

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

NEW YORK  
CITY BAR

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April 24, 2017

*By Facsimile and Email*

The Honorable Fatou Bensouda, Chief Prosecutor  
International Criminal Court  
Information and Evidence Unit  
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**Re: In Support of Filing OTP-CR-397/15**

Dear Prosecutor Bensouda:

I write on behalf of the New York City Bar Association (the “Association”) in support of the communication sent to you pursuant to Article 15 of the Rome Statute by the non-governmental organizations Yazda and Free Yezidi Foundation (the “Yazda/FYF communication”), together with the subsequent letter in support submitted by the Global Justice Center. Accordingly, the Association requests that the Office of the Prosecutor (OTP) commence a preliminary examination into the situation in Iraq with respect to the commission of genocide and other crimes within the jurisdiction of the Court committed against the Yazidi people by certain individual members of the group known as Islamic State of Iraq and al-Sham/Greater Syria (ISIS a/k/a ISIL a/k/a Daesh, hereinafter ISIS).

The Association is an independent non-governmental organization with a membership of some 25,000 lawyers, judges, law professors and government officials drawn from the New York metropolitan area, the broader United States and overseas, including members from more than 50 countries. Founded in 1870, the Association has a long history of dedication to human rights. The Association’s Committee on the United Nations is a liaison between the City Bar and the UN Secretariat and agencies on legal issues that raise humanitarian concerns, the Association’s Committee on International Human Rights investigates and reports on human rights conditions around the world, and the Association’s Middle Eastern and North African Affairs Committee is devoted to issues in the region.

The Association is and remains a committed supporter to and staunch advocate for the continuing work of the ICC and the informed exercise of its jurisdiction. Whilst we appreciate the complexities involved in enabling international justice to work as an effective deterrent and enforcement tool, we recognize the ICC's preliminary examination mechanism as a unique tool in the international criminal justice framework. We believe this mechanism can and must be exercised in situations such as the one in Iraq in relation to acts committed against the Yazidi. We respectfully refer you to the Yazda/FYF communication, which describes many of those acts in detail.

We are aware of the prior statement issued by your office in April 2015 with respect to the situation of the Yazidi people in Iraq. On that occasion, after due consideration, you stated your belief that the jurisdictional basis for opening a preliminary examination was "too narrow at this stage." However, you also stressed that you "remain profoundly concerned by this situation and ... want to emphasize our collective duty as a global community to respond to the plight of victims whose rights and dignity have been violated."<sup>1</sup>

Subsequent to your statement above, the plight of Yazidi women and girls abducted by ISIS has been the subject of increased global concern, as detailed in the Yazda/FYF communication and Global Justice Center's letter in support.

For example, Human Rights Watch issued a report describing interviews with Yazidi women and girls who had fled ISIS-controlled areas. Several of these Yazidi women and girls had been abducted in 2014 and had spent more than a year in captivity. According to the report, women and girls described "being forcibly converted to Islam, kept in sexual slavery, bought and sold in slave markets and passed among ISIS members."<sup>2</sup>

Similarly, The New York Times reported in early March 2016:

Islamic State leaders have made sexual slavery as they believe it was practiced during the Prophet Muhammad's time integral to the group's operations, preying on the women and girls the group captured from the Yazidi religious minority almost two years ago. To keep the sex trade running, the fighters have aggressively pushed birth control on their victims so they can continue the abuse unabated while the women are passed among them.<sup>3</sup>

U.S. Secretary of State John Kerry, the U.S House of Representatives, the EU Parliament and others have deemed these actions to constitute acts of genocide. In his Remarks on Daesh and Genocide issued on March 17, 2016, Secretary Kerry stated:

[I]n my judgment, Daesh is responsible for genocide against groups in areas under its control, including Yezidis, Christians, and Shia Muslims. Daesh is genocidal by self-

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<sup>1</sup> Int'l Criminal Court, Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS (8 April 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>

<sup>2</sup> See HRW report, "Iraq: Women Suffer Under ISIS," April 5, 2016.

<sup>3</sup> See Rukmini Callimachi, "To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control," subtitled "Modern methods allow the Islamic State to keep up its systematic rape of captives under medieval codes," March 12, 2016. The Times article was based on interviews with more than three dozen Yazidi women who escaped Islamic State captivity and who agreed to be interviewed about the methods ISIS fighters used to avoid pregnancy, including oral and injectable contraception, and in at least one case, forced abortion. See also Rukmini Callimachi, ISIS Enshrines a Theology of Rape, August 13, 2015. And see "Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide" published by the Global Justice Center on April 7, 2016, <http://globaljusticecenter.net/files/CounterTerrorismTalkingPoints.4.7.2016.pdf>.

proclamation, by ideology, and by actions—in what it says, what it believes, and what it does. Daesh is also responsible for crimes against humanity and ethnic cleansing directed at these same groups and in some cases also against Sunni Muslims, Kurds, and other minorities.... [O]ver the past months, we have conducted a review of the vast amount of information gathered by the State Department, by our intelligence community, by outside groups. And my conclusion is based on that information and on the nature of the acts reported....<sup>4</sup>

And in its June 15, 2016 report, “‘They came to destroy’: ISIS Crimes against the Yazidis,”<sup>5</sup> the Independent International Commission of Inquiry on the Syrian Arab Republic concluded that ISIS has committed the crime of genocide, as well as crimes against humanity and war crimes, against the Yazidis. The report also makes clear that these crimes continue to be committed by ISIS against the Yazidi people.

The Association understands that your Office undertakes a detailed, rigorous and phased process in considering whether to launch a preliminary examination, given your responsibilities under the Rome Statute to determine whether a situation meets the legal criteria to warrant investigation by the Court. We appreciate that at each phase—whether identifying preliminary jurisdictional questions of time, place or person, addressing issues with respect to subject matter jurisdiction, answering questions of admissibility through the prisms of complementarity and gravity, or examining countervailing considerations which could make proceeding with the investigation contrary to the interests of justice—you must be satisfied that the appropriate criteria are met.

As to the particulars of the situation before you and the credible allegations that crimes within the jurisdiction of the Court have been committed, the goal of the preliminary examination process is “to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation.”<sup>6</sup> Based on facts and evidence uncovered by journalists, nongovernmental organizations, the UN, and others, the Association believes that such a reasonable basis exists, and that a preliminary examination will so find.

First, as to the question of subject matter jurisdiction, you have earlier noted that the alleged atrocities “undoubtedly constitute serious crimes of concern to the international community.”<sup>7</sup> This would suggest that the allegations on their face, as far as subject matter jurisdiction is concerned, provide “a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed.”<sup>8</sup>

Regarding the personal jurisdiction of the Court, we understand that applying the reasonable basis standard to the question of personal jurisdiction over a national of a State Party to the Statute can be complex in circumstances where territorial jurisdiction does not apply. However, we note that your office already has one such situation, also involving Iraq, at Phase 2 of the preliminary examination process.<sup>9</sup> While the examination of a similar scenario alone may

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<sup>4</sup> <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>. And see European Parliament Resolution of 4 February 2016, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BTA%2BP8-TA-2016-0051%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN>

<sup>5</sup> UN Doc A/HRC/32/CRP.2

<sup>6</sup> Report on Preliminary Examination Activities 2016, para 11.

<sup>7</sup> See note 1

<sup>8</sup> ICC.01/09-19 Situation in the Republic of Kenya Decision Pursuant to Article 15 on the Authorization of an Investigation into the Situation in the Republic of Kenya 31 March 2010 para. 35

<sup>9</sup> See note 6, paras 75-108.

not be decisive in determining whether a preliminary examination should be commenced, we believe it should weigh in favor of a preliminary examination here.

While recognizing the potential jurisdictional complexities with regard to the allegations of crimes committed against the Yazidis in Iraq, the facts presented by the Yazda and Free Yezidi Foundation communication and the Global Justice Center's letter, along with facts presented by journalists, NGOs, the UN and others, provide support for finding that this case does not manifestly fall outside the jurisdiction of the Court<sup>10</sup> but, rather, more likely than not falls within the Court's jurisdiction (thus crossing the Phase 1 threshold).

Importantly, the OTP's decision to undertake a preliminary examination would enable a more detailed analysis of personal jurisdiction issues and the hierarchy of alleged perpetrators while putting pressure on those national authorities primarily responsible for investigating and prosecuting the perpetrators of these mass crimes. Based on credible allegations of extensive engagement of so-called "foreign fighters" from States Party to the Rome Statute (detailed in the communications referenced above), there is a reasonable basis to believe that at least some of these individuals from States Party may have committed, or aided and abetted the commission of, crimes that fall within the Court's subject matter jurisdiction.

In this situation, and particularly at this stage, we believe that jurisdictional complexities presented by the fact that these atrocities are being committed in Iraq ought not to serve as a bar to the effective administration of international justice, particularly in light of allegations that some of the individual actors are nationals of States Party to the Rome Statute, and that the efficacy of a preliminary examination—along with the investigative resources and international oversight that such an examination will bring to bear—is warranted. Indeed, we note in your recent report on Preliminary Examination Activities that preliminary examinations are among your most cost-effective tools in meeting the mission of the Court.

The Association supports exhausting each and every jurisdictional avenue, domestic and international, to hold these perpetrators accountable for their crimes. In situations like the one that has arisen with respect to the Yazidi, the International Criminal Court has a unique role to play. The particular confluence of international actors, the cross-border and international nature of the crimes, the unique, organized and international character of the non-state actor sponsoring the atrocities, the continuing commission of acts of a most horrendous nature, and the clear intent of the perpetrators that their atrocities—often filmed in high definition video that meets professional-quality production standards—resonate internationally as a conscience-shocking affront to basic human dignity, all raise the question of how the ICC, a Court of international jurisdiction, should intervene. Though the unique situation in Iraq may not have been anticipated when the Court was formed some years ago, the Association believes that this constellation of international criminal acts and actors demands that the ICC step forward. Indeed, the ICC is best positioned to investigate these crimes at the outset, even if some of the perpetrators are ultimately tried in domestic courts.

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<sup>10</sup> The Reports on Preliminary Examinations for 2015 and 2016, covering the periods when previous communications referred to above were submitted, detail the number of communications received and those found to be "manifestly outside" the jurisdiction of the court. As far as we are aware, none of the organizations writing in support of the Yazidi here have been informed that their communications manifestly fall outside the jurisdiction of the Court.

The OTP's reports on preliminary examinations and its most recent decision to open an investigation subsequent to such an examination<sup>11</sup> make clear that, in the pursuit of international justice, both your office and the Court are striving to give effect to the letter as well as the spirit of the Rome Statute. These reports suggest that, in order to accomplish this goal, issues of complementarity are to be examined in a realistic light and not applied as a means to frustrate the Court from engaging in matters falling properly within its jurisdiction. Accordingly, we believe the possibility that some alleged perpetrators identified through the preliminary examination process may ultimately be held to account in the domestic courts of States Party to the Rome Treaty should not, at the outset, present an obstacle to the launch of such a preliminary examination.

For the reasons outlined above, the New York City Bar Association supports the communication of Yazda and the Free Yazidi Foundation. We encourage you, pursuant to your powers under the Rome Statute, to open a preliminary examination into the situation raised by this communication— both to begin to address the crime of genocide, crimes against humanity and war crimes perpetrated by ISIS against the Yazidi, and to send a clear message to individual States Party and to the broader international community that the ICC will not stand by in the face of evidence of such atrocities but, rather, stands as a bulwark against injustice and in support of other actors in their efforts to properly and effectively exercise their responsibility to ensure justice for all, including crimes committed against the Yazidi and other minorities in Iraq.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John S. Kiernan', with a horizontal line extending to the right.

John S. Kiernan

cc:

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<sup>11</sup> ICC-01/15 Situation in Georgia Decision on the Prosecutor's Request for Authorization of an Investigation 27  
January 2016