

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them

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Minister of Foreign Affairs' criticisms of Gaza Inquiry are misleading **25 August 2014**

Minister of Foreign Affairs John Baird's statements slamming recent decisions on Gaza by the UN Human Rights Council (HRC) are one-sided and distort the truth. On 11 August 2014, the Minister called the HRC's decisions on appointments of members of a Gaza commission of inquiry a "[sham](#)" and "[an utter shame](#)." These condemnations follow the Minister's 23 July 2014 [statement](#), which incorrectly claims that the HRC resolution "completely ignores" the responsibility of Hamas for the suffering of Palestinian people while singling out Israel alone for condemnation. The Minister's disrespectful statements are disturbing because they mislead Canadians about the HRC's 23 July [resolution](#) and the HRC president's appointment of distinguished international human rights law experts as members of a commission of inquiry.

Resolution HRC S-21/1 "Ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem"

The HRC's [resolution](#) includes a condemnation of "all violence against civilians wherever it occurs, including the killing of two Israeli civilians as a result of rocket fire, and urges all parties concerned to respect their obligations under international humanitarian law and international human rights law" (paragraph 3). At least 2,165 people have been killed during the hostilities. An estimated 500 children are among the 2,097 Palestinians killed, the majority of whom were civilians. In Israel, 68 people have been killed, including 64 soldiers.

The people of both Israel and Palestine have the right to life, liberty and security and to remedies for violations as set out in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* (ICCPR). Israel ratified the ICCPR on 3 October 1992. Palestine has non-member observer status with the UN and acceded to the ICCPR on 2 April 2014. According to international law, Israel is the "occupying Power" of the Occupied Palestinian Territories (OPT), which include Gaza. The HRC resolution notes that, as occupier, "Israel has international obligations to ensure the welfare and safety of the Palestinian civilian population under its occupation in the West Bank, including East Jerusalem, and in the Gaza Strip..."

Each of the victims of the Gaza war and their families are entitled by international law to know whether the deaths occurred as a result of a violation of law and to have perpetrators of violations held accountable.

Mr. Baird's comments about the commission of inquiry demonstrate a lack of understanding of the role of the law as an instrument to prevent and remediate unlawful death, injury, displacement and destruction and to ensure justice for victims.

The Commission of Inquiry

At present, the HRC commission of inquiry is the only international legal process with a mandate to conduct a competent and independent investigation and recommend measures to impose accountability for violations of international law and to protect civilians from further violations. Neither Israel nor Palestine can conduct investigations that supply the required independence.

The mandate of the commission of inquiry created by the HRC is to investigate all violations of international humanitarian law and international human rights law in the context of the military operations that commenced 13 June 2014, to identify those responsible and to recommend measures that will end impunity and ensure those responsible are held accountable. The commission is also to recommend ways and means to protect civilians against further assaults.

The Members of the Commission of Inquiry

Mr. Baird's comments castigated the appointment of the members of the commission of inquiry but did not single them out by name. Even so, the Minister's comments have fed media vilification of the two members of the commission, Prof. William Schabas and Mr. Doudou Diène, both internationally recognized as distinguished international human rights and humanitarian law specialists. A third appointee, New York Supreme Court judge Mary McGowan Davis, was appointed after Mr. Baird's comments.

Most of the criticism by partisan commentators focuses narrowly on saying Prof. Schabas, should recuse himself because of previous stated opinions about policies of Israel and Israeli Prime Minister Benjamin Netanyahu. These opinions do not reflect a realistic and informed apprehension of bias.

According to international law expert [Theodore Meron](#), international judges are to reach a decision "only after having heard from both parties and having reviewed the facts and the applicable law." Judges should recuse themselves in two situations. One is the situation in which the judge concludes that she or he cannot be impartial because she or he has already formed an opinion on the issue to be decided. In this case, Prof. [Schabas has stated](#) that

if the job description for the position of Chairman of the Commission is an absence of opinion on issues in Israel and Palestine, it will be hard to find a qualified candidate. I don't know anyone who doesn't have a strong opinion, one way or another, about these matters.... The real issue is not whether I have views on relevant issues, but if I can put them to one side in an effort to be as impartial as possible, the way a judge or members of a jury do. I believe I can do this. Many of those who have criticised me do not seem to desire an impartial Chairman who attempts to put personal views to one side. Rather, they want a Chairman who has views close or closer to their own.

Prof. Schabas has stated that he is able to set his views aside in his work on the commission of inquiry because they are not relevant to the particular issues the commission is mandated to investigate, namely violations of international humanitarian law and international human rights law in the context of the military operations that commenced 13 June 2014.

A second situation in which Meron states that judges should recuse themselves occurs when "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." This is an objective test, separate from the opinion of the judge or one of the parties or their partisan supporters. The usual examples are situations in which the judge has a pecuniary or other interest in the outcome or has a strong connection to one of the parties. Neither of these situations arises in this case. A

more complex situation involves the judge's previous public expression of an opinion that could be viewed as prejudging the case before him or her. This can arise particularly in international tribunals where judges have, prior to their appointment to the bench, been academics, diplomats or politicians. One relevant example arose in the International Court of Justice (ICJ) in the 2004 case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The question arose as to whether Judge Nabil Elaraby, a former Egyptian diplomat, should recuse himself because of previous statements he had made about the question before the Court, as alleged by Israel. The ICJ [ordered](#), thirteen votes to one, that Judge Elaraby's previous opinions in opposition to conduct of Israel did not lawfully preclude his participation as a judge in the case.

While these principles of international courts are useful, it is important to state that the commission of inquiry is not an international court. No binding decisions will be made by the commission of inquiry; the commission will make recommendations to the HRC, which members may accept or reject.

The UN Human Rights Council as a political body

The comments of Mr. Baird convey a misunderstanding about the nature of the HRC and the appointment process. The HRC is composed of 47 states elected by the members of the UN General Assembly. Thus, the HRC is a political body like other organs of the UN including the General Assembly and the Security Council. Appointments of the members of the commission of inquiry were not, however, made by the HRC itself, but by its president, who is expected to play an impartial role, much as the Canadian speaker of the House of Commons plays an impartial role.

Prof. Schabas himself has [stated his opinion](#) that the members of the HRC have in the past demonstrated double standards in singling out Israel when it fails to condemn violations in other countries. He attributes the double standards to regrettable biases in the agendas of the countries making up the HRC. Prof. Schabas pointed out that it is “a plausible complaint that maybe Israel has gotten a lot of attention at the Human Rights Council but at the same time it has perhaps had a lot of inattention at the Security Council, so the double standards work in both directions for Israel.”

The commission of inquiry is expected to be impartial and independent of external influence

All mandate holders appointed by the HRC or its president, including the Gaza commission of inquiry, are expected to be independent and impartial in the fulfillment of their mandates despite any kind of external pressures placed upon them by the parties or their allies. Palestine and Israel and their partisan allies can be expected to protest any outcome with which they disagree or which challenges the lawfulness of their behaviour in the Gaza conflict. It is disappointing and regrettable that Mr. Baird, as a senior official of the Canadian government, has prejudged the commission of inquiry so as to discredit its findings before it has even commenced its work. It is troubling that Mr. Baird has chosen to adopt a partisan role in a dangerous conflict that requires measured commitment to the facts and law and careful diplomacy to prevent and remedy the violations of international law that have taken so many innocent lives.

Lawyers' Rights Watch Canada is a committee of lawyers who promote human rights and the rule of law through advocacy, education and research. LRWC is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations.