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Date: 12 January 2010

Dear Ms. Kang,

1. In response to your 14 December letter, I wish to inform you that in accordance with Articles 12 and 15 of the Rome Statute, the Office of the Prosecutor of the International Criminal Court is analyzing the Court's jurisdiction over alleged crimes committed by different parties during the conflict in Gaza in December 2008 and January 2009.
2. Before making any legal decision on whether to open an investigation, the Office has a duty to conduct a preliminary examination to consider all issues pertaining to its jurisdiction and to the admissibility of cases potentially arising from the situation.
3. In terms of timing, the Statute does not include any deadline for Article 15 decisions. In terms of process, the Office will provide, as is its practice in all situations, all interested parties an opportunity to present their views on the matter.
4. Such preliminary examination is based on information collected from open sources, States concerned and international organizations. The Office also received communications from different interested individuals and organizations. To date the Office has received 388 communications in relation to alleged crimes committed in Gaza in December 2008 and January 2009.

Jurisdiction

Palestinian National Authority declaration

5. On 22 January 2009, the Minister of Justice of Palestine, Mr. Ali Khashan, brought to the International Criminal Court an *ad hoc* declaration accepting jurisdiction of the ICC under Article 12(3) of the Rome Statute which allows a State which is not party to the Statute to accept the jurisdiction of the Court. The declaration states "*The Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of crimes committed on the territory of Palestine since 1 July 2002. As a consequence, the Government of Palestine will cooperate with the Court without delay or exceptions in conformity with Chapter 9. This declaration is made for an indeterminate duration...*"
6. In connection with this declaration, the Office must consider first whether the declaration accepting the exercise of jurisdiction by the Court meets statutory requirements; and second whether the crimes alleged fall within the Court's jurisdiction.

Information received

7. On 13 February 2009 Minister Ali Khashan visited the Office with the Minister of Foreign Affairs Mr. Riad al Malki. They committed to provide further information in support of their request.
8. On 26 January 2009, the Secretary General of the League of Arab States, Amr Musa, wrote to the Prosecutor in relation to the ICC's jurisdiction. On 9 May, Secretary General Musa submitted to the Prosecutor the report "No Safe Place" produced by an Independent Fact-Finding Committee established by the League, and headed by Professor John Dugard. In this context, I also visited the Arab League headquarters on 4 July 2009 to meet with members of the Secretariat. Finally, the Office met in The Hague on 15-16 October with a high level Arab League Secretariat delegation and with the members of the Fact Finding Committee - Professor John Dugard (Chair, South African), Judge Finn Lynghjem (Norwegian), Solicitor Raelene Sharp (rapporteur, Australian), Professor and forensic expert Francisco Corte-Real (Portuguese), Professor Paul de Waart (Dutch), and Advocate Gonzalo Boye (Chilean/German).

9. As part of the preliminary examination process, the Office has written to both Palestinian and Israeli authorities and to relevant institutions to secure the information required.
10. On 14 July 2009, the Office wrote to Minister of Justice Ali Khashan, requesting submission of any information relevant for its preliminary examination in furtherance of previous commitments to do so. In response, Dr. Khashan accompanied by a delegation from the Palestinian National Authority and advised also by Professor Vaughan Lowe of Oxford University, visited the Court on 15-16 October and presented a preliminary report comprising legal arguments in support of the declaration lodged on 22 January 2009. The delegation also indicated they would submit a further comprehensive report in relation to the declaration early in 2010.
11. On 6 August 2009, the Office wrote to the Embassy of Israel in the Netherlands, requesting submission of any information relevant for the preliminary examination. The Prosecutor also expressed his availability for further meetings. The Embassy responded to the Office on 7 September with a letter in relation to jurisdiction issues. Further contacts are anticipated.
12. The Office has also considered various public reports and received 11 legal submissions by a variety of experts, academics and NGOs on the issue of jurisdiction. Meetings with NGOs were organized at the seat of the Court on 14 October and 2 November 2009.

Summary of the arguments

13. A comprehensive summary of all legal arguments received will be made public in due time. In a preliminary manner, I can summarize the presentations as follows:
 - a. Some submissions consider that it is clear that the Palestinian National Authority cannot be regarded as a 'State' as required by Article 12(3) of the Rome Statute and take the position that the declaration should be dismissed for lack of jurisdiction.
 - b. Some submit that Palestine is recognized as a State by many States and many institutions.
 - c. Some argue that Palestinian statehood is irrelevant to this analysis. Instead, they argue that criminal jurisdiction within Palestine rests with the PNA which

can therefore transfer such jurisdiction to the ICC through an *ad hoc* declaration under Article 12(3) of the Statute.

- d. In this regard, some argue that the PNA cannot transfer a jurisdiction it does not possess fully, as it has entered into a bilateral agreement, the Oslo Accords, through which it has accepted not to exercise jurisdiction over Israeli nationals. Therefore the PNA has no authority to exercise jurisdiction over the criminal conduct of Israeli nationals on Palestinian territory and transfer it to the Court.
- e. Some others argue that this limitation confirms that the PNA has inherent jurisdiction. They consider that the Oslo Accords are analogous to other bilateral agreements related to state, diplomatic or SOFA immunities. It would be the existence of the PNA's inherent jurisdiction over Palestinian territory that allows them to delegate jurisdiction, similar to the agreements recognized by Article 98 of the Rome Statute.

Communications about alleged crimes committed by nationals of States parties

- 14. In accordance with Article 12 (2) (b) of the Statute, the Court may exercise its jurisdiction over alleged crimes committed by nationals of a State Party to the Statute. In this regard, South African lawyers have communicated to the Office information on alleged crimes committed in Gaza by individuals possessing South African nationality.

Admissibility

- 15. According to the principle of complementarity enshrined in the Rome Statute the ICC is a court of last resort. Even if the Court has jurisdiction, it cannot intervene if relevant authorities are conducting genuine investigations or prosecutions.
- 16. As a consequence, the Office has explored the existence of such proceedings with Israeli and Palestinian authorities, with the Arab League and with lawyers from other countries where potentially relevant national proceedings are being conducted.
- 17. In this regard, on 14 August 2009 the Office received from the Embassy of Israel a copy of the Government of Israel's public report on Operation Cast Lead. The report referenced "*multiple IDF investigations into allegations made by various groups of violations of the law*".

18. Minister of Justice Khashan, during the visit in October 2009, indicated the intention of the Palestinian National Authority to conduct investigations, including in relation to alleged crimes committed by Palestinian militants. A report for the Office in relation to intended and completed national proceedings is expected and has yet to be received by the Office.
19. The Office has not received other formal communications in this regard but it is following new developments through open source information. Israeli authorities announced that they decided to appoint a task force to present recommendations on Israel's course of action on the Goldstone Report and its ramifications. There are also statements from different parties involved in the conflict in Gaza, including Hamas, suggesting that they will conduct an inquiry into allegations of crimes. The Office would welcome any information from the United Nations on relevant proceedings.

Conclusion

20. The Office is ready to inform the United Nations of any relevant further development in its preliminary examination work.
21. The present letter is a public document. Should you have any further questions, please do not hesitate to contact Emeric Rogier, Head of the Situation Analysis Section in the Jurisdiction, Complementarity and Cooperation Division at the OTP, on emeric.rogier@icc-cpi.int, or Amna Guellali, Associate analyst, on amna.guellali@icc-cpi.int.
22. Please accept the assurances of my utmost consideration.

Yours sincerely,



Béatrice Le Fraper du Hellen

Director

Jurisdiction, Complementarity and Cooperation Division