

The Honorable Rob McKenna
Attorney General, State of Washington
1125 Washington Street SE
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Olympia, WA 98504-0100

Dear Mr. McKenna:

We are a group of international lawyers and legal scholars, writing in our individual capacities, who have studied, and in some cases, litigated, issues pertaining to Israel and the Occupied Palestinian Territories. We have read with concern your letter of March 30, 2009, to Secretary of State Hillary Clinton supporting Israel's December-January attack on the Gaza Strip. We find numerous factual and legal errors in the letter, and write to share our analysis of the letter with you and to ask you to publicly repudiate its claims. Below is a list of our principal concerns.

1. The first paragraph of the letter asserts that Israel's attack on the Gaza Strip involved an exercise of the right to self-defense. Israel is a recognized state within the international community, and enjoys the right of self-defense as any other state. Even when properly triggered, however, the right is limited. The exercise of self-defense must be necessary and proportional to the harm it seeks to redress. We find Israel's claim of self-defense invalid for at least three reasons. First, Israel did not suffer an "armed attack" within the meaning of international law in the period immediately preceding its aerial, sea, and land bombardment of the Gaza Strip beginning on December 27, 2008. For five months, from June to early November, both Israel and Hamas had observed a truce along the Israel-Gaza border that had brought substantial calm to the area. Israel violated this truce on November 4 by launching a raid into the Gaza Strip, killing six Palestinians. Hamas responded with rocket fire -- yet no Israelis died. Israel cannot claim self-defense against rocket fire following the collapse of the truce, because it was provoked by Israel's own violation. Second, Israel's assault was not necessary to preserve the security of its citizens. Innocent Israelis have undeniable rights to be free of indiscriminate attack. Yet their government failed to explore negotiating a renewal of the truce, which had brought the greatest calm to the region in years. Hamas had offered to extend the truce in public pronouncements in the days immediately preceding Israel's attack, as long as Israel abided by its terms -- including ending its blockade of the Gaza Strip. Israel ignored those offers. Third, even were Israel's assault otherwise justified, its scale was vastly disproportionate to the goal of stopping rocket fire. That goal might have authorized strikes at Hamas military targets - but certainly not at a university, schools, mosques, the justice, education, and housing ministries, civilian police stations, fire stations, courts, prisons, and other institutions that were the very backbone of Gaza society.
2. The second paragraph of the letter contains several errors of fact and misleading statements. First, Hamas did not take exclusive control of the Gaza Strip in June,

2005, as the letter alleges. Rather, Hamas gained the right to form a government in the Occupied Palestinian Territories by prevailing in lawful democratic elections in January, 2006. Hamas attempted on more than one occasion to form national unity governments with members of Fatah, but such attempts were either unsuccessful or short lived. In June 2007, Hamas forces, apparently acting to pre-empt a feared coup attempt, expelled fighters loyal to Fatah from the Gaza Strip. Palestinian Authority President Mahmoud Abbas then dissolved the Hamas government, as he was lawfully entitled to do. But Abbas then violated the Palestinian Authority's Basic Law by appointing a new government of his own supporters. Under the Basic Law, the previous cabinet should act as a caretaker government until a new government can be formed. Under Palestinian law, therefore, the former Hamas government had legal claim to continuing governing authority in both the Gaza Strip and the West Bank.

3. The third paragraph of the letter makes claims that have no grounding in international law. Hamas has been designated a "terrorist organization" in the domestic law of a handful of nations, but not a "terrorist regime" - a phrase that has no accepted meaning in international law. In any case, this designation in no way relieves Israel of its responsibilities to abide by international law. The claim that Hamas "acts under the cover of a 'sovereign state'" is devoid of legal meaning. Hamas has never declared statehood in the Gaza Strip nor anywhere else, nor has any nation in the world recognized Hamas or the Gaza Strip as an independent state. It is true, however, that non-state actors such as Hamas are subject to the rules of customary international humanitarian law and human rights law in the conduct of warfare.
4. The fourth paragraph of the letter correctly identifies the standard of proof in international criminal tribunals as "beyond a reasonable doubt," and also correctly cites the principle of distinction (the obligation of warring parties to distinguish between civilian and military targets). Yet the presumption of innocence is also a facet of international criminal law. Thus while the available evidence suggests strongly that some individuals within Hamas (not "Hamas" as a collective entity) may bear criminal liability for indiscriminate attacks on Israeli civilians, no trials have yet been held. To declare Hamas "guilty beyond a reasonable doubt" without benefit of trial violates the presumption of innocence that is part of both the U.S. and international legal tradition.
5. The fifth paragraph of the letter reiterates common Israeli claims that Hamas has used Palestinian civilians as "human shields." In fact, no evidence has yet emerged that Hamas intentionally used civilians to protect armed fighters from attack, in the manner barred by international law. Merely fighting from inhabited areas, as some Hamas troops apparently did, does not, in itself, constitute illegal conduct. We note, moreover, that during the fighting, Israel categorized Palestinian civilian police as "combatants," killing over 300 of them. Needless to say, these police officers, charged with directing traffic and maintaining public order, were, indeed, positioned in heavily populated areas, as their jobs required. Israel's definition of Palestinian police officers (and other civil servants who were employed by the Hamas-led government) as "combatants" violates well-grounded principles of international humanitarian law. Ironically, there is ample evidence

that Israeli troops, in fact, used Palestinian civilians as human shields in the invasion of Gaza, as they have repeatedly in the past. It is disturbing that Israeli troops persist in a practice which has been repeatedly held to be illegal even by the Israeli High Court.

6. This sixth paragraph criticizes Hamas for its failure to establish “a flourishing, independent Palestinian state.” Yet under the Oslo accords, Israel and the Palestine Liberation Organization agreed that the West Bank and the Gaza Strip were to be treated as an indivisible unit, and that their final status would be subject to negotiation. Thus, for Hamas to have declared an “independent state” in the Gaza Strip would have entailed a violation of the Oslo accords – which Hamas is under international demand to respect. Moreover, as Israel’s government has now made clear in words as well as in deeds, it is firmly opposed to the creation of an independent Palestinian state. It has done everything within its power to foil effective government by Hamas, including withholding tax revenues due the Palestinian Authority under the Oslo accords, kidnapping and jailing without trial 27 Hamas legislators, including the speaker of the Palestinian Legislative Council, and placing the Gaza Strip under virtual siege for almost two years. This siege – an act of war under customary international law – violates Article 33 of the Fourth Geneva Convention as a form of collective punishment.
7. The seventh paragraph misleadingly analogizes Israel’s attack on the Gaza Strip to the behavior of the Allies in World War II, ignoring the development of international humanitarian law and human rights law over the last sixty years. Arguably, however, Israel remains an occupying power in the Gaza Strip, by virtue of its continuing “effective control” of the Gaza Strip exercised from the outside. As such, Israel owes a duty of protection to the residents of that region. It has violated this duty by employing massive force against an occupied population and largely defenseless population. The proper legal paradigm, in short, is not warfare between the organized militaries of independent nations, but rather the law of military occupation provided in the Hague Conventions of 1907 and the Fourth Geneva Convention of 1949.
8. Although the international legal system does not function, strictly speaking, as an extension of the “common law,” the eighth paragraph correctly notes that intent is an element in establishing international criminal culpability. It is partly for that reason that we would not convict “Hamas” for its rocket attacks on Israeli civilians without further evidence, even though it seems likely that at least some of Hamas’s rocket fire violated international law. We note that Israeli military censorship of press references to base locations, troop movements, and other security-related information complicates evaluation of the intent behind Hamas rocket fire, which in some cases may have been directed toward military targets. We note further that other Palestinian organizations have also fired rockets and mortars into Israel, and Hamas leaders may bear no culpability for those acts by other groups and individuals. In contrast, statements by Israeli military and political leaders make quite clear that they intended to strike civilian infrastructure and to kill civilian individuals (such as the aforementioned police officers). Other statements and reports by observers strongly suggest that Israel deliberately employed disproportionate force in violation of international law,

- knowingly attacked medical and other emergency responders, used weapons illegally (including white phosphorous), and abused Palestinian detainees. We believe that this evidence would be sufficient at a minimum to justify further investigation of Israel's acts, although we would reserve judgment at this stage as to the culpability of any particular Israeli military or political leaders.
9. The ninth paragraph describes the impact of the visits of numerous attorneys general of the states to Israel. Among them seems to be a willingness to overlook Israel's illegal acts with respect to territories it has occupied in its various wars. Under the United Nations partition plan of 1947, the city of Jerusalem was slated to be governed by the UN as a "corpus separatum," and not to be part of either the Jewish or Palestinian state. Israel occupied the western portion of the city in 1948, but its sovereignty there has never been recognized by the international community. Israel occupied the eastern half of the city in 1967, and extended Israeli domestic jurisdiction there, effectively annexing it. Israel has also repeatedly extended the municipal boundaries of the city eastward, incorporating portions of the West Bank. All of these acts have been declared legally "null and void" by the United Nations Security Council. Israel also purported to extend domestic jurisdiction to the Golan Heights – part of Syria – in 1982, effectively annexing that territory as well. That act has been similarly condemned by the international community as a violation of the Charter of the United Nations.

We do not question the right of attorneys general for the states of the United States to hold and express political opinions as private individuals. But you have signed this deeply flawed and intemperate letter as the highest legal officer in your state. We wonder about the propriety of state officials, elected to perform limited functions under the constitutions of their states, endorsing the tendentious legal positions of a foreign state in an international armed conflict. We have not studied that issue, and ultimately that may be a political question to be resolved between you and your constituents. Nonetheless, we strongly encourage you to withdraw your name from the letter and publicly repudiate its contents.

Sincerely,

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