

## **The Palestine-Israel Situation at the ICC: Full Background of the OTP Preliminary Examination in Palestine**

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### **Summary**

The Palestine-Israel situation at the International Criminal Court (ICC) is very critical to the relationship between the US and the Court, and it could be the most politically explosive action for that relationship that the Court has undertaken. On January 16, 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, where, as in this case, the Prosecutor is addressing the situation on her own initiative, the Prosecutor will ask the Pre-trial Chamber to authorize a formal investigation. This could lead to an arrest warrant and eventually a trial.

The reference to "a situation" is fundamental and it indicates that the Prosecutor will examine potential crimes committed by both Israeli and Palestinian individuals equally, using the same criteria and procedures, to determine whether the alleged crimes have been or are being committed "in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014." She has declared that her decision on which crime to pursue and which person to charge would be based on the availability and quality of evidence and unbiased research by her office. The Prosecutor may consider information from various types of sources, including publicly available information as well as materials provided by relevant individuals, local and international NGOs, international organizations and states.<sup>1</sup>

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 RS. Last year, the Office had made significant progress in its assessment of relevant facts and legal issues that are essential to the determination of a formal investigation. The Office also engaged and consulted with state authorities and NGOs on issues in relation to the preliminary examination. This included, for example, meetings with different interested parties at the Court and senior officials of the government of the State of

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<sup>1</sup> OTP - Report on Preliminary Examination Activities 2017, available at [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf)

Palestine in June 2017.<sup>2</sup> In addition, the Prosecutor stated that she would continue to keep up with pertinent developments and events in the region.

There is no timeline provided in the Statute for a final decision on preliminary examination. However, based on the recent proceedings and announcements, it seems that the Prosecutor is more likely than not to initiate 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. The Trump administration position on the ICC as an organization is unclear, but will probably be hostile, given its attitude towards international institutions and its expected very strong reactions to the ICC's involvement in the Palestine and Afghanistan situations. Parts of the U.S. public will share these reactions. Under these circumstances, we provide our constituents with this necessary context and guidance as background and a resource to support the advocacy guidelines we are also providing separately.

## **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 123<sup>rd</sup> ICC member state. The UNSG was empowered by the RS to make this decision as the depositary for the Statute (RS Article 125), and the ICC had no role in it except to note that it had been made. This announcement provoked strong reactions from Israel and the US. Israel's Foreign Ministry spokesperson described Palestine's decision to join the ICC as a "political, hypocritical, and cynical maneuver."<sup>3</sup> The United States strongly disagreed with this action against Israel, and claimed it was "counterproductive to the cause of peace".<sup>4</sup> Many human rights groups such as Human Rights Watch, applauded this development and called on the ICC to investigate the situation in Palestine.<sup>5</sup> Despite the dispute over the Palestinian accession to the RS, this move finally allowed the ICC Prosecutor to begin examining the potential crimes committed by both Israeli and Palestinians on the territory of Palestine since June 13 2014.

### **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. In 1995, pursuant to the Oslo Accords of 1993-1995, the Palestine Liberation Organization and the State of Israel formally recognized each other, and agreed on a progressive handover of certain Palestine-populated areas in the West Bank to the Palestinian National Authority (PA).<sup>6</sup> Under

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<sup>2</sup> OTP - Report on Preliminary Examination Activities 2017.

<sup>3</sup> Israel Ministry of Foreign Affairs, "Palestinian Authority Joins the ICC—Israel's Response," 1 April 2015.

<sup>4</sup> US State Department, "Statement on ICC Prosecutor's Decision," 16 January 2005.

<sup>5</sup> Human Rights Watch, "Letter to the ICC Prosecutor on Palestine Preliminary Examination", November 4 2015.

<sup>6</sup> Israel-Palestine Liberation Organization Letters of Recognition, see [https://en.wikipedia.org/wiki/Israel%E2%80%93Palestine\\_Liberation\\_Organization\\_letters\\_of\\_recognition](https://en.wikipedia.org/wiki/Israel%E2%80%93Palestine_Liberation_Organization_letters_of_recognition)

the 1995 Interim Agreement (Oslo II Accord), the West Bank was divided into three administrative areas: Area A - full civil and security control by the PA; Area B - Palestinian civil control and joint Israel - Palestinian security control; Area C - full civil and security control by Israel. So far, there has been no final peace agreement between Israel and Palestine and many issues remain to be solved, including the determination of borders, water rights, status of Jerusalem, Israeli settlement activities in the West Bank, refugees, and Palestinian freedom of movement.<sup>7</sup>

### **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 operation was carried out through three phases: the initial phase focused on air strikes, and then Israel initiated a ground operation on 17 July 2014 which was followed by the third phase from on 5 August onwards of alternation of ceasefire and aerial strikes. A number of Palestinian armed groups also engaged in this war, most notably the respective armed wings of Hamas and the Palestine Islamic Jihad as well as the al-Naseer Salah al-deen Brigades.<sup>8</sup> The scale of this devastation was unprecedented. Specifically, more than 2000 Palestinians were reportedly killed and over 11,000 were injured. On the Israeli side, 6 civilians and 67 soldiers died and 1,600 were injured. The hostilities came to end on 26 August 2014 when both sides agreed to an unconditional ceasefire.<sup>9</sup> The conflict was followed by various allegations of violations of international law and human rights on the part of both Israel and Hamas. 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. The report called on all parties and authorities concerned to fully respect international humanitarian law and international human rights law and to take immediate and effective actions to shoulder responsibilities for the hostilities.<sup>10</sup>

### **Alleged Crimes**

While the Prosecutor has not made a final decision on the crimes to be pursued, she has reviewed and assessed a large amount of relevant materials and has made significant progress in her analysis of both factual and legal matters that are crucial to the determination of a formal investigation. Crimes that are likely to be examined are war crimes and crimes against humanity committed by both Israelis and Palestinian individuals in the West Bank and East Jerusalem

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<sup>7</sup> OTP - Report on Preliminary Examination Activities 2017.

<sup>8</sup> OTP - Report on Preliminary Examination Activities 2017.

<sup>9</sup> OTP - Report on Preliminary Examination Activities 2017.

<sup>10</sup> 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>

since 13 June 2014. Palestinian government officials regard its active engagement with the ICC as part of their new strategy of “internationalizing” the issue to put pressure on Israel after decades of armed struggle and on-and-off peace talks which still fail to resolve the conflict. However, the preliminary examination is to be carried out in an objective and impartial manner and not biased against any party, which means that the examination as result of efforts by Palestine could well expose Palestinian leaders to war crime charges themselves when the Prosecutor considers the recent Gaza conflict. Militants from Hamas and other groups fired thousands of rockets and mortars at Israeli towns and cities. Israel, for its part, carried out hundreds of air strikes in Gaza and launched a ground offensive.

### **West Bank and East Jerusalem**

The OTP has put its focus about the situation in the West Bank and East Jerusalem on the analysis of settlement-related activities, in particular as they involve the alleged transfer of people into and from territories. During the reporting period, the Office gathered relevant information and various materials and continued to keep up with factual, legislative and judicial developments, including “processes in relation to the acquisition of land, the approval of settlement plans, the start of new constructions, budget allocation procedures, as well as the issuance and enforcement of eviction and demolition notices and other measures affecting the displacement of Palestinian residents.”<sup>11</sup>

With regard to the settlement activities, the Israeli government has allegedly been involved in settling its civilians onto the West Bank including East Jerusalem and deporting Palestinian residents from those areas. Settlement-related activities have reportedly included “the confiscation and appropriation of land; the planning and authorization of settlement expansions and, in at least one instance, of a new settlement; construction of residential units and related infrastructures in the settlement; the regularization of constructions built without the required authorization from Israeli authorities (so-called outposts); and public subsidies, incentives and funding specifically allocated to settlers and settlements’ local authorities to encourage migration to the settlements and boost their economic development.”<sup>12</sup>

Since 1967, Israel’s government has transferred between 600,000 and 750,000 Israeli citizens into the occupied Palestinian territories. In recent years, Israeli authorities are alleged to have carried out plans to construct thousands of new residential units in the West Bank, including in the East Jerusalem. A report from the UN Office of the High Commission for Human Rights reveals that the Israeli government advanced settlement plans for almost 6.500 housing units in Area C between 1 November 2016 and 31 October 2017. As for East Jerusalem, the Israeli government advanced plans for about 3,100 housing units. In March 2017, for the first time within decades, Israel initiated the construction of a completely new settlement to relocate

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<sup>11</sup> OTP - Report on Preliminary Examination Activities 2017.

<sup>12</sup> OTP - Report on Preliminary Examination Activities 2017.

the residents of the Amona outpost, who had been removed in February 2017 following a December 2014 ruling by the Israeli High Court of Justice.<sup>13</sup>

Furthermore, Israeli authorities are alleged to have deliberately destroyed Palestine property and expelled Palestinians from their homes in the West Bank and East Jerusalem. According to a report from the UN Office for the Coordination of Humanitarian Affairs, between 1 August 2016 and 30 September 2017, Israeli authorities seized and ruined 734 Palestinian-owned structures, including 180 residential inhabited structures, which reportedly resulted in the alleged displacement of 1,029 individuals, including 493 women and 529 children.<sup>14</sup>

### **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 types of conduct that are considered by the Prosecutor. These are the types of alleged targets and objects hit by attacks, and the geographical areas which appear to be most seriously affected by attacks. In addition, the Office would also consider the availability of information when deciding on which incident to focus. 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. Specifically, the Prosecutor has stated that her Office has been trying to collect additional information on certain key evidence that is essential to assess the existence of necessary elements of potentially applicable crimes which fall in the jurisdiction of the Court. This includes information related to the circumstances of an alleged attack, the weapons used by both parties, the presence and nature of any military objective, the education level of alleged perpetrators, and the level and nature of any consequential damage.<sup>15</sup>

During the Gaza conflict between 7 July and 26 August 2014, over 2,000 Palestinians, including over 1,000 civilians, and over 70 Israelis, including 6 civilians, were reportedly killed, and over 11,000 Palestinians and up to 1,600 Israelis were reported injured in the conflict. Besides civilian casualties, the conflict also resulted in severe damage or destruction of residential buildings and infrastructures, and enormous displacement. The conflict also reportedly has had a huge impact on children. More than 500 Palestinian children and one Israeli child were killed, and more than 3,000 Palestinian children and around 270 Israeli children were injured.<sup>16</sup>

According to the OTP, both Israel and Palestine 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. Importantly, Hamas did not identify specific military targets. According to Human Rights Watch, "The unguided rockets launched by Gaza armed groups are inherently

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<sup>13</sup> Report of UN High Commission for Human Rights, available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Pages/ListReports.aspx>.

<sup>14</sup> OTP - Report on Preliminary Examination Activities 2017

<sup>15</sup> OTP - Report on Preliminary Examination Activities 2017.

<sup>16</sup> OTP - Report on Preliminary Examination Activities 2017

indiscriminate and incapable of being targeted at possible military targets in or near Israeli population centers.”<sup>17</sup> Additionally, members of Palestinian armed groups have allegedly committed crimes by their rocket and mortar attacks against Israel, the use of protected persons as shields, and the deprivation of human rights of those who were accused of collaborating with Israel. On the Israeli side, the Israel Defense Force (IDF) has directed alleged attacks that affected civilians and their buildings, such as residential structures, hospitals, ambulances and medical personnel. According to 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.<sup>18</sup>

### **Preliminary and Territorial Jurisdiction**

Despite the serious human rights violations and potential war crimes committed in Palestine, there are, however, substantial arguments about preliminary or territorial jurisdictional hurdles for such a case. The first argument is that Palestine is not a “state”, and therefore its complaints cannot be handled by the Rome Statute which established the ICC as a state-based system; the second argument is that the ICC only considers situations “on the territory” of Palestine, yet the borders of that territory remains largely undefined<sup>19</sup>; the third contention is that such a case would violate the widely-accepted Monetary Gold Principle established by the case of that name at the International Court of Justice (ICJ); the fourth contention is that since Israel is not a State Party, the ICC has neither the authority nor the jurisdiction for such a case. The following paragraphs respond to these arguments respectively.

Firstly, a common misconception is that Palestine is not a “state” and that the ICC cannot consider cases brought about by a “non-state” entity. The RS established a state-based international organization. Thus, a Palestinian state must exist in order to continue the proceedings. The Office previously contemplated a preliminary examination in Palestine upon receiving the declaration lodged by the PA as a non-State Party on 22 January 2009. Since the declaration of a non-State Party goes directly to the Court, the ICC must decide whether the referring entity is a state. This decision is made initially by the Prosecutor. Her Office carefully examined all legal arguments submitted to it and, after deliberate analysis and public consultations, concluded that the Palestine Authority was not then a state. Becoming a State Party to the RS is through the UNSG who acts as a depositary of instruments of accession. On 29 November 2012, the UN General Assembly (UNGA) adopted Resolution 67/19 granting Palestine “non-member observer state” status at the UN. On 2 January 2015, Palestine deposited its instrument of accession to the RS with the UNSG. He considered that the General Assembly had given the PA state status sufficient to allow it to ratify a treaty. Therefore, acting in his capacity as depositary, the UNSG accepted Palestine’s accession to the RS. As a result, Palestine

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<sup>17</sup> Human Rights Watch, “Israel/Gaza: Indiscriminate Rocket Attacks,” news release, 9 July 2014.

<sup>18</sup> Human Rights Watch, “Israel: An In-Depth Look at Gaza School Attacks,” 11 September 2014,

<sup>19</sup> Kontorovich, Eugene. “Israel/Palestine—The ICC’s Uncharted Territory.” *Journal of International Criminal Justice* 11, no. 5 (2013): 979-999.



became the 123<sup>rd</sup> State Party to the ICC, giving the ICC jurisdiction over crimes committed on the territory of Palestine. The Prosecutor acknowledged the UNSG's action. She decided that the jurisdiction of the Court would be from 29 November 2012 onward.

The second contention is that the ICC can only consider crimes committed “on the territory” of Palestine, yet both the UNGA resolution and the ICJ Wall Advisory case have concluded that the borders of Palestine remained significantly undefined. Thus, it is argued that in order to exercise jurisdiction over Israeli settlements in the West Bank, the ICC would need to decide the borders of both states, and it certainly lacks the power to make this determination. However, the idea that the absence of agreed borders for Palestine precludes the ICC from exercising jurisdiction with respect to the Israeli settlements is disputable.<sup>20</sup> First of all, the critical issue here is not the determination of the exact scope of territories, but whether the location where a specific crime (in this case, the settlement activities) was committed is within the territory of a state concerned. The Palestine's territory is not entirely undefined, and some areas such as Gaza and Area A are under undisputed Palestinian control. Secondly, while it is true that the ICJ did not make any conclusion about borders, it indicated that the construction of the wall forced some Palestinian population to move from areas between the Green Line and separation areas and it “severely impeded the exercise by the Palestinian people of its right to self-determination”<sup>21</sup>, which implicated that the settlements were situated within the entitlement of the Palestinian State. Thirdly, it is not a requirement in the general international law that control of territory must be uncontroverted in order for that territory to be attributed to that state. The extent of a state's territory does not depend on consent by other states, but on an internationally recognized entitlement to that territory. The recognition in UNGA Resolution 67/19 is based on both factual and legal factors that Palestine has effective control in Area A and that it has legal entitlement to statehood in the West Bank and Gaza Strip. Therefore, the ICC's proceedings would neither constitute border determinations nor allocations of territories.<sup>22</sup>

The third argument is that the Court's intervention into the situation in Palestine would constitute a demarcation of Israel's borders, thus violating the influential Monetary Gold Principle established at the ICJ, which suggests that a court should not pursue a case if doing so would involve adjudication of the legal rights and duties of a party to the issue which was not before the court or had not given its consent to the proceeding. As discussed above, the ICC exercising jurisdiction would not involve the determination of Israel's borders. Even if the ICC decided on borders, so long as the Israel sovereign territories were not touched on, its legal position would not be affected. Moreover, under Article 25, the RS provides that a person who commits a crime within jurisdiction of the Court shall be individually responsible and liable for

<sup>20</sup> Ronen, Yaël. "Israel, Palestine and the ICC—Territory Uncharted but not Unknown." *Journal of International Criminal Justice* 12, no. 1 (2014): 7-25.

<sup>21</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports (2004) 136, at 121-122.

<sup>22</sup> Ronen, Yaël. "Israel, Palestine and the ICC—Territory Uncharted but not Unknown." *Journal of International Criminal Justice* 12, no. 1 (2014): 7-25.

punishment. Thereby Israel is not a party to the case before the court, and the Monetary Gold Principle does not apply to this situation.

Fourthly, many Israel officials claim that since Israel is not a member state of the ICC, the Court has no jurisdiction over Israel. However, people who make the argument fail to understand the legal framework of the ICC. Under Article 13 of the RS, the Court has jurisdiction in a situation where the crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court. Therefore, even though Israel is not a State Party to the RS, the ICC would have jurisdiction over crimes committed in Palestine by Israeli citizens by virtue of Palestine's membership in the Court, and the Prosecutor would have the power to demand that Israel try those responsible for the alleged crimes. Besides, if Israel decided to ignore or refuse to accept an arrest warrant pursuant to the OTP request, the Israeli persons concerned would face the risk of being charged or arrested by any member states of the ICC under their obligations in the RS if they entered the territory of those countries. All countries in Europe and most countries in Latin America and Africa are ICC member states.

### **Subject-matter Jurisdiction**

In conducting the preliminary examination about the situation in Palestine, the Prosecutor needs to deal with a number of complex legal issues before coming to the final conclusion.

#### **Settlement-related Activities**

Israel argues that the settlements do not constitute crimes within the jurisdiction of the ICC. Most fundamentally, Israel denies that the West Bank qualifies legally as occupied territory and considers the area as a “disputed territory”, which is subject to competing claims and whose status will be determined by mutual negotiations. But as discussed previously, the absence of agreed borders for Palestine does not necessarily precludes the ICC from exercising jurisdiction with respect to the settlement-related activities.

Moreover, Israel's settlement activities have been widely described as illegal in the international community. The UNGA resolution 66/225 of 2012 reaffirmed the permanent sovereignty right of the Palestinian people in the occupied Palestinian territory including East Jerusalem, stressed that the Israeli settlements were contrary to international law and demanded Israel to cease the exploitation and damage. An official statement issued by the European Union in 2017 reasserted the EU's clear and unchanged position on Israeli settlement activities, claiming that such activities were illegal under international law and undermined the prospect for a lasting peace.<sup>23</sup> In addition, on 23 December 2016, 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

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<sup>23</sup> The EU statement on recent Israeli decisions to promote thousands of settlement units, available at [https://eeas.europa.eu/headquarters/headquarters-homepage/34139/statement-recent-israeli-decisions-promote-thousands-settlement-units\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/34139/statement-recent-israeli-decisions-promote-thousands-settlement-units_en)



relevant resolutions”. Other international institutions including the ICJ, and the great majority of ICC members also concluded that the settlement activities were illegal. In the RS, they fall under Article 8, which provides that “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” constitutes a war crime. Also, transferring an occupier’s citizens into an occupied territory is explicitly prohibited by Article 49 of the Fourth Geneva Convention. The RS provision was based on this provision. Yet international courts have not yet had cases which explicitly raise the issue of criminal responsibility under these provisions. The ICC’s preliminary examination will likely to be the first international judicial inquiry into whether the settlements in the occupied territories meets this definition.

### **2014 Gaza Conflict**

With regard to the 2014 Gaza conflict, several legal questions are raised in the Prosecutor’s analysis of alleged crimes committed in the course of that conflict.

In its report on preliminary examination activities in 2017, the Office discusses the potential legal challenges in light of the unique nature of the conflict. The Prosecutor said that while the existence of an armed conflict is widely accepted as easy to determine, the classification of the conflict (international or non-international character or both) is very controversial and remains to be decided. This controversy does not mainly come from the facts, but rather from different legal approaches. The classification will directly influence the Office’s analysis of the crimes allegedly committed during the 2014 conflict, as certain war crimes provisions under the Statute are only applicable to international armed conflicts.

Secondly, some other issues arise about the implications and application of various offenses under Article 8 of RS, having to do with how combat is conducted. Many of these issues remain unresolved by the Court and, under some circumstances, involve disagreement on international humanitarian law concepts among States, experts and scholars.

### **Admissibility**

In this phase, the OTP will continue to gather information on subject-matter jurisdiction, in particular when new or ongoing crimes are alleged to have been committed within the situation. Meanwhile, the Office shall examine two components: complementarity and gravity.

#### **The complementary principle**

The Preamble to the Rome Statute clearly provides that the ICC is “complementary to national criminal jurisdictions,” and “is not intended to supersede their jurisdiction.” Accordingly, the OTP is required to examine the existing national proceedings relevant to the potential cases being considered for investigation by the Office to determine whether national authorities are unwilling or unable to carry out genuine proceedings. Before making a decision on whether to initiate the investigation, the Prosecutor seeks to ensure that the States or parties concerned have had the opportunity to provide the information they regard as appropriate. The RS provides that after getting the notice from the Prosecutor, a state has one month to prove that it is investigating or has investigated its nationals or others for their criminal acts which fall

within the jurisdiction of the Court and to request that the Prosecutor defer her investigation. The Prosecutor shall defer the case to the national investigation unless a majority of the seven judges on the Pre-Trial Chamber decides to authorize the investigation nevertheless. Finally, under Article 16 of RS, the UN Security Council, acting under Chapter VII of the UN Charter, may defer the investigation or prosecution of any case for renewable twelve-month periods. There may be situations where the Court's exercise of jurisdiction would hamper the resolution of an ongoing conflict by the Council itself under its UN Charter mandate. In those circumstances, the framers of the RS conceded that the Security Council may demand that the requirements of peace and security are to be prioritized over the immediate needs of justice.

Palestine has not launched any investigations or trials so far. With regard to the national proceeding concerning the 2014 Gaza conflict, the Israeli authorities have conducted their own reviews of Gaza operations. In December 2014, the military advocate general of Israel Defense Forces (IDF) examined incidents of potential misconduct during the conflict, which included more than a dozen incidents, such as the beach attack, an attack on a UNRWA school, the killing of several ambulance drivers and the abuse of a detainee. In June 2015, the IDF concluded that since the Gaza beach strike was a mistake rather than a crime, it would not prosecute this incident. Reviews of other specific cases still remain pending.<sup>24</sup> Additionally, Israeli authorities provided their factual and legal interpretation of the conflict, which emphasized Hamas's attempts to use the civilian population as shields and Israel's extensive military precautions, including leaflets and warning phone calls.<sup>25</sup> On March 14 2018, Israeli State Comptroller Joseph Shapira issued a special audit report on the IDF's "Operation Protective Edge" from the perspective of international law.<sup>26</sup> The report gives the first formal investigation on Israel's own soldiers for alleged war crimes and alleged violations of international humanitarian law. It examined IDF preparation prior to "Operation Protective Edge", mainly referring to trainings about the rules of humanitarian behavior for soldiers, and concluded that the training did not provide an adequate response to the need. The audit also evaluated the Hannibal Protocol incident in which the most Palestinians were killed and determined that although it was required that the IDF forces act in accordance with the principles of international law, the principles of distinction and proportionality were not expressly mentioned in the "Hannibal" orders. In addition, the audit found that even though the national fact finding assessment for IDF was not perfectly efficient and expedient, it did its work in good faith and with a sincere desire to arrive at the truth. The ICC officials stated that they would carefully review the report's conclusion in making their own decisions.<sup>27</sup>

However, Israel does not seem to have national judicial proceeding concerning settlement-related activities; it cannot plausibly claim that it has investigated its own conduct. The Israeli Supreme Court has addressed several issues related to Israeli conduct in the occupied

<sup>24</sup> BBC News, "Gaza Beach Attack: Israel Struck Boys in Error," 12 June 2015.

<sup>25</sup> State of Israel, "The 2014 Gaza Conflict: Factual and Legal Aspects," 2015, available at [mfa.gov.il](http://mfa.gov.il).

<sup>26</sup> Israeli State Comptroller report, available at <http://www.mevaker.gov.il/he/reports/pages/622.aspx#>.

<sup>27</sup> The Jerusalem Post News, "Landmark Report on IDF Gaza War Crimes Allegations Due Out on Wednesday," 8 March 2018.

territories, but it has avoided the essential discussion of legality of settlements and has never concluded whether settlement activity creates criminal responsibility.<sup>28</sup> The failure of Israel's legal system to consider these issues could smooth the way for ICC action.

### **Gravity**

The RS provides that the ICC has no obligation to prosecute all criminal activities over which it has jurisdiction and that it is a court with limited resources designed for exceptionally serious situations. In the preliminary examination, the Prosecutor seeks to pursue crimes which appear to be the most serious, and to assess the scale, nature, manner of commission of the crimes, and their impact, bearing in mind the potential cases that would likely arise from an investigation of the situation.

For the prosecutor, the critical question will become whether these distinct categories of possible crimes—the conduct of all parties in Gaza and settlement activities combine to create a situation that merits a formal investigation.

### **Interests of Justice**

At phase four, the OTP needs to consider the interests of justice issue in order to formulate the final recommendation to the Prosecutor on whether there is a reasonable basis to initiate an investigation. The Office must assess whether, taking into account the gravity of the crime, the interests of victims and the infirmity of the alleged perpetrator, there are substantial reasons to believe that an investigation would not serve the interests of justice.<sup>29</sup>

### **Conclusion and Potential Next Steps**

The prosecutor's preliminary examination will almost certainly be a slow, deliberate process. The Gaza conflict presents a number of difficult evidentiary issues, including gathering reliable information about incidents in the midst of conflict. Settlement activity poses fewer problems about evidence, but a range of legal and jurisdictional questions will require further analysis. In addition, evidence on Israeli crimes, especially in relation to the settlements, is much easier for the OTP to get and present, while evidence on Palestinians is more difficult to get and use. How Palestine and Israel interact with the Court will also influence the speed of the examination and it will give the prosecutor a sense of what she can expect if she does launch a formal investigation.

In the course of its preliminary examination activities, the Office of the Prosecutor (OTP) seeks to achieve two main goals of the Rome Statute: one is the ending of impunity, by encouraging genuine national judiciary, and the other is the prevention of crimes, thus potentially eliminating the need for the Court's intervention. While the OTP has not made a final determination to launch an investigation, it states that the Office has made significant progress in

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<sup>28</sup> Kretzmer, David. "The law of belligerent occupation in the Supreme Court of Israel." *International Review of the Red Cross* 94, no. 885 (2012): 207-236.

<sup>29</sup> Rome Statute, Article 53(2)(c).

its assessment of the relevant factual and legal matters for the determination of a investigation and it will continue to gather information in relation to the situation and assess information on potential national proceedings, as necessary and appropriate.<sup>30</sup>

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<sup>30</sup> OTP - Report on Preliminary Examination Activities 2017.