Noam Chomsky that the ethnic cleansing of Palestine is a world historic tragedy that is the result of deliberate State policies of succeeding governments of Israel since 1948.

The Tribunal wishes to state that the test that it employed in determining guilt was the test of "beyond reasonable doubt".

The Tribunal heard significant evidence from the *Amicus Curiae* Team that Israeli actions of bombing, killing, maiming, other military interventions, curfews, checkpoints and "apartheid walls" were in response to continuous Palestinian terrorism.

The Tribunal agrees that there is cogent evidence of Palestinian resistance to Israeli presence, incidences of suicide bombing, and firing of crude rockets into Israeli territory by Palestinian fighters. However it is our finding that much of the Palestinian generated violence is not on Israel's own territory, but from and on Israeli occupied Palestinian land. Much of the violence perpetrated by Palestinians is a reaction to the brutalities of the vicious racism, brutalities and genocide that is a tragic feature of Palestinian life.

Much as we condemn violence and pray for peace, it must be stated that no power on earth can douse the flame of freedom from the human spirit. As long as there is suppression, there

1 will always be people prepared to die on their feet than to live  
on their knees.

5 We also hold that the force employed by the IDF is excessive,  
totally disproportionate and a violation of international  
humanitarian law. The methods used are unspeakably  
inhumane and amount to war crimes.

10 We unanimously find the State of Israel guilty as charged.

15 After considering the evidence adduced by the Prosecution  
and submissions by both the Prosecution and the *Amicus Curiae*  
Team on behalf of the two Defendants, the Tribunal is satisfied,  
beyond reasonable doubt, that the first Defendant, Amos  
Yaron, is guilty of Crimes Against Humanity and Genocide and  
the second Defendant, the State of Israel is guilty of Genocide.

20 10.1 The Tribunal orders that reparations commensurate  
with the irreparable harm and injury, pain and suffering  
undergone by the Complainant War Crime Victims be  
paid to them. While it is constantly mindful of its stature  
as merely a Tribunal of Conscience with no real power of  
enforcement, this Tribunal finds that the witnesses in this  
case are entitled *ex justitia* to the payment of reparations  
25 by the two convicted parties. It is the Tribunal's hope  
that armed with the Findings of this Tribunal, the  
witnesses (victims in this case) will, in the near future,  
find a State or an international judicial entity able and  
willing to exercise jurisdiction and to enforce the verdict  
30 of this Tribunal against the two convicted parties. The  
Tribunal's award of reparations shall be submitted to the  
War Crimes Commission to facilitate the determination  
and collection of reparations by the Complainant War  
Crime Victims.

35 10.2 **International Criminal Court and the United Nations,  
Security Council** - As a Tribunal of Conscience,  
the Tribunal is fully aware that its verdict is merely  
declaratory in nature. We have no power of enforcement.  
What we can do, under Article 34 of Chapter VIII of Part  
40 2 of the Charter is to recommend to the Kuala Lumpur  
War Crimes Commission, WHICH WE HEREBY DO,

to submit this finding of conviction by the Tribunal, together with a record of these proceedings, to the Chief Prosecutor of the International Criminal Court, as well as the United Nations and the Security Council.

10.3 **Commission's Register of War Criminals** - Further, under Article 35 of the same Chapter, this Tribunal recommends to the Kuala Lumpur War Crimes Commission that the names of the two convicted parties herein be entered and included in the Commission's Register of War Criminals and be publicised accordingly.

10.4 The Tribunal recommends to the Kuala Lumpur War Crimes Commission to give the widest international publicity to this conviction and grant of reparations, as these are universal crimes for which there is a responsibility upon nations to institute prosecutions.

10.5 The Tribunal deplores the failure of international institutions to punish the State of Israel for its crimes and its total lack of respect of International Law and the institutions of the United Nations. It urges the Commission to use all means to publicise this Judgement and in particular with respect to the Parliaments and Legislative Assemblies of the major powers such as members of the G8 and to urge these countries to intervene and put an end to the colonialist and racist policies of the State of Israel and its supporters.

Having delivered its verdict and consequential orders, this Tribunal wishes to place on record its deep appreciation to both the Prosecution and the *Amicus Curiae* Teams for their efforts in ensuring that this resumed Hearing was able to be conducted in the best tradition of the Bar.

The Tribunal commends Co-Prosecutors Prof Gurdial Singh Nijar and Tan Sri Abdul Aziz Abdul Rahman and the other members of their team for their thorough preparation of their case.

The Tribunal also commends every single member of the *Amicus Curiae* Team for accepting their difficult assignment as

1 friends of the court and for giving their all beyond their call  
of duty in the name of justice and fair play for their absent  
Defendants. Mr Jason Kay, Ms. Larissa Jane Cadd and Dr.  
Matthew Witbrodt, all of whom had addressed the Tribunal  
5 during the Hearing, meticulously presented the case for the  
Defendants with extraordinary fidelity even though none of  
them had met or had been instructed by the Defendants.

10 Finally, the Tribunal extends its thanks to members of the  
Malaysian public and other benefactors who had generously  
contributed to the Kuala Lumpur Foundation to Criminalise  
War in financing the holding of this adjourned Hearing.

15 **Ms. Fiffy Armiza Muhammad Sahit (Assistant Registrar):**

All rise.

(6.00pm)

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