

August 22, 2014

The Right Honorable Ms. Fatou Bensouda
Prosecutor of the International Criminal Court
International Criminal Court
Post Office Box 19519
2500 CM, The Hague
The Netherlands

Re: Request for the initiation of an investigation into crimes committed and ongoing during and immediately before Israel's Operation Protective Edge in Gaza pursuant to Article 15 of the Rome Statute, on the basis of information on crimes within the jurisdiction of the International Criminal Court

Dear Madam Prosecutor:

I write on behalf of the National Lawyers Guild, the first racially integrated United States bar association formed in 1937 to advocate for the protection of constitutional, human, and civil rights, and the endorsing organizations indicated below.

In light of the extreme gravity of the situation in the occupied Gaza Strip, in particular the large number of civilian casualties and large scale destruction of civilian property, including schools, mosques and hospitals, and the ongoing incitement to genocide perpetrated by Israeli political figures and leaders, the National Lawyers Guild and endorsing organizations strongly urge the Office of the Prosecutor to immediately use its power under Article 15 of the Rome Statute to initiate a preliminary investigation on "the basis of information on crimes within the jurisdiction of the Court" (article 15(1)).

A number of UN agencies and non-governmental organizations have conducted preliminary investigations and prepared reports that strongly suggest that crimes within the jurisdiction of the International Criminal Court (ICC) have been and are being committed. Credible information from "states, organs of the United Nations, intergovernmental or non-governmental organizations [and] other reliable sources," including eyewitness accounts (article 15(2)), is readily and widely available. The "seriousness of the information" available is beyond doubt, which is why both UN Secretary General Ban Ki-moon and UN High Commissioner for Human Rights Navi Pillay have called for accountability and justice. High Commissioner Pillay specifically stated that there is "increasing evidence of war crimes" being committed in Gaza.

Israel's clearly disproportionate use of force against the 1.8 million residents of Gaza appears to have little to do with any claim of security, but seems to be calculated to exact revenge against Palestinian civilians. Even before Israel's extensive aerial bombardment of Gaza began, Israeli Prime Minister Benjamin Netanyahu alluded to Israel's aim. On July 1, 2014, at the televised funeral of the three slain settlers, Netanyahu stoked the emotions of the mourners by quoting from a Hebrew poem: "*vengeance for the blood of a small child, Satan has not yet created*" and calling for God to "*avenge their blood.*" He later tweeted that same line from the poem. The

next day, Palestinian teen Mohammad Abu Khdeir was set on fire and murdered by extremist settlers, and acts of violence and incitement against Palestinians by Israeli settlers, police and occupation forces increased dramatically.

The day after Israel launched its high-intensity bombardment campaign against Gaza on July 8, 2014, other Israeli public figures continued the incitement against Palestinians. During a Knesset speech, Deputy Speaker Moshe Feiglin called on Israel to cut off all electricity to the Gaza Strip. *"The blood of a dialysis patient in Gaza is not redder than the blood of our IDF soldiers who will, God forbid, need to enter [Gaza],"* he stated. During the same session, Knesset Member Elazar Stern stated: *"When we shoot at a house in Gaza, it is also in order for Gazans to live better."* Separately, Knesset member Ayelet Shaked wrote, "What's so horrifying about understanding that the entire Palestinian people is the enemy?... The mothers of the martyrs... should follow their sons, nothing would be more just. They should go, as should the physical homes in which they raised the snakes. Otherwise, more little snakes will be raised there." Rather than charge these legislators with incitement, three Palestinian Knesset members were expelled for criticizing Israel's bombardment of Gaza.

Israeli authorities have not seriously attempted to quell this incitement against Palestinians. Feiglin continues to publicly call on Prime Minister Netanyahu to commit what amount to war crimes in Gaza, specifically calling for the internment of Palestinians in concentration camps in Sinai and the destruction of the civilian infrastructure in Gaza. The *Times of Israel*, a widely read Israeli newspaper, even went so far as to post (and later take down) an online op-ed entitled "When Genocide is Permissible."

The National Lawyers Guild and endorsing organizations request that the Office of the Prosecutor investigate whether members of the Israeli military establishment and political leadership have committed violations under the Rome Statute with respect to the following:

War Crimes

(1) **Willful killing:** Israeli forces have killed over 2,000 Palestinians (more than 80 percent civilians, including over 470 children) according to the non-governmental organization Palestinian Centre for Human Rights. Israel used 155-millimeter artillery, which, according to the non-governmental organization Human Rights Watch, is "utterly inappropriate in a densely populated area, because this kind of artillery is considered accurate if it lands any place within a 50-meter radius."

(2) **Willfully causing great suffering or serious injury to body or health:** Nearly 10,000 Palestinians of Gaza (about 2,200 of them children) have been wounded. UNICEF has said the Israeli offensive has had a "catastrophic and tragic impact" on children in Gaza; about 373,000 children have had traumatic experiences and need psychological help. The UN Relief and Works Agency for Palestine Refugees (UNRWA) said: "There's a public health catastrophe going on." UN shelters, medical facilities, the only power plant, water distribution facilities, and sewage plants have all been targeted, in some cases, more than once and despite repeated calls by UN officials to Israel reporting that civilian shelters were located near Israeli military activity.

(3) **Unlawful and wanton, extensive destruction and appropriation of property not justified by military necessity:** Tens of thousands of Palestinians have lost their homes. More than 1,300 buildings were destroyed and 752 were severely damaged. Damage to sewer and water infrastructure has affected two-thirds of the people of Gaza. The non-governmental organization

Oxfam described the level of destruction as "outrageous ... much worse than anything we have seen in previous [Israeli] military operations." The President of the International Committee of the Red Cross Peter Mauer has said "I've never seen such destruction ever before." Israel has apparently reduced Gaza's habitable land area by 44 percent, establishing a "no-go" zone for Palestinians three kilometers wide along the fence that surrounds the strip on the north and east; 82 of 147 square miles of land will now be off limits to its owners and others.

(4) Willfully depriving a prisoner of war or a civilian the rights of fair and regular trial:

Over 1,000 Palestinians were arrested by Israeli forces in June and July 2014, according to Addameer-Prisoner Support and Human Rights Association. Prisoners include 27 members of the Palestinian Legislative Council, dozens of women, journalists, activists, academics, and 62 former prisoners previously released in a prisoner exchange. More than 450 prisoners are being held without charge or trial under administrative detention, most of them arrested during the recent military operation.

(5) Intentionally directing attacks against the civilian population, civilian objects or humanitarian vehicles, installations and personnel: Israeli forces violated the principle of "distinction," which forbids deliberate attacks on civilians or civilian objects. Israeli forces bombed 142 schools (89 run by the United Nations), including six UN schools in which civilians were taking refuge, the coordinates of which had been repeatedly communicated to Israeli officials. Israeli forces shot and killed fleeing civilians and those seeking to recover the bodies of the dead. (Warnings, which must effectively give civilians time to flee before bombing, do not relieve Israel from its legal obligations not to target civilians.) Israeli forces repeatedly bombed Gaza's only power plant and other infrastructure, which are reportedly beyond repair. Israeli forces bombed one-third of Gaza's hospitals, 14 primary healthcare clinics, and 29 ambulances. At least five medical staff were killed and tens of others were injured. Israeli shelling completely destroyed 41 mosques and partially destroyed another 120.

(6) Intentionally launching attacks with knowledge they will cause incidental loss of life or injury to civilians or damage to civilian objects or long-term severe damage to the natural environment, if they are clearly excessive in relation to the anticipated military advantage:

The principle of "proportionality" forbids disproportionate and excessive civilian casualties compared to the claimed military objective. There is strong evidence to suggest that Israel has been applying the "Dahiya Doctrine" discussed in the UN Human Rights Council [Goldstone] Report, following the 2008-2009 Israeli operation in Gaza known as "Cast Lead." The Dahiya Doctrine is "the application of disproportionate force and causing of great damage and destruction to civilian property and infrastructure, and suffering to civilian populations" and directly violates the principle of proportionality. Responding to rocket fire from Gaza with 155-millimeter artillery and bombings by F-16s in densely populated areas is disproportionate.

(7) Attacking or bombarding undefended towns, villages, dwellings or buildings, or intentionally attacking religious, educational and medical buildings, which are not military objectives: On July 20, 2014, Israeli forces virtually flattened the small town of Khuza'a.

Genocide

As defined by the Rome Statute (Article 6), "genocide" means any of the following acts committed **with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:**

(a) killing members of the group; (b) causing serious bodily harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part: See above regarding civilian casualties. In light of the fact that Palestinians in Gaza had no ability to flee for safety, it must be assumed the responsible Israeli officials knew that huge casualties and destruction of civilian property and infrastructure were certain during the massive bombardment by land, air and sea of the occupied Gaza Strip. With the repeatedly inciting public statements made by Israeli officials before and during the course of Operation Protective Edge and the history of Israel's repeated bombardment of Palestinian refugee camps and populations in Lebanon and in Gaza, the National Lawyers Guild and endorsing organizations specifically request that the Office of the Prosecutor determine whether Israeli officials may be implementing a plan to destroy the Palestinian population, at least in part.

Crimes against Humanity

As defined by the Rome Statute (Article 7), "crimes against humanity" means any of the following when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder; (b) Persecution against a group or collectivity based on its political, racial, national, ethnic or religious character; (c) The crime of apartheid (inhumane acts committed in the context of an institutional regime of systematic oppression and domination by one racial group over another racial group, with the intent to maintain that regime). See above regarding civilian casualties.

In light of the public statements and prior reports and investigations into Israeli operations in Gaza, it appears that crimes against humanity have been committed and are ongoing.

Israeli forces have killed, wounded, summarily executed and administratively detained Palestinians, Hamas forces and civilians alike. Israeli forces intentionally destroyed the infrastructure in Gaza with apparent knowledge that Palestinians were present. UN Secretary General Ban Ki-moon said: "The massive death and destruction in Gaza have shocked and shamed the world." He added that the repeated bombing of UN shelters facilities in Gaza was "outrageous, unacceptable and unjustifiable."

In a system of control that many prominent South African political leaders have described as worse than apartheid-era South Africa, Israel has been keeping Palestinians in Gaza caged in what amounts to "the world's largest open air prison." Israel (with the help of Egypt at Rafah) controls all ingress and egress to Gaza, and limits the access of Palestinians living there to medicine and other essentials. In the West Bank, it subjects Palestinians to arbitrary arrest and long-term administrative detention; expropriates their property; destroys their homes, crops and trees; and maintains separate areas and roads, segregated housing, and different legal and educational systems for Palestinians and Jews. Israel maintains an illegal barrier wall, ignoring the 2004 advisory opinion by the International Court of Justice that it encroaches on Palestinian territory in the occupied West Bank and East Jerusalem, where Israel has built hundreds of illegal Jewish-only settlements with more than 500,000 residents.

The Palestinians who live in Gaza are predominantly refugees from what is today Israel and are prohibited from returning to their homes and property there in contravention of UN resolutions and international law. They are prevented from exercising their right to return solely because

they are not Jews; on the other hand, Jews from anywhere in the world are eligible for automatic Israeli citizenship upon arrival under Israel's "Law of Return."

Aiding and Abetting Rome Statute Violations

The National Lawyers Guild and endorsing organizations submit that for there to be true justice and accountability, the investigation should include whether certain U.S. officials have aided and abetted the commission of war crimes, genocide, and crimes against humanity in Gaza. An individual can be convicted of a war crime, genocide or a crime against humanity in the International Criminal Court if he or she "aids, abets or otherwise assists" in the commission or attempted commission of the crime, "including providing the means for its commission" (Article 25). By transferring financial assistance, weapons and other military aid to Israel, members of the U.S. Congress, President Barack Obama, and Defense Secretary Chuck Hagel have aided and abetted the commission of war crimes, genocide, and crimes against humanity by Israeli officials and commanders in Gaza.

U.S. military aid to Israel

On July 20, 2014, in the midst of its criminal behavior in Gaza, Israel requested additional ammunition, including 140mm tank rounds and 40mm illumination grenades. Three days later, the U.S. Defense Department authorized munitions caches stored inside Israel -- the War Reserve Stockpile Ammunition -- to be transferred to the Israeli authorities. In addition, in early August 2014, the US Congress overwhelmingly passed, and President Obama signed, an appropriation of \$225 million for Israel's Iron Dome missile defense system. The Senate vote was unanimous. With no debate, the House of Representatives voted 395 to 8 to approve the deal.

Prospects for criminal accountability

Neither Israel nor the United States is a party to the Rome Statute. But if Palestine accedes to the statute, the ICC could exercise jurisdiction over crimes committed by Israelis and Americans in Palestinian territory. It is unlikely that the ICC could take jurisdiction pursuant to a UN Security Council referral in light of the fact that the United States has veto power in the Council. The National Lawyers Guild and endorsing organizations therefore respectfully request that the ICC prosecutor initiate her own investigation.

The 2009 Declaration of the Government of Palestine to the ICC pursuant to article 12(3) of the Rome Statute provides the jurisdictional basis for the Office of the Prosecutor to open an investigation under Article 15. Any prior doubts concerning the status of Palestine as a state within the meaning of Article 12(3) have been resolved since the United Nations recognized the State of Palestine and gave it non-member observer state status in November 2012. There is no legal requirement for a further declaration in order for an investigation to be initiated.

The National Lawyers Guild and endorsing organizations submit that all the requirements for the initiation of an investigation pursuant to article 15 have been clearly met. The "information available to the prosecutor provides," at the very least, "a reasonable basis to believe that ... crime[s] within the jurisdiction of the Court ha[ve] been or [are] being committed" (article

53(1)(a). The “gravity of the crime[s] and the interests of the victims” warrant an investigation, and there can be no doubt that such an investigation would serve the interests of justice (article 53(1)(c)).

The initiation of an investigation would send a clear message to all those involved either in committing or in aiding and abetting of the aforementioned crimes that they stand to be held personally accountable for their actions. This could help end the continuing breaches of international law and end the impunity that has underpinned the ever increasing violence in the region, and that has caused – and continues to cause – extreme suffering to its civilian population.

Very truly yours,

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