

**Communication**  
**to the Office of the Prosecutor of the International Criminal Court**

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**Responsibility of the President of the European Commission**  
**for aiding and abetting the commission of war crimes, crimes against humanity**  
**and genocide by the Israeli military forces in the Gaza Strip**

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## Executive Summary

1. A communication is submitted to the Office of the Prosecutor of the International Criminal Court (ICC), setting forth in detail, through facts and evidence, that there are reasonable grounds to believe that the current president of the European Commission, Mrs. Ursula von der Leyen, a national of Germany, is complicit in a number of violations of international humanitarian law, amounting to crimes within the jurisdiction of the ICC, committed by the Israeli armed forces (IDF) against Palestinian civilians in the Occupied Palestinian Territory (OPT), including the Gaza Strip.
2. This communication, made pursuant to Article 15 of the Rome Statute of the ICC, calls the Prosecutor to initiate investigations *proprio motu* on the basis of the information provided against Mrs. Ursula von der Leyen.
3. Mrs. Ursula von der Leyen shall be criminally responsible and liable for punishment for some of the war crimes, crimes against humanity and genocide having been committed (and still being committed) by the Israeli armed forces in the OPT, to the extent that she has aided, abetted and otherwise assisted in the commission or attempted commission of such crimes, including providing the means for its commission, in the meaning of Article 25(3)(c) of the Rome Statute of the ICC.
4. Mrs. Ursula von der Leyen has done so, through a range of positive acts as well as omissions, in her official capacity as president of the European Commission. Positive acts include the following:
  - **Military support** to Israel: Mrs. von der Leyen, in her official capacity as president of the European Commission, has been instrumental in securing the provision of means, under the form of military support, to the IDF. During the period 2019-23, Israel has been the 3<sup>rd</sup> main recipient of weapons provided by a EU Member State, Germany, itself the 5<sup>th</sup> largest exporter of major arms in the world (Germany's share in global arms exports is 5,6%). Israel received during that period 12% of Germany's total exports of military equipment.
  - **Economic and financial support** to Israel: both by refusing to take any steps toward the suspension of the EU-Israel Association Agreement

(despite the human rights clause in that instrument calling for such suspension in accordance with the EU policy on conditionality of international agreements), and by promoting, amidst the current Israeli assault on Gaza, new EU-Israel cooperation instruments.

- **Diplomatic support** to the Israeli government: this appears to be a response to the demand formulated by Prime Minister Netanyahu on 7 October 2023, on the international community “to ensure freedom of action for Israel in the continuation of the campaign”. The diplomatic support enjoyed by Israel has been the condition *sine qua non* of the perpetration of war crimes, crimes against humanity and genocide plausibly committed by the IDF in the Gaza Strip since 7 October.
  - **Political support**: the various official statements of Mrs. von der Leyen expressing unconditional support to Israel have amounted to (and could not reasonably be understood otherwise than) giving encouragement and moral support to members of the IDF, who were (and still are) involved in the commission of crimes against the Palestinian population in the OPT.
5. The President of the European Commission had knowledge of participating, by aiding and abetting, in the commission of the relevant crimes. Given the wide publicity given on a daily basis to the violations of international humanitarian law perpetrated by the IDF in the Gaza Strip, especially since October 2023, and the wealth of official United Nations reports and documents available, which as a matter of fact have prompted numerous UN officials - including the UN Secretary-General – to express their utmost concern, Mrs. von der Leyen cannot escape the simple fact that she knew of such crimes, or at the very least she knew of the plausibility of such crimes, as was found by the ICJ in its Order on provisional measures of 26 January 2024 as regards genocide. Even under the “plausibility” standard, she should have taken every possible action at her disposal to prevent the continued commission of such crimes, and at the very least not to facilitate in any manner the commission of these crimes, as she unfortunately did.
6. The President of the European Commission has also failed to act to prevent the commission of the relevant crimes. She is thus complicit by omission. Indeed:
- President von der Leyen was, and still is, under a legal duty to act in the circumstances considered, to the extent that international law places upon a person vested with public authority a duty to act in order to protect human life.
  - President von der Leyen had, and still has, the ability to act; means were (and still are) available to her to fulfil her duty to act. This is confirmed by actions taken by the European Commission under her presidency, in other contexts, to prevent the commission of war crimes and curtail the ability of certain powers to conduct military operations (e.g. international

sanctions against the Russian Federation in the context of the conflict in Ukraine).

- Should President von der Leyen have acted pursuant to her legal duty to act, rather than sought to “ensure freedom of action for Israel in the continuation of the campaign”, the crimes would have been substantially less likely to occur, or at the very least to be perpetrated over such a long period of time, and on such a scale and magnitude.

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**A. Introduction**

1. The present communication is addressed to the Office of the Prosecutor (hereinafter “**OTP**”) of the International Criminal Court (hereinafter the “**ICC**” or the “**Court**”), pursuant to Article 15 of the Rome Statute of the ICC<sup>1</sup>, according to which the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. The present communication provides such information regarding the case of the President of the European Commission, Mrs. Ursula von der Leyen.

2. It is demonstrated in the present communication, through facts and evidence, that there are reasonable grounds to believe that Mrs. Ursula von der Leyen is complicit in a number of violations of international humanitarian law, amounting to crimes within the jurisdiction of the Court, committed by the Israeli armed forces (officially named “Israeli Defence Forces” or “**IDF**”) against Palestinian civilians in the Occupied Palestinian Territory (hereinafter the “**OPT**”), including the Gaza Strip. Put otherwise, the present communication asserts that Mrs. Ursula von der Leyen shall be criminally responsible and liable for punishment for some of the war crimes, crimes against humanity and genocide having been committed (and still being committed) by the Israeli armed forces in the OPT, to the extent that she has aided, abetted and otherwise assisted in the commission or attempted commission of such crimes, including providing the means for its commission, in the meaning of Article 25(3)(c) of the Rome Statute of the ICC. The present communication also demonstrates that Mrs. Ursula von der Leyen has done so, through a range of positive acts as well as omissions, in her official capacity as president of the European Commission, in full knowledge of the

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<sup>1</sup> Rome Statute adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, in force on 1 July 2002, *United Nations, Treaty Series*, vol. 2187, No. 38544.

fact that her actions and omissions would render substantial assistance to the perpetrators of the crimes concerned; so that she is to be deemed to have acted “for the purpose of facilitating the commission of such [] crime[s]”, for the purposes of Article 25(3)(c) of the Rome Statute.

3. The present communication is structured as follows. It first sets out briefly the jurisdiction of the ICC (**Section B**). It then provides a factual summary of the various acts, including statements of Mrs. Ursula von der Leyen, that may qualify as complicity by mode of aiding and abetting in crimes committed by the IDF against Palestinian civilians in the OTP, including the Gaza Strip, and provides the relevant factual background of these statements and actions, i.e. the genocidal statements of Israeli officials contemporary to these statements and actions, as recorded by a number of open sources, and identified as such by the ICJ,<sup>2</sup> and the contemporary records of violations of international humanitarian law committed by the IDF (**Section C**). It then briefly recalls the principles governing complicity by mode of aiding and abetting in the meaning of Article 25(3)(c) of the Rome Statute of the ICC, as clarified by the jurisprudence of international criminal courts and tribunals (**Section D**), before applying these principles to the facts summarised in Section B, i.e. the relevant statements, actions and omissions of Mrs. Ursula von der Leyen, demonstrating that the relevant statements and actions satisfy all accepted criteria for complicity by mode of aiding and abetting (**Section E**). The communication finally briefly addresses issues of complementarity (**Section F**) and gravity (**Section G**).

## B. Jurisdiction

4. It is respectfully submitted that the OTP can be satisfied that the crimes referred to in this communication fall within the jurisdiction of the ICC. The following paragraphs establish that all relevant jurisdictional requirements are met.

5. With respect to jurisdiction *ratione materiae*, we refer to the allegations and legal analysis provided respectively in Section C (*Factual background*) and E (*Complicity by aiding and abetting in the context of support to Israeli actions*) below.

6. It is submitted that jurisdiction *ratione personae* also exists since the crimes described in the present communication have been committed by a national of a State Party to the Rome Statute, i.e. the Federal Republic of Germany.

7. As regards jurisdiction *ratione temporis*, the acts referred to in the present communication occurred since October 2023, i.e. after the entry into force of the Rome Statute both in general (1 July 2002) and in relation to Germany (1 July 2002) and Palestine (1 April 2015).

8. Finally, as regards jurisdiction *ratione loci*, it is submitted that the crimes described in the present communication have been committed both on the territory of States Parties to the Rome Statute, i.e. Belgium (where the European Commission has its seat and Mrs. von der Leyen exercises her functions) and Germany (of which Mrs. von der Leyen is a national), and in the specific case of complicity which forms the subject-matter of the present

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<sup>2</sup> See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 26 January 2024 (*Provisional measures*), para. 52.

communication, that these acts (i.e. aiding and abetting the crimes of the principals) have occurred in relation to, and have facilitated the commission of, war crimes, crimes against humanity and genocide, perpetrated on the territory of another State Party to the Rome Statute, i.e. Palestine.

### C. Factual background

9. The present communication intends to present selected statements and actions by European Commission President Ursula von der Leyen, that may qualify as complicity by mode of aiding and abetting in crimes committed by the IDF against Palestinian civilians in the OPT, including the Gaza Strip.

10. These statements and actions are reported in the present communication in a non-exhaustive manner, and focus on early statements, made during the days and weeks immediately following the attacks conducted by Palestinian militant groups on 7 October 2023 against various IDF sites and Israeli settlements. Thus, the present communication may need to be supplemented from time to time in light of ongoing actions by President Ursula von der Leyen and of the situation unfolding on the ground in the OPT.

11. As regards such war crimes, crimes against humanity and genocide having been committed (and still being committed) by the Israeli armed forces in the OPT, the authors of the present communication respectfully submit that there is no need to set out in detail nor even in brief the record of such crimes, since the OPT is aware of their existence, amply documented by the media and collected and presented by NGOs and most of all by various official reports of United Nations organs, bodies and agencies.<sup>3</sup>

12. Following the attacks conducted by Palestinian militant groups on 7 October 2023, as early as **11 October 2023**, European Commission President Ursula von der Leyen stated, with reference to the attacks of 7 October, that “there can only be one response to it. Europe stands with Israel. And we fully support Israel's right to defend itself”. She added: “I spoke with President Herzog and conveyed to him my full support”.<sup>4</sup> On the same day (11 October 2023), she attended a ceremony “in solidarity with the victims of the terror attacks in Israel” at the European Parliament during which the President of the European Parliament Roberta Metsola referred to the 7 October attacks as “the worst terrorist attack in generations”. Addressing Israeli Ambassador Regev, Metsola stated: “We stand with you”.<sup>5</sup>

13. At the time when these early expressions of unconditional support for Israel were voiced, various genocidal statements had already been issued publicly by the highest Israeli

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<sup>3</sup> See e.g. Report of the United Nations High Commissioner for Human Rights, Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, and the obligation to ensure accountability and justice (A/HRC/55/28), 4 March 2024.

<sup>4</sup> European Commission, ‘[Statement by President von der Leyen](#) on the occasion of the minute of silence held by the College in honour of the victims of the terrorist attacks in Israel, in presence of the ambassador of Israel to the EU’, 11 October 2023.

<sup>5</sup> European Parliament, [President Metsola in solidarity with the victims of the terror attacks in Israel](#), Press Release, 11 October 2023.



political and military leaders. For example, on 7 October 2023, in a televised address by the Government Press Office, Prime Minister Benjamin Netanyahu told the population of Gaza to “[l]eave now because we will operate forcefully everywhere”.<sup>6</sup> On 9 October 2023, Defence Minister Yoav Gallant in an Israeli Army ‘situation update’ advised that Israel was “imposing a complete siege on Gaza. No electricity, no food, no water, no fuel. Everything is closed. We are fighting human animals and we are acting accordingly”.<sup>7</sup> Gallant also informed troops on the Gaza border that he had “released all the restraints”,<sup>8</sup> stating in terms that: “Gaza won’t return to what it was before. We will eliminate everything. If it doesn’t take one day, it will take a week. It will take weeks or even months, we will reach all places”.<sup>9</sup> He further announced that Israel was moving to “a fullscale response” and that he had “removed every restriction” on Israeli forces.<sup>10</sup> On 8 October 2023, the Israeli Minister of Finance Bezael Smotrich stated at a meeting of the Israeli Cabinet that “[w]e need to deal a blow that hasn’t been seen in 50 years and take down Gaza”.<sup>11</sup>

14. Notwithstanding these statements, speaking to Israeli Prime Minister Netanyahu during her visit in Israel on **13 and 14 October 2023**, European Commission President Ursula von der Leyen strongly expressed her unconditional support for Israel in plain terms. Referring to the 7 October attacks as an “unspeakable tragedy”, she stated that “there is only one possible response: Europe stands with Israel. And Israel has a right to defend itself. In fact, it has the duty to defend its people. And we must call by their name the atrocities committed by Hamas. This is terrorism. This is an act of war. Nothing can justify what Hamas did. This is the time to stand in solidarity with Israel and its people. And this is why I am here”. She added: “Let me also be very clear that Hamas alone is responsible for what is happening”. “I know that how Israel responds will show that it is a democracy”.<sup>12</sup>

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<sup>6</sup> “The IDF will immediately use all its strength to destroy Hamas's capabilities. We will destroy them and we will forcefully avenge this dark day that they have forced on the State of Israel and its citizens. As Bialik wrote: 'Revenge for the blood of a little child has yet been devised by Satan'. All of the places which Hamas is deployed, hiding and operating in, that wicked city, we will turn them into rubble. I say to the residents of Gaza: Leave now because we will operate forcefully everywhere. To our beloved IDF soldiers, police officers and security forces personnel, remember that you are the continuation of the heroes of the Jewish people, of Joshua, Judah Maccabee and the heroes of 1948 and of all of Israel's wars. You are now fighting for the home and future of us all. We are all with you. We all love you. We all salute you. Today, I spoke with US President Biden and with other world leaders in order to ensure freedom of action for Israel in the continuation of the campaign. I thank President Biden for his strong and clear words. I thank the President of France, the Prime Minister of Great Britain and many other leaders for their unreserved support for Israel” – Ministry of Foreign Affairs of Israel, Press Release, [Statement by Prime Minister Benjamin Netanyahu](#), 7 October 2023.

<sup>7</sup> [Statement](#) by Israeli Defence Minister Yoav Gallant, 9 October 2023.

<sup>8</sup> [Video released](#) by the Israeli Ministry of Defense, Kipa News, 10 October 2023. Translation in Emanuel Fabian, “Gallant: Israel moving to full offense, Gaza will never return to what it was”, *The Times of Israel* (10 October 2023).

<sup>9</sup> [Video released](#) by the Israeli Ministry of Defense, Kipa News, 10 October 2023. Translation in “Israeli Defense Minister Warns Hamas ‘Will Regret’ Deadly Attacks”, *Bloomberg* (10 October 2023).

<sup>10</sup> Bill Hutchinson, [“Bombarded by Israeli airstrikes, conditions in Gaza grow more dire as power goes out”](#), *ABC News* (12 October 2023).

<sup>11</sup> [“By abducting over 100 people into Gaza, Hamas has put Netanyahu in a political bind”](#), *The Times of Israel* (8 October 2023).

<sup>12</sup> European Commission, [‘Statement by President von der Leyen with Israeli Prime Minister Netanyahu’](#), 14 October 2023.

15. This statement was made while two days before, on 12 October 2023, President Isaac Herzog had made clear that Israel was not distinguishing between militants and civilians in Gaza, stating in a press conference to foreign media — in relation Palestinians in Gaza, over one million of whom are children: “It’s an entire nation out there that is responsible. It’s not true this rhetoric about civilians not aware not involved. It’s absolutely not true. ... and we will fight until we break their backbone”.<sup>13</sup> Netanyahu, for his part, had already stated at that time (on 13 October 2023) that “[w]e are striking our enemies with unprecedented might”.<sup>14</sup> On 15 October 2023, when Israeli airstrikes had already killed over 2,670 Palestinians, including 724 children,<sup>15</sup> the Prime Minister stated that Israeli soldiers “understand the scope of the mission” and stand ready “to defeat the bloodthirsty monsters who have risen against [Israel] to destroy us”.<sup>16</sup> And the Israeli Minister of Energy and Infrastructure Israel Katz had already stated, on 13 October 2023: “All the civilian population in Gaza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world.”<sup>17</sup> The day before (12 October 2023), he had ‘tweeted’: “Humanitarian aid to Gaza? No electrical switch will be turned on, no water hydrant will be opened and no fuel truck will enter until the Israeli abductees are returned home. Humanitarianism for humanitarianism. And no one will preach us morality”.<sup>18</sup>

16. On 17 October 2023, back from her visit to Israel, von der Leyen addressed an extraordinary meeting of the European Council, with a reference to “another heinous terror attack perpetrated by Hamas on Israel. 1,400 Israelis and other nationals massacred in one single day. Hamas taking close to 200 hostages. We call for their immediate release. In Israel, I spoke to families. For example, a family whose 82-year-old grandmother had been abducted by Hamas; a mother that was desperately looking for her 22-year-old daughter, abducted by Hamas at the festival in Israel”.<sup>19</sup> “In the face of this”, von der Leyen asserted, “it is clear to everyone that Israel has the right to defend itself in line with international and humanitarian law”.<sup>20</sup> She then added: “But that is not all. Hamas’ terror is also bringing immense suffering to the Palestinian people”.<sup>21</sup> “So, we have to care for the Palestinian people and their

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<sup>13</sup> Rageh Omaar, [‘Israeli president Isaac Herzog says Gazans could have risen up to fight ‘evil’ Hamas’](#), ITV News 13 October 2023.

<sup>14</sup> [Address](#) by the Prime Minister of Israel, (13 October 2023). Translation in [“‘Only the beginning’ says Netanyahu as Israel makes first raids into Gaza”](#), Reuters (13 October 2023).

<sup>15</sup> UNICEF, [Immediate Needs Document in the State of Palestine \(October – December 2023\)](#) (17 October 2023), (Total as of 17:45, 15 October 2023; children as of 12:00, 14 October 2023)

<sup>16</sup> Israel Prime Minister’s Office, [PM Netanyahu asks Ministers to Rise for a Moment of Silence](#) (15 October 2023).

<sup>17</sup> 7 Israel Katz, Minister of Energy and Infrastructure, Member of the Political-Security Cabinet, Member of Knesset, @Israel\_katz, [Tweet](#) (6:01 pm, October 13, 2023).

<sup>18</sup> Israel Katz, Minister of Energy and Infrastructure, Member of the Political-Security Cabinet, Member of Knesset, @Israel\_katz, [Tweet](#) (7:34 am, October 12, 2023). Translation in [“First Thing: no power, water or fuel for Gaza until hostages are freed, Israel says”](#), *The Guardian* (12 October 2023).

<sup>19</sup> European Commission, [Opening statement by President von der Leyen at the joint press conference with President Michel on the occasion of the extraordinary meeting of the European Council](#), 17 October 2023.

<sup>20</sup> European Commission, [Opening statement by President von der Leyen at the joint press conference with President Michel on the occasion of the extraordinary meeting of the European Council](#), 17 October 2023.

<sup>21</sup> European Commission, [Opening statement by President von der Leyen at the joint press conference with President Michel on the occasion of the extraordinary meeting of the European Council](#), 17 October 2023.

humanitarian needs. There is no contradiction in standing in solidarity with Israel and acting for the humanitarian needs of the Palestinians.<sup>22</sup>

**17.** Then on **18 October 2023**, von der Leyen stated before the European Parliament: “Israel has the right to self-defence, in line with international law. Hamas are terrorists. And the Palestinian people are also suffering from that terror. And we have to support them. And there is no contradiction in standing in solidarity with Israel and acting on the humanitarian needs of the Palestinian people. I have visited Israel many times in my life. But this time, I saw a nation that is shocked to the core. I was struck to hear the same request from all the people I spoke to. From President Herzog, from Prime Minister Netanyahu, all forces in the unity government, from families of the abducted. They all asked for solidarity and clear words. And this is the least we can do for the people of Israel. This horror calls for a united response from us. As human beings, as defenders of a free world, as citizens of Europe where hate, terror and racism have no place. Europe stands with Israel in this dark moment”.<sup>23</sup> “This is the essential starting point. And I believe it was important to pass this message of solidarity in person, in Israel, just days after the Hamas attack. Only if we acknowledge Israel's pain, and its right to defend itself, will we have the credibility to say that Israel should react as a democracy, in line with international humanitarian law. And that it is crucial to protect civilian lives, even and especially in the middle of a war”.<sup>24</sup>

**18.** Two days before this address to the European Parliament, on **16 October 2023**, Israeli Prime Minister Netanyahu, in a formal address to the Israeli Knesset, had described the situation as “a struggle between the children of light and the children of darkness, between humanity and the law of the jungle”,<sup>25</sup> a dehumanising theme to which he returned on various occasions, including: on 3 November 2023, in a letter to Israeli soldiers and officers also published on the platform ‘X’ (formerly Twitter); the letter asserted that: “[t]his is the war between the sons of light and the sons of darkness. We will not let up on our mission until the light overcomes the darkness — the good will defeat the extreme evil that threatens us and the entire world”.<sup>26</sup> The Israeli Prime Minister also returned to the theme in his ‘Christmas message’, stating: “we’re facing monsters, monsters who murdered children in front of their parents [...] This is a battle not only of Israel against these barbarians, it’s a battle of civilization against barbarism”.<sup>27</sup> On 28 October 2023, as Israeli forces prepared their land invasion of Gaza, the Prime Minister invoked the Biblical story of the total destruction of Amalek by the Israelites, stating: “you must remember what Amalek has done to you, says

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<sup>22</sup> European Commission, [Opening statement by President von der Leyen at the joint press conference with President Michel on the occasion of the extraordinary meeting of the European Council](#), 17 October 2023.

<sup>23</sup> European Commission, [Speech by President von der Leyen](#) at the EP Plenary debate on the despicable terrorist attacks by Hamas against Israel, Israel's right to defend itself in line with humanitarian and international law and the humanitarian situation in Gaza, 18 October 2023.

<sup>24</sup> European Commission, [Speech by President von der Leyen](#) at the EP Plenary debate on the despicable terrorist attacks by Hamas against Israel, Israel's right to defend itself in line with humanitarian and international law and the humanitarian situation in Gaza, 18 October 2023.

<sup>25</sup> Israel Ministry of Foreign Affairs, [Press Release](#): Excerpt from PM Netanyahu's remarks at the opening of the Winter Assembly of the 25th Knesset's Second Session, 16 October 2023.

<sup>26</sup> Prime Minister's Office in Hebrew, [@IsraeliPM\\_heb](#), [Tweet](#) (11:44 am, November 3, 2023).

<sup>27</sup> Israel Ministry of Foreign Affairs, [Christmas message](#) from PM Netanyahu, 24 December 2023.

our Holy Bible. And we do remember”.<sup>28</sup> The Prime Minister referred again to Amalek in the letter sent on 3 November 2023 to Israeli soldiers and officers.<sup>29</sup> The relevant biblical passage reads as follows: “Now go, attack Amalek, and proscribe all that belongs to him. Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses”.<sup>30</sup>

**19.** It is to be noted that in that context, hundreds of EU officials and staff in a confidential letter to von der Leyen on **21 October 2023** criticized her for “the *unconditional support* by the Commission [she] represent[s] for one of the two parties”. “We hardly recognize the values of the EU in *the seeming indifference demonstrated over the past few days by our Institution* toward the ongoing massacre of civilians in the Gaza Strip, in disregard for human rights and international humanitarian law”. They denounced a “patent show of double-standards which considers the blockade (water and fuel) operated by Russia on the Ukrainian people as an act of terror whilst the identical act by Israel against the Gazan people is completely ignored. We cannot remain silent observers when the Institution you represent as President not only has been unable to halt the Palestinian tragedy unfolding for decades in full impunity, but by its recent unfortunate actions or positions *seem to give a free hand to the acceleration and the legitimacy of a war crime in the Gaza Strip*”.<sup>31</sup>

**20.** On **22 October 2023**, Mrs. von der Leyen reiterated previous statements during a speech to the youth organization of her German CDU/CSU political group in Braunschweig, Germany. While stating that any Israeli defense against the Hamas terrorist group must be “in accordance with international law,” she stressed that “[t]here is no contradiction in standing in solidarity with Israel and providing humanitarian aid in Gaza.”. She also compared Israel’s role in the conflict to Ukraine’s defense against Russian aggression: “All these conflicts have one thing in common: they are about the struggle between those who seek peace, balance, freedom and cooperation — and those who do not want any of this because they profit from the chaos and disorder”.<sup>32</sup>

**21.** This brief summary of statements made and actions taken by President von der Leyen, against the background of some of the most striking public genocidal statements and war crimes committed by the IDF in the Gaza Strip, could be indefinitely expanded to the present day. It has been deemed unnecessary by the authors of the present communication to add to this brief summary, even if documentary evidence of similar statements and actions may need to continue to be collected.

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<sup>28</sup> [Address](#) by the Prime Minister of Israel, 28 October 2023. Translation [in “Israel-Hamas war: 'We will fight and we will win', says Benjamin Netanyahu”](#), *Sky News* (28 October 2023).

<sup>29</sup> Prime Minister’s Office in Hebrew, @IsraeliPM\_heb, [Tweet](#) (11:43 am November 3, 2023).

<sup>30</sup> I Samuel 15:1-34.

<sup>31</sup> [Letter](#) from 850 EU officials and staff to EC President von der Leyen, 21 October 2023 (emphasis added).

<sup>32</sup> See Politico, [‘Von der Leyen doubles down on pro-Israel stance, lashes out at Iran’](#), 22 October 2023.

## D. General standards of complicity in international criminal law

22. Article 25 para. 3 of the Rome Statute (*Individual criminal responsibility*) provides for the criminal responsibility for complicity of those ‘aiding and abetting or otherwise assisting’ the commission of crimes covered by the jurisdiction of the Court, in the following terms:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

[...]

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

23. The terms ‘aiding and abetting’ in the context of the ICC are not interchangeable: the wording of Article 25(3)(c) of the ICC Statute indicates that each of them has its own meaning.<sup>33</sup> More specifically, ‘aiding’ refers to the provision of practical or material assistance to the commission of a crime, while ‘abetting’ denotes the provision of encouragement or moral support to the commission of a crime. Aiding and abetting is therefore an accessorial mode of liability where the accused is alleged to have facilitated the commission (or, at least, the attempted commission) of crimes by others (i.e. the principals).<sup>34</sup>

24. The wording of Article 25(3)(c) also makes clear that aiding and abetting are just two ways of other possible forms of ‘assistance’, the latter thus serving as a sort of umbrella term.<sup>35</sup> Thus, ‘providing the means’ for the commission of a crime is merely a special example of assistance.<sup>36</sup>

### 1. The material element (*actus reus*) standard of complicity

25. As far as the material element (*actus reus*) is concerned, the following elements of ‘aiding and abetting’ liability, as per Article 25(3)(c) of the ICC Statute, and in light of the jurisprudence of *ad hoc* and hybrid international criminal tribunals, are well established and not controversial:

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<sup>33</sup> A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese, P. Gaeta, J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), vol. I, p. 798.

<sup>34</sup> M.J. Ventura, ‘Aiding and Abetting’, in J. de Hemptinne, R. Roth and E. van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge: Cambridge University Press, 2019) 173-256, para. 2. See also A. Eser, ‘Individual Criminal Responsibility’, supra note 33, vol. I, p. 798.

<sup>35</sup> A. Eser, ‘Individual Criminal Responsibility’, supra note 33, vol. I, p. 798.

<sup>36</sup> A. Eser, ‘Individual Criminal Responsibility’, supra note 33, vol. I, p. 798.

- First, the *actus reus* can occur before, during or after the crime in question is committed.<sup>37</sup>
- The location of where the *actus reus* takes place can be remote from the time and location of where the crime in question is committed;<sup>38</sup> the accused need not have been personally present during the commission of the crime.<sup>39</sup>
- Encouragement or moral support need not be explicit; the act of being present at or near the crime scene as a silent spectator, particularly when the accused is in a position of authority, can be construed as tacit approval or encouragement of the crime.<sup>40</sup>
- According to Article 25(3)(c) of the ICC Statute, the *attempted commission* of a crime is sufficient for the ‘aiding and abetting’ liability to arise, i.e. there is no need for the crime in question to have been fully carried out or completed. The underlying rationale is that complicity by assistance is, like instigation, a form of accessorial liability in relation to the principal crime; this means that it must assist the accomplishment (or at least the attempt) of a crime. Therefore, preparatory contributions, though determined to enable the commission of a crime, remain unpunishable if the intended principal crime is not carried out. If, however, the principal crime reaches at least the stage of an attempt, it does not matter at what time and place during the preparation and performance of the crime the assistance was rendered.<sup>41</sup>
- The support of the aider and abettor must have had a substantial effect upon the perpetration of the crime.<sup>42</sup> However, it has been held by the jurisprudence that no minimum threshold is required for the contribution to be considered as having had an effect: ‘the elements of this mode of liability are met in so far as the accessory’s contribution had an effect on the commission of the offence’.<sup>43</sup> It has been considered sufficient for ‘the person [to] provide[] assistance to the commission of a crime’ without stipulating the requisite level of contribution to the crimes.<sup>44</sup> In substance, ‘the form of contribution under Article 25(3)(c) [...] does not require the meeting of any specific threshold’.<sup>45</sup>

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<sup>37</sup> See e.g. ICTY, *Blaškić*, Appeals Chamber Judgment, IT- 95-14-A, 29 July 2004, para. 48

<sup>38</sup> See e.g. ICTY, *Blaškić*, Appeals Chamber Judgment, supra note 37, para. 48.

<sup>39</sup> See e.g. SCSL, *Taylor*, Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013, para 370.

<sup>40</sup> ICTY, *Brđanin*, Appeals Chamber Judgment, IT-99-36-A, 3 April 2007, para. 273: ‘An accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime’.

<sup>41</sup> A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese, P. Gaeta, J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), vol. I, pp. 798-799.

<sup>42</sup> See e.g. ICTY, *Blaškić*, Appeals Chamber Judgment, supra note 37, para. 48.

<sup>43</sup> ICC, *Bemba et al.*, Confirmation of Charges Decision, ICC-01/05-01/13-749, 11 November 2014, para 35.

<sup>44</sup> ICC, *Blé Goudé*, Confirmation of Charges Decision, ICC-02/11-02/11-186, 11 December 2014, para 167.

<sup>45</sup> ICC, *Bemba et al.*, Trial Chamber Judgment, ICC-01/05-01/13-1989-Red, 19 October 2016, para 93.

- No evidence of a plan or agreement between the aider and abettor and the principal perpetrator is required.<sup>46</sup>
- It is not necessary for the accused to have had authority or control over the principal perpetrator.<sup>47</sup>
- The assistance need not be given directly to the principal perpetrator and used by him/her in the commission of the crime; the essential question is whether the accused's acts and conduct can be said to have contributed substantially to the commission of the crime rather than to the principal perpetrator.<sup>48</sup>
- It is not necessary to establish that the aider and abettor's contribution served as a precondition to the crime or that the crime would not have occurred but for the aider and abettor's contribution (i.e. that the contribution was a *sine qua non*).<sup>49</sup>

**26.** Complicity under the form of 'aiding and abetting' can also arise *by omission*. It is now well recognized that an omission is another way that the conduct element of aiding and abetting liability may be fulfilled.<sup>50</sup> As regards complicity by omission, the following requirements generally apply:

- Aiding and abetting by omission requires the accused to have a legal duty to act in the circumstances considered.<sup>51</sup>
- To attract aiding and abetting by omission liability, the accused must have had the ability to act; means must have been available to the accused to fulfil his/her duty to act.<sup>52</sup>

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<sup>46</sup> ICTY, *Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999, para 229(ii); ICTY, *Simić et al.*, Trial Chamber Judgment, IT-95-9-T, 17 October 2003, para 162; ICTY, *Brđanin*, Appeals Chamber Judgment, supra note 40, para 263; ECCC, *Kaing* Trial Chamber Judgment, 001/18-07-2007/ECCC/TC/E188, 26 July 2010, para 534; SCSL, *Taylor* Trial Chamber Judgment, SCSL-03-01-T, 18 May 2012, para 484.

<sup>47</sup> *Taylor* Appeal Judgment, supra note 39, para 370. See also ICTY, *Aleksovski* Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, para 170.

<sup>48</sup> *Taylor* Appeal Judgment, supra note 39, paras 367-368 and 401; *Bemba et al.*, Appeals Chamber Judgment, ICC-01/05-01/13-2275-Red, 8 March 2018, paras 19, 1329

<sup>49</sup> Thus, "proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required", ICTY, *Blaškić*, Appeals Chamber Judgment, supra note 37, para. 48.

<sup>50</sup> See M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015) 98.

<sup>51</sup> ICTY, *Popović et al.* Appeals Chamber Judgment, IT-05-88-A, 30 January 2015, para 1740. See also ICTR, *Ntagerura et al.*, Appeals Chamber Judgment, ICTR-99-46-A, 7 July 2006, paras 334 (referring to all modes of liability under Article 6(1) of the ICTR Statute (which includes aiding and abetting)); ICTY, *Galić*, Appeals Chamber Judgment, IT-98-29-A, 30 November 2006, para 175.

<sup>52</sup> *Ntagerura et al.* Appeal Judgment, supra note 51, para 335; ICTY, *Mrkšić and Šljivančanin* Appeals Chamber Judgment, IT-95-13/1-A, 5 May 2009, paras 49, 82 and 154; ICTY, *Šainović et al.*, Appeals Chamber Judgment, IT-05-87-A, 23 January 2014, para 1677.

- In aiding and abetting by omission cases, the *actus reus* is satisfied if the crimes would have been substantially less likely had the accused acted pursuant his/her legal duty to act.<sup>53</sup>

## 2. The *mens rea* standard

27. As regards the *mens rea* requirements for aiding and abetting liability, the following requirements are generally understood to apply:

- The accused need not know the precise crime which was intended and which was committed by the principal, but he/she must be aware of its essential elements, including the state of mind of the principal.<sup>54</sup>
- The accused need not share the intent of the principal perpetrator.<sup>55</sup>
- As set out above, Article 25(3)(c) of the ICC Statute requires an aider and abettor to act ‘[f]or the *purpose* of facilitating the commission of [...] a crime’ (emphasis added). The requirement that assistance be given ‘for the purpose of facilitating the commission of’ a crime has generally been understood as fulfilled where the accused had *knowledge* of the consequence of his acts or conduct on the commission of the crimes.
- The required *mens rea* element of aiding and abetting is characterised where the accused can be deemed to have been ‘aware of the substantial likelihood’ that his conduct would assist in the commission of the crimes. It has been consistently held by the jurisprudence that ‘awareness of the substantial likelihood’ is a culpable mental state for aiding and abetting under customary international law.<sup>56</sup> This jurisprudence

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<sup>53</sup> *Mrkšić and Šljivančanin* Appeal Judgment, supra note 52, paras 97 and 100; *Šainović et al.* Appeal Judgment, supra note 52, paras 1679 and 1682, fn. 5510; *Popović et al.* Appeal Judgment, supra note 51, paras 1741 and 1744.

<sup>54</sup> *Aleksovski* Appeal Judgment, supra note 47, paras 162 and 164; ICTY, *Krnojelac* Appeals Chamber Judgment, IT-97-25-A, 17 September 2003, paras 51-52; ICTY, *Blaškić* Appeal Judgment, supra note 37, para 50; ICTY, *Simić* Appeal Judgment, Appeals Chamber Judgment, IT-95-9-A, 28 November 2006, para 86; *Brđanin* Appeal Judgment, supra note 40, para 484; *Blagojević and Jokić* Appeals Chamber Judgment, IT-02-60-A, 9 May 2007, para 221; ICTR, *Nahimana et al.* Appeals Chamber Judgment, ICTR-99-52-A, 28 November 2007, para 482; ICTR, *Karera* Appeals Chamber Judgment, ICTR-01-74-A, 2 February 2009, para 321; *Mrkšić and Šljivančanin* Appeal Judgment, supra note 52, para 159; ICTY, *Lukić and Lukić*, Appeals Chamber Judgment, IT-98-32/1-A, 4 December 2012, para 440; ICTY, *Perišić*, Appeals Chamber Judgment, IT-04-81-A, 28 February 2013, para 48.

<sup>55</sup> *Krnojelac* Appeal Judgment, supra note 54, paras 51-52; ICTY, *Krstić*, Appeals Chamber Judgment, IT-98-33-A, 19 April 2004, paras 140; *Simić* Appeal Judgment, supra note 54, para 86; ICTR, *Seromba*, Appeals Chamber Judgment, ICTR-2001-66-A, 12 March 2008, para 56; *Kaing* Trial Judgment, supra note 46, para 535; STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, STL-11-01/I/AC/R176bis/F0936, 16 February 2011, para 225; ECCC, *Nuon and Khieu*, 002/01 Trial Judgment, 002/19-09-2007/ECCC/TC/E313, 7 August 2014, para 704; MICT, *Ngirabatware*, Appeals Chamber Judgment, MICT-12-29-A, 18 December 2014, para 155.

<sup>56</sup> See *Brima et al.* Appeal Judgment, para. 242: ‘[t]he mens rea required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator’ (quoting *Brima et al.* Trial Judgment, para. 776); *Sesay et al.* Appeal Judgment, para. 546. The STL Appeals Chamber subsequently



is consistent with the principle that awareness and acceptance of the substantially likely consequence of one's acts and conduct constitutes culpability.<sup>57</sup>

## **E. Complicity by aiding and abetting in the context of support to Israeli actions**

### **1. Forms of assistance rendered by the President of the European Commission**

**28.** As already mentioned, the present communication is intended to draw the attention of the Office of the Prosecutor on the plausible liability for complicity of President of the European Commission Ursula von der Leyen, in relation to the rendering of aid and assistance under various forms to the Government of Israel as well as specifically to the IDF, that are currently engaged in armed operations in the Gaza Strip and, in that context, have been engaged in a series of violations of international humanitarian law, many of which are likely to qualify as international crimes.

**29.** The aid and assistance in question has been rendered by Mrs. von der Leyen under various forms, including:

- political and economic support;
- military support;
- diplomatic support.

**30.** Political and economic support to Israel has taken *inter alia* the form of (i) the maintenance of existing international agreements between the EU and Israel, in disregard to human right clauses on the conditionality of such agreements, and (ii) the promotion and development of new frameworks and mechanisms of bilateral cooperation with Israel.

**31.** Existing bilateral agreements between the EU and Israel include the EU-Israel Association Agreement, which entered into force in June 2000.<sup>58</sup> This agreement aims to provide an appropriate legal and institutional framework for political dialogue and economic cooperation between the EU and Israel. By virtue of this agreement, the Israeli economy benefits from a free trade area encompassing the EU area. Article 2 of the agreement provides that “the relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement”, making the application of the Agreement conditional upon respect of human rights. Article 79(2) of the Agreement provides that “if either Party considers that the other Party has failed

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endorsed this Court's jurisprudence that awareness of a substantial likelihood is a culpable mens rea for aiding and abetting liability in customary international law. STL Applicable Law Decision, para. 227.

<sup>57</sup> SCSL, *Taylor*, Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013, para. 438.

<sup>58</sup> See Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, *EU Official Journal*, 21 June 2000, L. 147/3.

to fulfil an obligation under the Agreement, it may take appropriate measures”. Since the start of the current Israeli military offensive on Gaza, the EU Commission has failed to invoke these provisions, despite having been called to do so by the Governments of Ireland and Spain.<sup>59</sup> Such failure to suspend the EU-Israel Association Agreement is at odds with the EU’s own policies in terms of human rights clauses in trade agreements.<sup>60</sup> The EU claims in that regard that it takes steps to ensure that bilaterally agreed human rights provisions apply to all its trade agreements, and thus to use its leverage as the world’s biggest trade bloc in order to promote respect for these rights together with its trade partners. Today, human rights feature prominently in most of the EU’s agreements, commercial and non-commercial ones, with third countries. This is in line with EU’s official policy on the matter as outlined in the “Common Approach on the use of political clauses”, agreed in 2009.

**32.** In terms of economic interdependence between Israel and the European Union, it is to be recalled that while Israel is only the EU’s 25th biggest trade partner, representing 0.8% of the EU’s total trade in goods in 2022, the EU is Israel’s biggest trade partner, accounting for 28.8% of its trade in goods in 2022. That same year, 31.9% of Israel’s imports came from the EU, and 25.6% of the country’s exports went to the EU. Total trade in goods between the EU and Israel in 2022 amounted to €46.8 billion. The EU’s imports from Israel were worth €17.5 billion and were led by machinery and transport equipment (€7.6 billion, 43.5%), chemicals (€3.5 billion, 20.1%), and other manufactured goods (€1.9 billion, 11.1%). The EU’s exports to Israel amounted to €12.2 billion and were dominated by machinery and transport equipment (€12.3 billion, 41.9%), chemicals (€5.1 billion, 17.6%), and other manufactured goods (€3.5 billion, 12.1%). Two-way trade in services between the EU and Israel amounted to €16.7 billion in 2021. EU imports of services represented €6.9 billion, while exports accounted for €9.8 billion.<sup>61</sup> These data point to the very significant reliance by Israel on EU imports.

**33.** The European Commission, with President von der Leyen at its head, has also been active in promoting new EU-Israel cooperation instruments, such as the EU Commission Action “Regional EU-Israel cooperation in support of the Abraham Accords, and fight against antisemitism and fostering Jewish life”.<sup>62</sup> This Action aims to allocate EU resources “to reinforce EU-Israel bilateral relations, in a wider effort to strengthen regional stability in support of the Abraham Accords, in particular in light of the Hamas attack on Israel on 7 October and the subsequent escalation which is exacerbating regional tensions and risks serious spill overs in the neighbouring countries”. The Action is structured along three objectives, including “[s]upport to strategic policy dialogues and exchanges between the EU and Israel, including the development of technical capabilities and approximation of EU-Israel legislation”. It aims at “deepening the EU-Israel relations by framing interactions and

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<sup>59</sup> [‘Spain and Ireland call for ‘urgent review’ of EU-Israel agreement over war in Gaza’](#), Euronews, 14 February 2024.

<sup>60</sup> [Human rights in EU trade agreements The human rights clause and its application](#) (European Parliamentary Research Service, July 2019).

<sup>61</sup> See European Commission, [‘EU trade relations with Israel. Facts, figures and latest developments’](#) (accessed on 29 March 2024).

<sup>62</sup> See [Action Document](#) for “Regional EU-Israel cooperation in support of the Abraham Accords, and fight against antisemitism and fostering Jewish life”, Annex to the Commission Implementing Decision on the financing of the 2023 action plan part III in favour of the Regional South Neighbourhood, 2023.

collaborations”. The Action has been adopted by the European Commission on 28 November 2023.<sup>63</sup>

34. President von der Leyen has also been instrumental in building, at the international level and in the framework of various international organisations, diplomatic support to Israel intended to facilitate Israel’s actions in the Gaza Strip. This support came as a response to the demand formulated by Prime Minister Netanyahu as early as of 7 October 2023 to various world leaders, “to ensure freedom of action for Israel in the continuation of the campaign”.<sup>64</sup> In particular, expressions such as “Europe stands with Israel”<sup>65</sup> used repeatedly at a time when disproportionate and indiscriminate attacks in violation of international humanitarian law were conducted, and had already caused huge human losses and widespread suffering, undeniably qualify as a form of “abetting” in the meaning of Article 25(3)(c) of the ICC Statute, especially when no explicit condemnation of these violations of international humanitarian law is made, or at least is explicitly blamed on (or attributed to) the perpetrators.

## 2. Legal characterisation of assistance provided the President of the European Commission

35. In that context, it is submitted that President of the European Commission von der Leyen:

- has provided Israel with positive assistance to Israel under various forms, and that such assistance has had a *substantial effect* upon the perpetration of the relevant crimes;
- could not but have *knowledge* that she was (and still is) participating, by aiding and abetting the perpetrators, in the commission of the relevant crimes;
- has also *failed to act* to prevent the commission of the relevant crimes. She is thus *complicit by omission*.

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<sup>63</sup> See [Commission Implementing Decision](#) of 28 November 2023 on the financing of the 2023 annual action plan part III in favour of the Regional South Neighbourhood, Doc. C(2023) 8324 final.

<sup>64</sup> Ministry of Foreign Affairs of Israel, Press Release, Statement by Prime Minister Benjamin Netanyahu, 7 October 2023.

<sup>65</sup> See e.g. European Commission, [Speech by President von der Leyen](#) at the EP Plenary debate on the despicable terrorist attacks by Hamas against Israel, Israel's right to defend itself in line with humanitarian and international law and the humanitarian situation in Gaza, 18 October 2023.

**(i) Positive assistance by the President of the European Commission to Israel has had a *substantial effect* upon the perpetration of the relevant crimes**

**36.** It is submitted that President von der Leyen has had an instrumental role in providing support to Israel under various forms; and that such support has had a substantial effect upon the perpetration of the relevant crimes.

**37.** *First*, Mrs. von der Leyen, in her official capacity as president of the European Commission, has been instrumental in securing the provision of means, under the form of military support, to the IDF.

**38.** The competence of the European Commission may need to be briefly recalled. The main role of the European Commission, as defined by Article 17 of the Treaty on European Union, is to “ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union”.<sup>66</sup> In that context, one of the tasks of the European Commission is to oversee implementation of the current EU framework regulating the export of arms by EU Member States, i.e. the Council Common Position on arms exports of 8 December 2008.<sup>67</sup> The aim of this EU Common Position, as set out in its Preamble, is to “prevent the export of military technology and equipment which might be used for internal repression or international aggression or contribute to regional instability”. Article 2 of the EU Common Position sets various criteria , including the following:

2. Criterion Two: Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.

— Having assessed the recipient country’s attitude towards relevant principles established by international human rights instruments, Member States shall:

- (a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;
- (b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe.

— Having assessed the recipient country’s attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

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<sup>66</sup> Consolidated version of the Treaty on European Union, EU Official Journal, C 202/1, 7 June 2016, Art. 17.

<sup>67</sup> See Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, EU Official Journal L 335, 13 December 2008, p. 99.

- (c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.<sup>68</sup>

**39.** The European Commission under Mrs von der Leyen has claimed an active role in the prevention of human rights violations in the context of arms exports. For example, the European Commission has dealt with EU export controls for dual-use items, with a view to ensuring that “items such as advanced electronics, toxins, missile technology or nuclear components, which have civil but also military uses, do not get into the wrong hands. Dual-use items are therefore subject to authorisations when exported outside the EU, limiting the possibility for such items to be used in war or conflict situations, for breaches of human rights or to enable the proliferation of weapons of mass destruction”.<sup>69</sup>

**40.** Against that background, it was reported that during the period 2019-23, Israel has been the 3<sup>rd</sup> main recipient of weapons provided by Germany, itself the 5th largest exporter of major arms in the world (Germany’s share in global arms exports is 5,6%). Israel received during that period 12% of Germany’s total exports of military equipment.<sup>70</sup> SIPRI has reported that “[b]etween 2014–18 and 2019–23, [...] the USA accounted for 69 per cent and Germany for 30 per cent of Israeli arms imports”,<sup>71</sup> and that “[b]y the end of 2023, pending deliveries of major arms to Israel included 61 combat aircraft from the USA and 4 submarines from Germany”.<sup>72</sup>

**41.** It should be stressed that is commonly accepted by the jurisprudence of international criminal tribunals that “[p]rocurring means is a very common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes”.<sup>73</sup> It can be recalled in that respect that a Dutch Court of Appeals found in 2007 in the *Van Anraat* case that an industrialist who had supplied chemicals to Iraq was complicit, aiding and abetting, in the commission of war crimes committed using mustard gas in the course of repression of the Kurds uprising.<sup>74</sup>

**42.** *Second*, President von der Leyen has provided economic and financial support to Israel, both by refusing to take any steps toward the suspension of the EU-Israel Association Agreement (despite the human rights clause in that instrument calling for such suspension in accordance with the EU policy on conditionality of international agreements), and by promoting, amidst the current Israeli assault on Gaza, new EU-Israel cooperation instruments,

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<sup>68</sup> Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, EU Official Journal L 335, 13 December 2008, p. 99, Art. 2.

<sup>69</sup> See European Commission, *White Paper on Export Controls*, Brussels, 24 January 2024, COM(2024) 25 final, at p. 2.

<sup>70</sup> See SIPRI Fact Sheet, [Trends in International Arms Transfers, 2023](#), March 2024, p. 2.

<sup>71</sup> SIPRI Fact Sheet, [Trends in International Arms Transfers, 2023](#), March 2024, p. 11.

<sup>72</sup> SIPRI Fact Sheet, [Trends in International Arms Transfers, 2023](#), March 2024, p. 12.

<sup>73</sup> ICTR, *Akayesu*, Trial Judgement, ICTR-96-4-T, 2 September 1998, para. 536.

<sup>74</sup> Public Prosecutor v Van Anraat, The Hague Court of Appeal, 9 May 2007, ECLI:NL:GHSGR:2007:BA4676, at 13.

such as the EU Commission Action “Regional EU-Israel cooperation in support of the Abraham Accords, and fight against antisemitism and fostering Jewish life”.

43. *Third*, President von der Leyen has provided diplomatic support to the Israeli government, in what appears to be a response to the demand – already quoted – formulated by Prime Minister Netanyahu on 7 October 2023, on the international community “to ensure freedom of action for Israel in the continuation of the campaign”.<sup>75</sup> Ensuring “freedom of action” to Israel has amounted to enabling the IDF to “continue [its] campaign” to this day and even intensify its attacks against Palestinian civilians, inflicting human losses, destruction and suffering of a magnitude and scale without equivalent in any contemporary armed conflict, as affirmed by military experts. It is submitted that the diplomatic support enjoyed by Israel from President von der Leyen (as well as from many other world leaders) has been the condition *sine qua non* of the perpetration of war crimes, crimes against humanity and genocide plausibly committed by the IDF in the Gaza Strip since 7 October.

44. *Fourth* and last, President von der Leyen has provided moral support to the perpetrators of the crimes. It is indeed obvious that, by their plain terms, the various official statements of Mrs. von der Leyen expressing unconditional support to Israel have amounted to (and could not reasonably be understood otherwise than) giving encouragement and moral support to members of the IDF, who were (and still are) involved in the commission of crimes against the Palestinian population in the OPT. Moreover, such statements are likely to have improved the morale of IDF troops. These elements (i.e. conduct amounting to encouragement and moral support, improving morale of soldiers), have been considered by international criminal tribunals, if duly established in a particular case, as indicative of a conduct able to be considered as aiding and abetting the commission of relevant crimes.<sup>76</sup>

45. It is to be stressed in that context that the public statements and actions of Mrs. von der Leyen stand in stark contrast to those of the authority entrusted with the task to “conduct the Union's common foreign and security policy”<sup>77</sup>, i.e. the High Representative of the Union for Foreign Affairs and Security Policy, Mr. Josep Borrell. After an informal meeting of European Union foreign ministers on 10 October 2023, Josep Borrell stated that “Israel has the right to defend itself, but some of its actions since Hamas attack counter international humanitarian law”.<sup>78</sup> On 6 November 2023, during the European Union Ambassadors’ Conference, he expressed “concern about the continued colonization of the West Bank, noting a significant increase in the number of settlers over the past 30 years. He stressed the necessity of a comprehensive and final settlement in the Israeli-Palestinian conflict as a “last chance” to resolve the two-state issue”.<sup>79</sup> On 13 November, Josep Borrell discussed again the crisis in Gaza, affirming the EU’s collective call for an immediate humanitarian ceasefire, and “stated

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<sup>75</sup> Ministry of Foreign Affairs of Israel, Press Release, Statement by Prime Minister Benjamin Netanyahu, 7 October 2023.

<sup>76</sup> See e.g. ICTY, *Šainović et al.* Appeal Judgment, supra note 52, paras. 1687-1690.

<sup>77</sup> See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (EU Official Journal, 2007/C 306/01), Art. 9E.

<sup>78</sup> See [Israel has right to self-defence, but some actions 'counter international law' – Borrell](#), Euronews, 10 October 2023.

<sup>79</sup> See [EU Ambassadors Conference 2023: Opening speech by High Representative/Vice-President Josep Borrell](#), European External Action Service, 6 November 2023.

“no” to forced displacement of the Palestinian people, reducing the size of the Gaza Strip, and separating Gaza from the broader Palestinian issue.<sup>80</sup> In February 2024, at a press conference with UNWRA Commissioner-General Philippe Lazzarini, Borrell called for stopping arms deliveries to Israel.<sup>81</sup>

**(ii) The President of the European Commission had *knowledge* of participating, by aiding and abetting, in the commission of the relevant crimes**

46. It is submitted that President von der Leyen necessarily had knowledge that she has been (and still is) participating, by aiding and abetting the perpetrators, in the commission of the relevant crimes. Her knowledge of the consequences of her acts or conduct establishes the required *mens rea* for personal liability for complicity by aiding and abetting.

47. An examination of the post-World War II jurisprudence of international criminal courts, as indicative of customary international law, supports the assertion that an accused’s knowledge that he was participating in the commission of the crime – that is, an accused’s knowledge of the consequence of his acts or conduct – establishes the *mens rea* for personal liability.<sup>82</sup>

48. This standard of “knowledge” was applied inter alia by the International Military Tribunal (IMT). Article 6 of the Charter of the IMT established individual criminal liability for “[l]eaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit [the crimes]”.<sup>83</sup> The IMT found:

Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties

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<sup>80</sup> See [Foreign Affairs Council: Press remarks by High Representative Josep Borrell after the meeting](#), 13 November 2023.

<sup>81</sup> See [AlJazeera report](#), 12 February 2024, mentioning the following: “European Union foreign policy chief Josep Borrell has urged allies of Israel, primarily the United States, to stop sending it weapons as “too many people” are being killed in Gaza. Pointing to US President Joe Biden’s comment last week that Israel’s military action was “over the top”, Borrell said on Monday: “Well, if you believe that too many people are being killed, maybe you should provide less arms in order to prevent so many people having been killed.” “Is [it] not logical?” he asked, in a Brussels news conference alongside Philippe Lazzarini, head of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) [...]. “How many times have you heard the most prominent leaders and foreign ministers around the world saying too many people are being killed?” Borrell asked. “If the international community believes that this is a slaughter, that too many people are being killed, maybe we have to think about the provision of arms,” Borrell added. The chief EU diplomat also slammed an order by Israeli Prime Minister Benjamin Netanyahu that the more than one million Palestinians sheltering in the Gaza city of Rafah need to be “evacuated” ahead of a planned Israeli military operation there. “They are going to evacuate – where? To the moon? Where are they going to evacuate these people?” Borrell asked”.

<sup>82</sup> See e.g. SCSL, *Taylor*, Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013, para. 419.

<sup>83</sup> IMT Charter, Art. 6 (emphasis added). The same provision can be found in Article 5 of the Charter of the International Military Tribunal for the Far East (IMTFE).

to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.<sup>84</sup>

This is according to this standard that the IMT held accused personally liable for their knowing participation in the crimes.<sup>85</sup> For example, Von Schirach was found guilty in that “while he did not originate the policy of deporting Jews from Vienna, [he] participated in this deportation after he had become Gauleiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the ghettos of the East. Bulletins describing the Jewish extermination were in his office”.<sup>86</sup>

**49.** The jurisprudence generally does not require that an accused directly intended that the consequence of his acts or conduct were to contribute to the commission of the crimes. Thus, for example, in the *Ministries* cases, adjudicated by military tribunals under Control Council Law No. 10, Von Weizsaecker and Woermann, senior officials in the German Foreign Ministry, were convicted for crimes against humanity. The Tribunal found that even though they neither willed nor desired the commission of the crimes, their knowledge that they were participating in the crimes was sufficient to establish the requisite mens rea:

“The mass deportation of Jews to the East which resulted in the extermination of many millions of them found its expression in the celebrated Wannsee conference of 20 January 1942. The Foreign Office played an important part in these negotiations and in the actions thereafter taken to implement and assist the program. *Von Weizsaecker or Woermann neither originated it, gave it enthusiastic support, nor in their hearts approved of it. The question is whether they knew of the program and whether in any substantial manner they aided, abetted, or implemented it*”.<sup>87</sup>

**50.** Given the wide publicity given on a daily basis to the violations of international humanitarian law perpetrated by the IDF in the Gaza Strip, especially since October 2023, and the wealth of official United Nations reports and documents available, which as a matter of fact have prompted numerous UN officials - including the UN Secretary-General – to express their utmost concern, Mrs. von der Leyen cannot escape the simple fact that she knew of such crimes, or *at the very least* she knew of the *plausibility* of such crimes, as was found by the ICJ in its Order on provisional measures of 26 January 2024 as regards genocide. Even under the “plausibility” standard, she should have taken every possible action at her disposal to prevent the continued commission of such crimes, and at the very least not to facilitate in any manner the commission of these crimes, as she unfortunately did.

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<sup>84</sup> IMT Judgment, p. 226.

<sup>85</sup> See e.g. the examples quoted in SCSL, *Taylor*, Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013, paras. 417-427.

<sup>86</sup> IMT Judgment, p. 319.

<sup>87</sup> *Ministries Case*, p. 478 (emphasis added).



**(iii) The President of the European Commission has *failed to act* to prevent the commission of the relevant crimes**

**51.** It is submitted that President von der Leyen has also *failed to act* to prevent the commission of the relevant crimes. They are thus *complicit by omission*.

In that respect, the following paragraphs demonstrate that the omissions by President von der Leyen fulfil the criteria set by the jurisprudence of international criminal courts and tribunals, as set out above.

**(a) President von der Leyen was, and still is, under a legal duty to act in the circumstances considered**

**52.** It is admitted that “international law [...] places upon a person vested with public authority a duty to act in order to protect human life”.<sup>88</sup> The reference to international law in that context extends *inter alia* to Common Article 1 of the Geneva Conventions.<sup>89</sup> Similarly, it seems undisputed that “all public authorities have a duty not only to comply with the basic rights of the human person, but also to ensure that these are complied with, which implies a duty to act in order to prevent any violation of such rights”.<sup>90</sup> This duty applies all the more since President von der Leyen, by virtue of her unique position as head of the European Commission, was reasonably expected to exercise due diligence on the likely consequences of her statements and actions taken with respect to Israel.

**(b) President von der Leyen had, and still has, the ability to act; means were (and still are) available to her to fulfil her duty to act**

**53.** President von der Leyen holds a unique position of authority as head of the European Commission. She undeniably had access to a wide range of means to fulfil her duty to act. That President von der Leyen had the ability to act may be illustrated (and confirmed) by a brief review of some actions taken by the European Commission under her presidency, in other contexts, to prevent the commission of war crimes and curtail the ability of certain powers to conduct military operations. For example, the EU has adopted since 24 February 2022 massive and comprehensive restrictive measures, i.e. international sanctions against the Russian Federation, aiming at curtailing Russia’s ability to wage the war in Ukraine, depriving it of critical technologies and markets and significantly weakening its industrial base. In that context, while EU Member States are primarily responsible for implementing the sanctions, the European Commission “oversees the implementation by Member States and is working closely with them in order to support them on implementation, provide

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<sup>88</sup> ICTR, *Rutaganira*, Trial Chamber Judgment, ICTR-95-1C-T, 14 March 2005, para. 78.

<sup>89</sup> See e.g. ICTR, *Nyiramasuhuko et al.*, Trial Chamber Judgment, ICTR-98-42-T, 24 June 2011, paras 5896-5899.

<sup>90</sup> ICTR, *Rutaganira*, Trial Chamber Judgment, ICTR-95-1C-T, 14 March 2005, para. 79.

information to stakeholders, and engage in a dialogue to collect feedback on how sanctions are implemented”.<sup>91</sup>

54. To give but one other example, the European Commission is also involved in the functioning of the European Union Agency for Criminal Justice Cooperation (Eurojust),<sup>92</sup> an EU agency operating the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes (the “Genocide Network”) established in 2002 “to enable close cooperation between the national authorities when investigating and prosecuting the crime of genocide, crimes against humanity and war crimes, known collectively as core international crimes. The Network’s mandate is to ensure perpetrators do not attain impunity within the Member States”.<sup>93</sup>

**(c) The crimes facilitated by the omissions of President von der Leyen would have been substantially less likely had she acted pursuant to her legal duty to act**

55. Should President von der Leyen have acted pursuant to her legal duty to act, rather than sought to “ensure freedom of action for Israel in the continuation of the campaign”,<sup>94</sup> the crimes would have been substantially less likely to occur, or at the very least to be perpetrated over such a long period of time, and on such a scale and magnitude. It is thus submitted that the diplomatic support enjoyed by Israel from President von der Leyen (as well as from many other world leaders), especially the lack of adequate and effective public condemnation of the crimes committed, the lack of practical and effective measures and action intended to ensure the prevention of such crimes and the cessation of the criminal behaviour of IDF troops, has been the condition *sine qua non* of the perpetration of war crimes, crimes against humanity and genocide plausibly committed by the IDF in the Gaza Strip since 7 October 2023.

56. The analysis above has overall demonstrated beyond doubt the existence of the requisite nexus between the rendering of assistance by President von der Leyen and the crimes committed by the IDF in the OPT.

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<sup>91</sup> See European Commission, [Sanctions adopted following Russia’s military aggression against Ukraine](#) (accessed on 12 April 2024).

<sup>92</sup> See Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust).

<sup>93</sup> See European Union Agency for Criminal Justice Cooperation, [Genocide Network](#) (accessed on 12 April 2024).

<sup>94</sup> Ministry of Foreign Affairs of Israel, Press Release, Statement by Prime Minister Benjamin Netanyahu, 7 October 2023.

## F. Complementarity

57. The ICC Appeals Chamber in the *Katanga* case established a two-step test for complementarity under Article 17 of the Rome Statute.<sup>95</sup> The test considers the action or inaction of the relevant State and the motive behind this action or inaction:

1. are there on-going investigations or prosecutions, or have investigations been carried out and a decision made not to prosecute?; and
2. is the State unwilling or unable to carry out investigations or prosecutions to the required standard? This requires the OTP to consider the nature and quality of the proceedings. The OTP is guided by the considerations set out in Article 17(2) and (3) of the ICC Statute.

The absence of national proceedings is sufficient to make the case admissible and the question of unwillingness or inability does not arise.<sup>96</sup>

58. To the knowledge of the authors of the present communication, there are nor have been any national investigations or prosecutions against President von der Leyen in relation to the facts documented in the present communication, neither in Germany – of which von der Leyen is a national – nor in Belgium (where the European Commission is based), nor in any other jurisdiction. This is sufficient to satisfy the complementary test under Article 17.

## G. Gravity

59. Article 17(1)(d) of the ICC Statute provides that the Court shall determine that a case is inadmissible, if “the case is not of sufficient gravity to justify further action by the Court”. According to the Office of the Prosecutor of the ICC, the criteria of gravity of a crime can be evaluated through the factors of scale, nature, manner of commission, and impact of the crimes.<sup>97</sup> It has already been abundantly documented that the current situation in Gaza satisfies all these factors.

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<sup>95</sup> *Katanga* (ICC-01/04-01/07-1497), Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 78. The two-step test was also referred to by the Pre-Trial Chamber I in the *Situation in Libya*, (ICC-01/11-01/11), Decision on the Admissibility of the Case against Abdullah Al-Senussi, 11 October 2013, para.26.

<sup>96</sup> OTP, *Policy Paper on Preliminary Examinations*, November 2013, para.47.

<sup>97</sup> OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 38.

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