



Cour
Pénale
Internationale
International
Criminal
Court

Le Bureau du Procureur
The Office of the Prosecutor

Report on Preliminary Examination Activities (2015)

12 November 2015

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PALESTINE

Procedural History

45. On 1 January 2015, the Government of Palestine lodged a declaration under article 12(3) of the Statute accepting the jurisdiction of the Court with respect to alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014."¹⁴ On 2 January 2015, the Government of Palestine deposited an instrument of accession to the Statute with the UN Secretary-General ("UNSG").¹⁵ The Rome Statute entered into force for Palestine on 1 April 2015, pursuant to article 126 of the Statute.

46. On 16 January 2015, the Prosecutor opened a preliminary examination of the situation in Palestine, in accordance with Regulation 25(1)(c) of the Regulations of the Office and the Office's policy on preliminary examinations.¹⁶

47. The Office has received 66 communications pursuant to article 15 in relation to crimes alleged to have been committed since 13 June 2014.

Preliminary Jurisdictional Issues

48. The Office previously conducted a preliminary examination of the situation in Palestine upon receipt of a purported article 12(3) declaration lodged by the Palestinian National Authority on 22 January 2009. The Office carefully considered all legal arguments submitted to it and, after thorough analysis and public consultations, concluded in April 2012 that Palestine's status at the UN as an "observer entity" was determinative, since entry into the Rome Statute system is through the UNSG, who acts as treaty depositary. The Palestinian Authority's "observer entity," as opposed to "non-member State" status at the UN, at the time meant that it could not sign or ratify the Statute. As Palestine could not join the Rome Statute at that time, the Office concluded that it could also not lodge an article 12(3) declaration bringing itself within the ambit of the treaty, as it had sought to do.

49. On 29 November 2012, the UN General Assembly ("UNGA") adopted Resolution 67/19 granting Palestine "non-member observer State" status in the UN by majority: 138 votes in favour, nine votes against and 41 abstentions. The Office examined the legal implications of this development for its own purposes and concluded, on the basis of its previous extensive analysis of and consultations on the issues, that, while the change in status did not retroactively validate the previously invalid 2009 declaration lodged without the necessary standing, Palestine would be able to accept the jurisdiction of the Court from 29 November 2012 onward, pursuant to articles 12 and 125 of the Rome Statute. The Rome Statute is open to accession by "all States," with the UNSG acting as depositary of instruments of accession.

50. On 2 January 2015, Palestine deposited its instrument of accession to the Rome Statute with the UNSG. As outlined in the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, "the Secretary-General, in discharging his functions as a depositary of a convention with an 'all States' clause, will follow the practice of the [General] Assembly in implementing such a clause [...]." The practice of the UNGA "is to be found in unequivocal indications from the Assembly that it considers a particular entity to be a State."¹⁷ In accordance with this practice and specifically UNGA Resolution 67/19, on 6 January 2015, the UNSG, acting in his capacity as depositary, accepted Palestine's accession to the Rome Statute, and Palestine became the 123rd State Party to the ICC. It was welcomed as such by the President of the Assembly of States Parties to the Rome Statute.¹⁸

51. Likewise, on 7 January 2015, President Mahmoud Abbas was informed by the ICC Registrar of the latter's acceptance of the article 12(3) declaration lodged by the Government of Palestine on 1 January 2015, and that the declaration had been transmitted to the Prosecutor for her consideration.¹⁹

52. The Office considers that, since Palestine was granted observer State status in the UN by the UNGA, it must be considered a "State" for the purposes of accession to the Rome Statute (in accordance with the "all States" formula). Additionally, as the Office has previously stated publicly, the term "State" employed in article 12(3) of the Rome Statute should be interpreted in the same manner as the term "State" used in article 12(1). Thus, a State that may accede to the Rome Statute may also lodge a declaration under article 12(3).

53. For the Office, the focus of the inquiry into Palestine's ability to accede to the Rome Statute has consistently been the question of Palestine's *status* at the UN. The UNGA Resolution 67/19 is therefore determinative of Palestine's ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration.

54. The Office's conclusions with respect to the validity of the article 12(3) declaration lodged by the State of Palestine on 1 January 2015 are without prejudice to any future determinations by the Office regarding the exercise of territorial or personal jurisdiction by the Court.

Contextual Background

Gaza

55. The conflict in Gaza stems as far back as Israel's occupation of the territory beginning in 1967 and its subsequent conflicts with the organised groups operating in Gaza. In 2005, Israel unilaterally disengaged from Gaza, and shortly thereafter Hamas gained control over the Gaza Strip, following its electoral victory in 2006.

56. In response to increasing rocket attacks, in 2007, Israel declared that Hamas had turned Gaza into "hostile territory" and took sanctions against Hamas, imposing restrictions on the passage of certain goods to Gaza and the movement of people to and from Gaza. In January 2009, Israel also imposed a naval blockade of the Gaza Strip, as an extension of the previously imposed land crossing restrictions. Two major military operations were also launched in Gaza by Israel in 2008 and 2012.

57. Despite occasional ceasefires, periodic rocket attacks by Hamas and affiliated armed groups, military incursions into Gaza by Israel, and clashes between the two sides continued in the subsequent years.

58. On 12 June 2014, three Israeli teenagers were kidnapped and murdered in the West Bank. In response, Israel launched an extensive search and arrest operation named "Brother's Keeper," which lasted until the bodies of the three Israeli teenagers were found on 30 June. On 7 July 2014, the Israel Defense Forces ("IDF") commenced operation "Protective Edge" in the Gaza Strip, with the stated objectives of destroying Hamas and other armed groups' military infrastructure, particularly with respect to their rockets and mortar launching capabilities, and neutralising their network of cross-border assault tunnels. After an initial phase focused on air strikes, Israel launched a ground operation on 17 July 2014, followed by a third phase of the operation between 5-26 August characterised by alternating ceasefires and aerial strikes.

West Bank and East Jerusalem

59. As a result of the Six-Day War in 1967, Israel acquired control over the West Bank and East Jerusalem. Shortly thereafter, Israel adopted laws and orders effectively extending Israeli law, jurisdiction and administration over East Jerusalem and purporting to unite West and East Jerusalem. In 1980, the Knesset passed a law declaring Jerusalem, complete and united, the capital of Israel.

60. Pursuant to the Oslo Accords, the Palestine Liberation Organisation was recognised as the official representative of the Palestinian people in 1993, and Israel transferred security and civilian control of certain Palestinian-populated areas of West Bank to the Palestinian Authority ("PA"), which was formed in 1994 as the interim governing body of such areas. Under the accords, West Bank is divided into three administrative divisions (Area A—full civil and security control by the PA; Area B—Palestinian civil control and joint Israeli-Palestinian security control; Area C—full civil and security control by Israel). The accords also provided a framework to facilitate negotiations between the two parties for a peaceful resolution of the conflict.

61. To date, no final peace agreement has been reached, and remaining unresolved issues between the parties include determination of borders, security, water rights, control

of Jerusalem, Israeli settlements in the West Bank, refugees, and Palestinian freedom of movement.

Alleged Crimes

62. The following summary of alleged crimes is preliminary in nature and is based on publicly available reports as well as information received by the Office. The descriptions below are without prejudice to the identification of any further alleged crimes which may be made by the Office in the course of its analysis, and should not be taken as indicative of or implying any particular legal qualifications or factual determinations regarding the alleged conduct.

Gaza conflict

63. The conflict in Gaza between 7 July and 26 August 2014 allegedly caused a high number of civilian casualties. According to multiple sources, over 2,000 Palestinians, including over 1,000 civilians, and over 70 Israelis, including six civilians, were reportedly killed, and over 11,000 Palestinians and 1,600 Israelis were reportedly injured as a result of the hostilities.²⁰ These casualty figures include both civilians and combatants on both sides. Casualty figures reported by various sources differ on the number of overall casualties, the proportion of civilians to combatant casualties, and the proportion of civilian casualties that were incidental to the targeting of military objectives. All parties are alleged to have committed war crimes during the 51-day conflict.

64. ***Alleged crimes by Palestinian armed groups:*** According to UNDSS, Palestinian armed groups allegedly indiscriminately fired 4,881 rockets and 1,753 mortars towards Israel. At least 243 of these projectiles were intercepted by Israel's Iron Dome missile defence system while at least 31 fell short and landed within the Gaza Strip. Six civilians, including one child, were

65. Attacks by Palestinian armed groups were allegedly launched from civilian buildings and compounds, including schools, hospitals and buildings dedicated to religion. Civilian buildings and facilities were also allegedly used for other military purposes, such as storing munitions.

66. Additionally, between 21 and 23 August 2014, over 20 Palestinians accused of collaborating with Israel were reportedly summarily executed by gunmen alleged to have been acting on instructions from Hamas. The majority of them were allegedly taken from Katiba Prison in Gaza City and summarily executed, while the others were allegedly executed in other locations.

67. ***Alleged crimes by IDF:*** On the Israeli side, IDF attacks were allegedly directed against civilian residential buildings and infrastructure, UN facilities, hospitals, paramedics and ambulances, and further included allegedly indiscriminate attacks in densely populated civilian neighbourhoods. In particular, according to UN Office for the Coordination of Humanitarian Affairs ("OCHA"), intense artillery shelling and aerial strikes alongside fierce ground fighting in Ash Shuja'iyyeh neighbourhood between 19-21 July 2014, allegedly resulted in hundreds of civilian fatalities, including many women and children. Widespread destruction of civilian buildings and infrastructure was also reported. Dozens of civilian casualties were also reported during several incidents of artillery fire on the town of Khuza'a, east of Khan Yunis, between 23-25 July 2014. Between 1-3 August 2015, massive bombardment of the Rafah area reportedly caused more than one hundred civilian casualties.

West Bank and East Jerusalem

68. Successive Israeli governments have allegedly led and directly participated in the planning, construction, development, consolidation and/or encouragement of settlements on West Bank territory occupied during the Six-Day War (June 1967). This settlement activity is allegedly created and maintained through deliberate implementation of a carefully conceived network of policies, laws, and physical measures. Such activities are alleged to include the planning and authorisation of settlement expansions or new construction at existing settlements; the confiscation and appropriation of land; demolitions of Palestinian property and eviction of residents; and a scheme of subsidies and incentives to encourage migration to the settlements and to boost their economic development.

69. In 2014, the Israeli government reportedly destroyed 590 Palestinian-owned structures in the West Bank, including East Jerusalem, displacing 1,177 people, according to figures published by OCHA. An additional 77 Palestinians, over half of them children, were reportedly displaced in January 2015 due to the demolition of 42 Palestinian-owned structures in the Ramallah, Jerusalem, Jericho and Hebron governorates by Israeli authorities. OCHA reported that during the first half of 2015, the Israeli Civil Administration demolished 245 Palestinian structures. In August 2015, 228 Palestinians, including 124 minors, were allegedly displaced as a result of demolitions in 29 villages and communities, primarily in the Jordan Valley and the Ma'ale Adumim area.

70. With respect to settlement-related activities, the Office has also received information related to acts of violence allegedly committed by settlers against Palestinian communities.

71. Allegations concerning ill-treatment of Palestinians arrested, detained and prosecuted in the Israeli military court system have also been reported, including, for example, allegations of systematic and institutionalised ill-treatment of Palestinian children in relation to their arrest, interrogation, and detention for alleged security offences in the West Bank.

OTP Activities

72. Since the initiation of the preliminary examination in January 2015, the Office has focused on gathering relevant information from reliable sources. This includes publicly available information, information from individuals or groups, States, and intergovernmental or non-governmental organisations, including from the UN system. The Office gathered a large volume of information in the public domain and has taken steps to analyse and verify the seriousness of information received, including through a rigorous and independent source evaluation process.

73. The Office received and responded to a large number of queries from potential information providers, regarding procedures and modalities for the submission of information pursuant to article 15 of the Statute. Subject to any future legal process, the confidentiality of all information submitted under article 15 is protected, as is the identity of the information provider, unless the provider chooses to waive that confidentiality.

74. The Office also sought the cooperation of key information providers such as the Governments of Palestine and Israel. On 25 June 2015, the Palestinian Minister of Foreign Affairs, H.E. Riad al-Malki, submitted a communication pursuant to article 15 of the Statute regarding alleged crimes committed in Palestine. Further information was submitted by Palestine on 3 August and 30 October 2015.

75. On 9 July 2015, the Government of Israel announced that it had decided to open a dialogue with the Office over the preliminary examination.²¹ In May 2015, the Government of Israel published a report on factual and legal aspects of the 2014 Gaza Conflict.

Conclusion and Next Steps

76. The Office is in the process of conducting a thorough factual and legal assessment of the information available, in order to establish whether there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been or are being committed. In accordance with its policy on preliminary examination, the Office may gather available information on relevant national proceedings at this stage of analysis. Any decision on whether there is a reasonable basis to proceed with an investigation will be based on an independent and impartial analysis of all reliable information available to the Office, in application of the legal criteria set forth in article 53 of the Statute.

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Endnotes

¹⁴ Declaration lodged by the Government of Palestine under Article 12(3) of the Statute, 31 December 2014.

¹⁵ UNSG Depositary Notification of Palestine's Accession to Rome Statute, C.N.13.2015.TREATIES-XVIII.10, 6 January 2015.

¹⁶ See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para. 76.

¹⁷ UN Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, U.N. Doc. ST/LEG/Rev.1, paras. 81-83.

¹⁸ ICC-ASP, *The State of Palestine accedes to the Rome Statute*, ICC-ASP-20150107-PR1082, 7 January 2015. See also ICC-ASP, *Official Records of the Resumed Thirteenth Session*, The Hague, 24-25 June 2015, para. 16 and Annexes I and II.

¹⁹ Letter from ICC Registrar to President Mahmoud Abbas, 7 January 2015.

²⁰ See for example UN HRC, Report of independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, paras. 20-21 (based on data compiled by UN OCHA Protection Cluster, 31 May 2015, Palestinian Ministry of Health, Israeli Internal Security Agency and Israeli Ministry of Foreign Affairs), reportedly killed in Israel as a result of these attacks, and many more sustained injuries or were displaced. It is alleged that rocket attacks that were aimed at Israel but fell short also caused civilian casualties and damage to civilian objects within the Gaza strip.

²¹ Haaretz, *Exclusive: Israel Decides to Open Dialogue With ICC Over Gaza Preliminary Examination*, 09 July 2015.