

The Palestine-Israel Situation at the ICC: Brief Overview of the OTP Preliminary Examination in Palestine

Written for AMICC by Yixuan Ouyang

The Palestine-Israel situation at the International Criminal Court (ICC) is very important to the relationship between the US and the Court. It could be the most politically explosive action for that relationship that the Court has undertaken. This brief paper is intended to provide guidance for explaining or rebutting claims against the ICC's actions on this situation. Full background is in the larger paper sent with this one.

On 16 January 2015, the Prosecutor of the ICC, Mrs. Fatou Bensouda, launched a preliminary examination into the situation in Palestine to reach a fully informed determination on whether there is a reasonable basis to proceed with a formal investigation into a situation, pursuant to the criteria established by the Rome Statute (RS), the Court's founding treaty. Specifically, the Prosecutor shall consider jurisdiction, admissibility (complementarity and gravity) and interests of justice on the basis of facts and information available. If these conditions are met, since in this case the Prosecutor is addressing the situation on her own initiative, she will ask the Pre-trial Chamber to authorize a formal investigation. This could lead to an arrest warrant and eventually a trial.

There is no timeline provided in the Statute for a final decision on a preliminary examination. However, based on the recent proceedings and announcements, it seems that the Prosecutor is more likely than not to ask for a formal investigation. If this happens, it could place the Prosecutor in direct and open opposition to the US and it would be the first case where senior government officials of a developed country would be charged.

Background

On 2 January 2015, the Government of Palestine acceded to the RS by depositing its instrument of accession with the United Nations Secretary-General (UNSG). The RS officially entered into force for Palestine on 1 April 2015, making Palestine the 123rd ICC member state. The UNSG was empowered by the RS to make this decision, and the ICC had no role in it except to note that it had been made.

West Bank and East Jerusalem

In June 1967, the Six-Day War broke out between Israel and neighbouring states. As a result, Israel took control of several territories including the West Bank and East Jerusalem. So far, there has been no final peace agreement between Israel and Palestine and a lot of issues remain to be solved, including the determination of borders, water rights, attribution of Jerusalem, Israeli settlement activities in the West Bank, refugees, and Palestinian freedom of movement.¹

¹ OTP - Report on Preliminary Examination Activities 2017.

Gaza

On 7 July 2014, Israel launched “Operation Protective Edge” in order to damage Hamas and other military groups operating in Gaza, counter their network of cross-border tunnels and terminate their rocket and mortar attacks against Israel. The hostilities came to an end on 26 August 2014 when both sides agreed to an unconditional ceasefire.² The United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict had investigated all violations of international humanitarian law and international human rights law in the conflict and finally concluded in a June 2015 report that both the Israeli military and Palestinian armed groups had violated international human rights law and that in some cases, these violations might amount to war crimes.³

Alleged Crimes

West Bank and East Jerusalem

In relation to the situation in the West Bank and East Jerusalem, the OTP has put its focus on the analysis of settlement-related activities, in particular as they involve the alleged transfer of people into and from territories. Since 1967, Israel’s government has transferred between 600,000 and 750,000 Israeli citizens into the occupied Palestinian territories. Israeli authorities are alleged to have deliberately destroyed Palestine property and expelled Palestinians from their homes in the West Bank and East Jerusalem.

Gaza

With regard to the 2014 Gaza conflict, the OTP has mainly focused on a number of reported incidents which appear to be the most serious in allegedly harming civilians and/or are representative of the main kinds of conduct that are considered by the Prosecutor, such as the types of alleged targets and objects hit by attacks and the geographical areas which appear to be been most seriously affected by attacks. The Office would give priority to those incidents about which there were various sources and sufficient information for the Prosecutor to conduct a thorough and objective analysis.

According the Office of the Prosecutor, both Israelis and Palestinian persons have committed serious crimes during the 51-day conflict. On the Palestinian side, Hamas’s rocket strikes toward Israel may be the clearest war crimes. Hamas operatives fired thousands of rockets toward Israeli cities and towns during the conflict. On the Israeli side, The Israel Defense allegedly directed attacks that affected civilians and their buildings, such as residential structure, hospitals, ambulances and medical personnel. According to the Human Rights Watch, on 30 July 2014, Israeli artillery hit a UN Relief and Works Agency facility sheltering a large number of children, an attack that claimed the lives of several dozen civilians and wounded hundreds more.⁴

² OTP - Report on Preliminary Examination Activities 2017.

³ Report of the independent commission of inquiry established pursuant to Human Rights Council resolution, available at <http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx>

⁴ Human Rights Watch, Israel: An In-Depth Look at Gaza School Attacks (11 September 2014), <https://www.hrw.org/news/2014/09/11/israel-depth-look-gazaschool-attacks>.

Jurisdiction

On 29 November 2012, the UN General Assembly (UNGA) adopted Resolution 67/19 granting Palestine “non-member state” status. On 2 January 2015, Palestine deposited its instrument of accession to the RS with the UNSG. Acting in his capacity as depositary and on the basis of the General Assembly resolution, he accepted Palestine’s accession to the RS. As a result, Palestine became the 123rd State Party to the ICC, giving the ICC jurisdiction over crimes committed on the territory of Palestine. The Office acknowledged the Secretary General’s decision and concluded that ICC jurisdiction over the Palestine situation began on 29 November, 2012.

Conclusion and Next Step

Up until the December of 2017, the Office of the Prosecutor (OTP) had received a total of 98 communications relevant to the situation in Palestine since 13 June 2014, and all information gathered was subjected to rigorous source evaluation to ensure its credibility and reliability. The prosecutor is required to conduct a fully independent, impartial and thorough analysis under the strict guidance of the Rome Statute. Last year, the Office has made significant progress in its assessment of relevant facts and legal issues that are essential to the determination on a formal investigation. In addition, the Prosecutor stated that she would continue to keep up with pertinent developments and events in the region, and continue to gather information in relation to the situation and assess information on potential national proceedings.

Potential Criticism and Responses

1. “The Court has no authority or jurisdiction over Israel”: The Court has the jurisdiction over Israeli persons for alleged crimes because they were committed on the territory of a State Party (Palestine). It has jurisdiction over alleged crimes by Palestinians because they are the citizens of a State Party.

2. “Charges against Israel is anti-Semitism”: The Court does not try states, governments or whole peoples. It tries only individuals based on their actions. If the criteria for investigation and trial are satisfied, the Court would take action regardless of the nationality or religion of the accused. The Prosecutor will not attempt to bring charges against any individuals without evidence that meets the standards for trials.

3. “Occupied Palestine was in fact ‘disputed territory whose status will ultimately be resolved in the course of peace process negotiations’”: Intergovernmental and international judicial bodies have periodically made determinations that the West Bank, including East Jerusalem, has been occupied by Israel since 1967. These include the International Court of Justice (ICJ) in its 2004 Israeli Wall advisory opinion and the UN Security Council and General Assembly in various resolutions adopted over the past 50 years. Last December’s UN Security Council resolution 2334 reaffirmed the occupied status of the West Bank, and explicitly

condemned the “construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions”.⁵

4. “Israel has its own legal system and will prosecute applicable war crimes and the Court is redundant”: Israel has no complementarity defense on settlements; it cannot plausibly claim that it has investigated its own conduct. The Israeli Supreme Court has addressed a host of issues related to Israeli conduct in the Occupied Territories, but it did not touch on the fundamental legality of settlements and has never decided whether settlement activity creates criminal responsibility.

5. “The ICC is subject to political pressure and is not able to conduct impartial and independent examination.” There is little evidence that the prosecutor’s office is animated by a political or ideological agenda, or that it has operated without regard to the relevant law and evidence.

6.” The settlements are not a crime because according to the Fourth Geneva Convention, an occupying state is prohibited from deporting or transferring parts of its own civilian population into the territory it occupies but that excludes voluntary migrations of citizens”: The Rome Statute expands this definition by criminalizing the transfer, “directly or indirectly,” of civilian population into occupied territory. This includes subsidies and other inducements to settlements.

⁵ UN Security Council resolution 2334, available at <http://www.un.org/webcast/pdfs/SRES2334-2016.pdf>