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Sent by email otp.informationdesk@icc-cpi.int
International Criminal Court
Office of the Prosecutor
Communications
Post Office Box 19519
2500 CM The Hague
The Netherlands.

Dear Sirs,

Crimes against humanity and genocide by the Government of New Zealand towards people with Down syndrome

A group of 37 concerned parents and supporting organisations wish to apply to the Office of the Prosecutor under the provisions of Article 15.1 of the Rome Statute of the International Criminal Court (the Rome Statute) to investigate and intervene in matters relating to crimes against humanity and genocide towards people with Down syndrome. The crimes relate to what we consider are breaches of Articles 6 and 7 of the Rome Statute through the persecution of an identifiable group of the civilian population (those with Down syndrome, identified by their 3rd 21st Chromosome) through measures that prevent their birth.

This matter relates to our evidence that that the New Zealand Governments' antenatal screening programme for Down syndrome (the Programme) targets and prevents the births of people diagnosed pre-birth with Down syndrome through selective abortion and that this constitutes persecution towards that group of the civilian population. The consequences of the Programme are that around 75% of this identifiable group of people are being prevented from being born. The programme is promoted and funded by the New Zealand Government.

The Programme is managed through the [National Screening Unit](#) (NSU), within [the Ministry of Health](#), both of whom are governmental departments. The [Minister of Health](#) is responsible for the programme under the statutory roles of Government Ministers. The **enclosed** document "Screening programme management structure" outlines the various roles of Government and Ministry of Health officials in relation to the Programme. These are provided in accordance with the provisions of Article 27 of the Rome Statute, in relation to these people acting in an official capacity in implementing and managing the Programme. Article 27 provides that a role as a government official shall in no case exempt a person from criminal responsibility under the Rome Statute.

This matter has previously been raised through the New Zealand [Human Rights Commission](#), who has determined that people with Down syndrome are not protected under Article 6 of the Rome Statute. The matter was subsequently raised with the New Zealand [Director of Human Rights Proceedings](#). The Director of Human Rights Proceedings also determined that people with Down syndrome are not protected under Article 6 of the Rome Statute, but indicated that should they have protection under the Rome Statute, then a screening programme that would ultimately facilitate the selective abortion of such a group on the basis of their identity would breach the Rome Statute. A copy of his ruling is available on request.

The Director of Human Rights Proceedings has advised that having made his decision about representation, he is now *functus officio*, i.e. that his statutory function of considering our application for legal representation has come to an end and that he is unable to review his decision about representation. As we have no further recourse under New Zealand law available to us, we are seeking the intervention of the International Criminal Court under the provisions of Article 15.1 of the Rome Statute. New Zealand is a State Party to the Rome Statute and has therefore agreed to the intervention of the International Criminal Court on their territory should they fail to act.

Our case for crimes against humanity and genocide is summarised below and our detailed case is presented in the **enclosed** document "Summary notes for the case against the Government of New Zealand for crimes against humanity and genocide towards people with Down syndrome".

In our evidence we have referred to various Ministry of Health reports and briefing papers to the Minister of Health, which were obtained under the provisions of the Official Information Act 1982. These can be provided on request.

Summary

1. Crimes against humanity

In terms of crimes against humanity: Article 7 subsets 1(h) and 2(g) of the Rome Statute relate to crimes against humanity through the persecution against an identifiable group within a civilian population. Article 7 states:

1(h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

2(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively.

Article 7 1(h) covers any identifiable group within a civilian population. People with Down syndrome are an identifiable group of people. They all share a third 21st chromosome. The New Zealand Government's antenatal screening programme for Down syndrome is solely based on identifying unborn children within the group through their genetic constitution, i.e. by the very fact that are an identifiable group.

There is precedence to prosecutions for the persecution of people with Down syndrome and other disabilities in relation to the [Nazi Action T-4 programme](#) that preceded the holocaust.

Article 7 1(h) refers to any crime within the jurisdiction of the Court. That includes genocide (Article 6), and the crime of genocide includes preventing births within the group (Article 6d). The persecution against people with Down syndrome (an identifiable group of the civilian population) is therefore a crime against humanity under Article 7 as genocide is a crime within the jurisdiction of the International Criminal Court via Article 6. Persecution by reason of the identity of a group is prohibited under the definition within Article 7 2(g).

2. Genocide

The legal definition of genocide is also covered under the international treaty, the Convention on the Prevention and Punishment of the Crime of Genocide (the Convention), which was adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260 and ratified by New Zealand in 1949.

Genocide is an international crime. All participating countries are required to prevent and punish acts of genocide.

It is our opinion that the Programme is in violation of Article 2 (d) of the Convention: Imposing measures intended to prevent births within the group.

Article 2 of the Convention defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

Item ... (d) Imposing measures intended to prevent births within the group;

Intent to destroy, in whole or in part, is established through the legal test of foresight of particular consequences and a desire to act so that those consequences occur. We have detailed our evidence in the **attached** document that demonstrates that the NSU, the Minister of Health and the Cabinet of the New Zealand Government had foresight that the consequences of the programme would be the prevention of births of people with Down syndrome via selective abortion, leading to the destruction, in part, of that group of people and a reduction in the number of births within the group.

Our evidence is that around 75% of the group will be destroyed through the Programme, which indicates that the harm against the group is widespread. The Programme is systematic as it is government policy that screening is offered to every pregnant woman and is funded by the government at a cost of around NZ\$9.4M per year.

The desire to act is established through the introduction of the Programme.

Additionally, people with Down syndrome are a stable and permanent group and as such falls within the status of a protected group. In the International Criminal Court's [Akayesa judgement](#), dated 2nd September 1998, relating to genocide in Rwanda, the definition of a protected group was recognised to apply to any stable and permanent group. Item 701 of that judgement states "*The Chamber found that it was necessary, above all, to respect the intent of the drafters of the Genocide Convention which, according to the travaux préparatoires, was clearly to protect any stable and permanent group*".

People with Down syndrome are a stable and permanent group of people. Additionally, as people with Down syndrome are genetically linked through their commonality in having a third 21st chromosome and share the same physical characteristics they could be defined as both an ethnical group and a racial group, both of which relate to people distinguished on the basis of common genetically linked characteristics and physical characteristics under standard dictionary definitions.

Irrespective of the above considerations, we consider that people with Down syndrome are protected against genocide as an identifiable group of the civilian population through Article 7 1(h) of the Rome Statute.

Imposing measures intended to prevent births within the group is established through the introduction of the Programme and the use of selective abortion to prevent births within the group.

3. Factors for consideration

In considering this request we ask that the following issues be taken into consideration:

- That we have exhausted the statutory processes available to us within New Zealand;
- That around 75% of the group of people with Down syndrome is being systematically destroyed;
- This complaint raises a significant point of law, being the application of the Rome Statute and the UN Convention of Genocide in relation to the genetic screening and selective abortion of unborn children diagnosed with Down syndrome;
- Genocide is one of the most serious of crimes on which humanity must unite to prevent and punish;
- Resolution of the complaint will affect a large number of people, particularly those with Down syndrome, as a distinct group of people;
- The level of harm involving the matters raised is very serious, being the selective abortion of unborn children diagnosed with Down syndrome and the reduction in number of their births, as a distinct group of people;
- The likelihood of the proceedings being successful; the New Zealand Director of Human Rights Proceedings has indicated that should people with Down syndrome have protection under the Rome Statute, then a screening programme that would ultimately facilitate the selective abortion of such a group on the basis of their identity would breach the Rome Statute;
- The remedies available through proceedings suit the case;
- Representation is an effective use of resources as the issues affect fundamental principles and values of life and
- It is in the interest of the international community, as it affects fundamental principles and values of life, there has been no public consultation or parliamentary debate on the issue in New Zealand, and people with Down syndrome have been excluded from involvement in policies that directly affect them.

In closing we would like to emphasise that our desire is for the New Zealand Government to promote love and respect to those with Down syndrome and for them to be treated with the same human dignity and respect afforded to their fellow citizens. The Universal Declaration of Human Rights eloquently articulates *“the equal and inalienable rights of all members of the human family”*. The rights of the people with Down syndrome are sanctioned in law; we are asking that these be actualised in practice.

Thank you for your time and consideration and we look forward to your assistance in resolving this matter.

Yours Sincerely,

A handwritten signature in blue ink, appearing to read 'MSullivan'.

Mike Sullivan

This application is submitted by 37 individuals and organisation as per the **attached** list.

Attachments:

1. Screening programme management structure;
2. Summary notes for the case against the Government of New Zealand for crimes against humanity and genocide towards people with Down syndrome; and
3. List of supporters to this application.