

Submission to the United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict

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This submission is not confidential

There exists a grave concern as to whether Professor William Schabas, chairman of the United Nations Independent Commission of Inquiry, will be able to perform his function of investigating the conduct of the conflicting parties which took place before, during and after the 2014 Gaza conflict.

The gravest concern and well founded apprehension exists as to whether Prof. William Schabas ("WS") can fairly and impartially be part of or preside over the Commission of Inquiry which it is mandated to carry out.

Such concern and apprehension is being and has been experienced in consequence of the partiality and prejudice against Israel displayed on many occasions by WS, Chairman of the Commission.

Details of WS's partiality and prejudice appear from statements he made which have been widely circulated in press publications as also from his conduct on various occasions.

I refer fully hereunder to inter alia a number of such statements and details of such conduct.

Details of various statements and the conduct of WS which clearly reflect such partiality and prejudice.

Albeit that such details have on numerous occasions been widely published and referred to, they bear repeating and need to be emphasized once again: -

1. His repeated calls for prosecuting Israeli officials for alleged "war crimes" at the International Criminal Court (``ICC`)
2. He has served as legal counsel to Ireland's Amnesty International branch, which has consistently shown a deep hostility to Israel.
3. He has defended Iran's Mahmoud Ahmadenijad, stating that his repeated calls "to wipe Israel off the map, do not constitute a call for genocide but are simply political views".
4. He authored the foreword for a volume titled "Is there a Court for Gaza: A Test Bench for International Justice" in which he endorsed the discredited 2009 Goldstone Report, and repeated the call for the ICC prosecution of Israelis.
5. WS` biases were particularly evident during "The Russel Tribunal" on Palestine("RToP") session in October 2012. The tribunal was widely recognized as a kangaroo court labeling Israel as an `` apartheid state`` as part of the 2001 Durban strategy of demonization. During this event WS

stated his desire to see Prime Minister Netanyahu stand before the International Criminal Court ("ICC").

6. WS's decision to participate in the widely discredited RToP demonstrates the depth of his hostility to Israel and willingness to exploit a pseudo-judicial framework in order to advance this goal.

The RToP consisted of "jurors" and "witness's" all of whom including WS had extensive histories of Israel-bashing.

The 24 "witnesses" who participated in the Tribunal included i.a. Israeli MK HANNEN ZOABI who declared "I would say. there is no justification for Zionist projects and to have a Jewish state in my homeland".

7. The NGO Monitor , strongly condemns the appointment of WS based on this history of and his participation in the hate-filled RToP .

The NGO Monitor called on all UN member states to demand his immediate dismissal.

See: the Report of the "NGO Monitor" (web@ngo-monitor.org) dated 13/8/14 in support of what is stated in paragraphs 1-7 above.

Further details of the anti Israel bias of WS are set out in an advance copy of the Request by UN Watch " , signed by Hillel Neuer,for William Schabas to recuse himself for bias or the appearance thereof" dated September 4, 2014 (the "Request") which is available at <http://tinyurl.com/pgojppw>
Relevant references in the Request are repeated herein for the reader's convenience.

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- WS speaking in a university symposium on 10 September 2010 declared "Frankly, if I had to think of an Individual who would be the biggest threat to the survival of Israel, I'd probably choose Netanyahu." (page 4 footnote 4)
 - SW's above stated view was again repeated by him in a subsequent law journal when he wrote Netanyahu could be considered "the single individual most likely to threaten the survival of Israel." (page 4 footnote 5)
 - Interviewed in 2009, WS called for "going after" Israel's President - then Shimon Peres – for war crimes. WS further asked "why are we going after the president of Darfur and not the President of Israel for Gaza? (page 5 footnote 6)
 - Speaking in 2012 at the RToP WS accused Israel of having engaged in "punitive action" in 2009 which was not motivated by self-defense but rather "aimed to punish the people of Gaza". (page6 par9)
 - Over three decades WS has made additional statements that taken together evince a pattern and practice of seeking to accuse and indeed indict Israel for war crimes. (Various examples are furnished on pages 5-7 of the Request.)

- In 2012 WS accused Israel of perpetrating crimes against humanity, war crimes and the crime of aggression at various times of its history. (Request- page 5 footnote 10)
- Regarding the omission by the ICC to indict Israel for war crimes, WS acknowledged that much of his efforts are devoted to trying to indict Israel. (Request- page 5 footnote 11)

"A strong and arguable case could be made that the court can already exercise jurisdiction over crimes against humanity and war crimes perpetrated in Palestine, and that the obstacle... is simply a decision by the prosecutor of the international criminal court. *And so much of my efforts these times is addressed to trying to get that decision rethought and reversed, and pointing out the legal fallacy and the policy error of the court in failing to take up this burning important issue.*" (Request-footnote 11)
- Writing about the UN's controversial Durban II conference on racism WS stated that the former President Mahmoud Ahmadinejad was merely "provocative", suggesting that his statements (which included, denying the Holocaust) were made in "desperation" and "deserve to be ignored rather than exaggerated". (Request- footnote 15.)
- "In an interview on 17 July 2014 with the BBC, WS effectively pronounced Israel presumptively guilty on the very question that the Commission is now called to investigate – Refer to: 21 BBC World Service, *Newshour*, 17 July 2014, <http://youtu.be/yHc7RqYBI64>.

BBC: "Well, Israel has maintained that in doing its best to minimize civilian casualties and that Hamas is using civilians as human shields. Israel also says that Hamas's rockets are illegally targeting residential areas. So, are any crimes being committed here? William Schabas is professor of international law at Middlesex University of London and at Leiden University in the Netherlands. First of all on the Israeli airstrikes, are they justified as self-defense protecting babies?"

SCHABAS: "Well, self-defense will always be a justification, but it's only to the extent that it's proportionate to the threat that's being posed... There are huge numbers of civilian casualties on one side and virtually no civilian casualties on the other, and so prima facie, there is evidence of disproportionality in the response that Israel in undertaking in order to protect itself."

11. Prof. Irwin Cotler " a member of the Canadian Parliament, Emeritus Professor of law at McGill University and a former minister of Justice and attorney- general in Canada stated in an article on 12/9/14 in the Jerusalem

Post inter alia "...the Commission of Inquiry is tainted by Professor Schabas's past conduct and prejudicial pronouncements...." and he referred to some of the same facts and allegations regarding the anti-Israel bias mentioned in the Request.

Professor Cotler further stated that Shabas has accused Israel of war crimes, crimes against humanity, and aggression committed "on the territory of Palestine since 2002," while acknowledging that most of his effort is focused on bringing about the prosecution of Israelis at the ICC. This alone is grounds for recusal.

Schabas has similarly sanitized the actions of Hamas, saying: "If we look at the poor people of Gaza...all they want is a state – and they get punished for insisting upon this, and for supporting a political party in their own determination and their own assessment that seems to be representing that aspiration"

In an incredible 2009 statement, Schabas expressed surprise that the President of Sudan would be prosecuted before the ICC – where he was indicted for war crimes, crimes against humanity, and genocide in Darfur – but not President Shimon Peres".

What then has been the response of WS to the criticism/s accusing him of anti-Israel bias?

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1. In responding to the criticism of his appointment leveled against him by Israel's ambassador, Ron Prozor, to the United Nations, by reason of his anti Israel bias, WS said to National Public Radio that Prozor's goal attacking his credibility was to disqualify the commission.

"The ambassador of Israel does not want this commission. I am obviously a lightning rod and a few of my previous statements have contributed to that but he would not be happy with anyone. He is opposed to the commission. He is opposed to the Human Rights Council. He is opposed to all of the Human Rights mechanism in the UN, that is his target. Perhaps I underestimated the venom that would be associated with my own appointment. But this all to be expected. There is nothing surprising there. If there are other important governments around the world, and more credible that come and say that I am not the right person, I am going to be a little bit more attentive to them than I am to the Israeli permanent representative," Schabas said.

Schabas added that his critics are not looking for an impartial judge, they simply want someone who agrees with them. The commission is about Gaza and not his past views.

He further added: "If it becomes clear that I am an obstacle to this going forward I will be the first to offer to step aside, but this has not happened. **"I have a job to do and I have to do it as honestly as I can," he told NPR.** (My emphasis)

"There are more than 2,000 people who have lost their lives in the conflict and it would be a travesty for the UN to pass over it", Schabas said.

In past interviews with the Israel media, Schabas described himself as someone who was critical of Israel, but not anti Israel. He footnoted that he has visited the country many times, lectured there and is even a member of the International Advisory Board of the Israel Law Review.

The UNHRC said "the Commission of Inquiry will investigate all violations of international human rights and humanitarian law since the current military operations began in mid-June.

"In carrying out its work, the Commission of Inquiry will aim to establish the facts and circumstances of Human rights violations and crimes perpetrated in order to identify those responsible. "

(See the report of Tova Lazaroff in the Jerusalem Post Report on 26/8/14).

Professor Cotler's response to WS

Regarding WS insisting that he will put aside his personal views and perform his duties with impartiality, Cotler responded as follows:

"Since being named to chair the Commission of Inquiry, Schabas has insisted that he will set aside his personal views and perform his duties with impartiality. Yet, as McGill University Law Professor Frederic Megret has written with respect to UN fact-finders,

"a declaration that one is impartial....will not suffice to dispel an appearance that one is already committed to an outcome.

Simply put, Schabas' appointment to an already fatally flawed commission raises, at a minimum, a reasonable apprehension of bias, if not actual bias, and is a standing violation of the elementary principles of due process applicable to UN fact-finding commissions".

Legal Principles to be applied

1. The test is one of "**Reasonable Apprehension of Bias**"[my emphasis].
2. The requirement of impartiality is violated not only where a judge is actually biased, but also where there is an appearance of bias.

Professor Schabas himself has summarized the law of international war crimes tribunals as follows:

"A judge maybe disqualified in any case in which he or she has a personal interest, or some other association, which might affect his or her impartiality. The test is one of **"reasonable apprehension of bias"** [my emphasis].

See: Request footnote 38

William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006), at 316.

3. The authoritative exposition of this rule comes from the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY). In the case of *Prosecutor v. Anto Furundzija*, the Appeals Chamber found that, "as a general rule, courts will find that a Justice "might not bring an impartial and unprejudiced mind" to a case if there is proof of actual bias or of an appearance of bias"
See : Request footnote 39. *Furundzija* (Appeal Judgement), IT-95-17/1-A, International Crime Tribunal for the former Yugoslavia, 21 July 2000, at par. 179
4. The ICTY Appeals Chamber concluded that "there is a general rule that a Judge should not only be subjectively free from bias, but also **there should be nothing in the surrounding circumstances which objectively give rise to the appearance of bias**" [my emphasis]
See: Request footnote 42.
5. An appearance of bias exists, inter alia, where "the circumstances would lead a reasonable observer, properly informed, **to reasonably apprehend bias.**" [my emphasis] See: Request footnote 43
6. Writing about Schabas in The Times of London, a former British judge, Lord David Pannick, noted that a person should not sit in a judicial or quasi-judicial role if "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" "The appearance of bias is sufficient to disqualify a person," wrote Lord Pannick.

My concluding Submissions

I respectfully submit that:

1. In the light of the recent call by founding director of Human Rights Watch, Aryeh Neier, a colleague of WS and former head of the ACLU, that WS recuse himself and in view of the facts and contentions set out above;

- there can be no doubt of the existence of the Anti-Israel bias of WS.
- there can be no doubt of the partiality and hostility of WS against Israel.
- there are well-substantiated grounds and reasons for Israel to believe and to be concerned that adverse findings and conclusions have already been formed in the mind of WS.

2. Accordingly it is clear that, in accordance with the rulings and dicta quoted above and Lord Pannick's dictum that the appearance of bias is sufficient to disqualify a person, the test has been met that there is a reasonable apprehension of bias.

3. In view of WS not being recused and/or refusing to recuse himself from presiding over and/or participating in the UN Independent Commission of Inquiry on the 2014 Gaza conflict there can be no doubt that the findings and conclusions of the Commission will be seriously tainted and in breach of the fundamental principles of justice which should govern the Inquiry

Dated January 28, 2015.

Henry Shakenovsky