



AL - HAQ



Al-Haq's Questions and Answers:

The Preliminary Examination of the Situation in Palestine.

Al-Haq Organisation

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On 1 January 2015, the State of Palestine lodged an *ad hoc* declaration pursuant to Article 12(3) of the Rome Statute, accepting that the International Criminal Court (the ICC) exercise jurisdiction as of 13 June 2014.¹ On 2 January 2015, Palestine deposited its accession instrument with the UN Secretary General and acceded to the Rome Statute.² By 7 January 2015 the registrar of the ICC had accepted the declaration submitted according to Article 12(3).³ As a result of the 12(3) Declaration, the Prosecutor of the ICC opened a preliminary examination into the situation in Palestine on 16 January 2015.⁴

This paper seeks to explain the current situation of Palestine at the International Criminal Court (the ICC) in regard to the ongoing preliminary examination being conducted by the Office of the Prosecutor into crimes committed in Palestine from 13 June 2014 and onwards.

What is a declaration under Article 12(3)?

Article 12 of the Rome Statute contains the pre-conditions that need to be met in order for a situation to fall under the jurisdiction of the Court. Article 12(3) allows a State that is not a party to the Rome Statute of the ICC to accept that the Court exercises jurisdiction with respect to a specific situation.⁵ In the case of Palestine's 12(3) Declaration, the Prosecutor opened a preliminary examination into "the situation in Palestine."⁶

1 Palestine declares acceptance of ICC jurisdiction since 13 June 2014, Press Release: (05/01/2015), ICC-CPI-20150105-PR1080.

2 Depository Notification, C.N.13.2015.TREATIES-XVIII.10, 6 January 2015.

3 The State of Palestine accedes to the Rome Statute, Press Release: (07/01/2015), ICC-ASP-20150107-PR1082.

4 The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, Press Release: (16/01/2015), ICC-OTP-20150116-PR1083.

5 Rome Statute of the International Criminal Court, A/CONF/183/9, Article 12(3).

6 *Ibid*, The Prosecutor of the International Criminal Court opens a preliminary examination.

What time-frame does Palestine's Article 12(3) Declaration cover?

According to Article 11(2) of the Rome Statute, the ICC can only exercise jurisdiction with respect to crimes committed after the entry into force of the Rome Statute unless a 12(3) Declaration has been made that alters the temporal scope.

With respect to Palestine's 12(3) Declaration, Palestine has accepted that the Court exercises jurisdiction from 13 June 2014 and onwards.⁷ As such, the ICC could exercise jurisdiction over International crimes committed during the recent Israeli military offensive on the Gaza Strip codenamed Operation Protective Edge, as well as crimes committed since then, both within the Occupied Palestinian Territories, and by Palestinian citizens.

Is this the first time that Palestine has made a declaration under Article 12(3)?

No. The recent 12(3) Declaration is the second such declaration lodged by Palestine. In 2009, Palestine made a similar declaration. According to the Office of the Prosecutor, that declaration failed because the issue of statehood with respect to Palestine for the purpose of article 12(3) was still controversial. The Prosecutor stated at the time, however, that once competent bodies in the UN (the Secretary General or the General Assembly) or the Assembly of State Parties of the Rome Statute address the issue and take a positive decision concerning Palestine's statehood, "the Office could in the future consider allegations of crimes committed in Palestine".⁸ On the 29 November 2012, the United Nations General Assembly adopted Resolution 67/19 granting Palestine 'non-member observer state status'.⁹ Consequently, Palestine succeeded in lodging the said declaration and acceding to the Statute.

⁷ *Supra*.

⁸ Office of the Prosecutor, Update on Situation in Palestine, Report: 03/04/2012.

⁹ Resolution adopted by the General Assembly 67/19. State of Palestine in the United Nations, A/RES/67/19, 4 December 2012.

When does the Prosecutor initiate an investigation?

'Article 12(3) is a jurisdictional provision, not a trigger mechanism. As such, declarations of the sort should not be equated with referrals, but will require a separate trigger by the Prosecutor *proprio motu* or by a State Party.'¹⁰ In other words, an investigation must be triggered through other mechanisms.

Such mechanisms include:

- State referral pursuant to Article 14 of the Rome Statute
- Security Council referral pursuant to Article 13(b) of the Rome Statute
- *Proprio motu* initiation of investigation by the Prosecutor pursuant to Article 15(1) of the Rome Statute

Under Article 14 of the Rome Statute, any State party to the ICC can refer situations within the jurisdiction of the Court to the Prosecutor.¹¹ Palestine became a State Party on 1 April 2015 and is thus capable of making a referral under Article 14.

Under Article 13(b) any situation anywhere in the world can be referred by the Security Council.¹² Chapter VII of the Charter of the United Nations grants the Security Council the ability to take 'action with respect to threats to the peace, breaches of the peace, and acts of aggression.'¹³

Article 15(1) of the grants the Prosecutor the ability to initiate investigations *proprio motu* of crimes within the jurisdiction of the courts, without any referrals at all.¹⁴ It is the policy of the Office of the Prosecutor, that "[u]pon receipt of a referral or a declaration pursuant to Article 12(3) the Office [of the Prosecutor] will open a preliminary examination of the Situation at

10 Office of the Prosecutor, **Policy Paper of Preliminary Examinations**, ICC-OTP 2013, November 2013, footnote 25.

11 Rome Statute of the International Criminal Court, A/CONF/183/9, Article 14.

12 *Supra*, Article 13(b).

13 Charter of the United Nations, 1 UNTS XVI, 24 October 1945, Chapter VII.

14 *Ibid*, Rome Statute, Article 15(1).

hand.”¹⁵ On 16 January 2015, the Prosecutor therefore began its preliminary examination.

‘Preliminary examination activities will be conducted in the same manner, irrespective of whether the Office receives a referral from a State Party or the Security Council, or acts on the basis of information on crimes obtained pursuant to article 15.’¹⁶

Has the ICC started a criminal investigation into the situation in Palestine?

No. A preliminary examination **is not** a criminal investigation. In fact, a preliminary examination takes place before a possible investigation.

What does a preliminary examination entail?

There are four distinct phases of a preliminary examination, and the examination of Palestine is on the second phase.¹⁷ These phases are:

- Phase 1: Initial Assessment.
- Phase 2: Jurisdiction.
- Phase 3: Admissibility.
- Phase 4: Interest of Justice.

These phases are ‘applied to all situations, irrespective of whether the preliminary examination was initiated on the basis of information received on crimes, by a referral, or by a declaration lodged pursuant to article 12(3).’¹⁸

15 *Ibid*, Policy Paper on Preliminary Examinations, para 76.

16 *Ibid*, Policy Paper on Preliminary Examinations, para 12.

17 Office of the Prosecutor, Preliminary Examination, available at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx (last accessed 3/12/2015).

18 *Ibid*, Policy Paper on Preliminary Examinations, para 35.

Phase 1: Initial Assessment

Phase 1 is the Initial Assessment and has already been completed by the Office of the Prosecutor in regards to Palestine. Here, the Office compiles information and categorizes them according to whether or not they are “manifestly outside”¹⁹ the scope of the Court, or already the subject of a preliminary examination, investigation, or prosecution.

Phase 2: Jurisdiction

Phase 2 is the current phase of the preliminary examination into the situation in Palestine, and is the formal commencement of a preliminary examination. At this point the Office of the Prosecutor explores issues of jurisdiction, in effect measuring the extent to which the conflict will fall under the scope of the court. There are three types of jurisdiction to be considered by the court:²⁰

- Temporal Jurisdiction.
- Material Jurisdiction.
- Territorial or Personal Jurisdiction.

Temporal jurisdiction concerns the time span that the ICC can prosecute crimes. If the referral is from the Security Council then it this is simply the date specified in the referral, whilst if the examination was instigated by a State party or the prosecutor, then the date that the statute came into force is the starting point for jurisdiction. Under the Article 12(3), the State that submits the declaration can decide the temporal scope. According to Palestine’s 12(3) Declaration the Prosecutor can only look at crimes committed since 13 June 2014.

Material jurisdiction asks whether a particular act can be recognized as a crime in relation to Article 5 of the Rome Statute. This means that the Office of the Prosecution will consider whether there is a reasonable basis that certain conduct constitutes genocide, crimes against humanity, war crimes,

¹⁹ *Supra*, para 78.

²⁰ *Supra*, para 5.

or aggression.²¹

The final form of jurisdiction considered can be either territorial or personal, depending on the situation examined. According to Article 12(2) of the Rome Statute, the Court hold jurisdiction in two situations: crimes committed on the territory of a member State (territorial jurisdiction),²² and crimes of which the accused is a national of a member state (personal jurisdiction). This means that the Office of the Prosecutor can examine crimes committed on the territory of the State of Palestine or by Palestinian nationals. The one exception to this form of jurisdiction is through a Security Council referral which may “set aside the territorial and personal parameters set out in article 12”²³ allowing them limitless jurisdiction inside of the referred situation, regardless of whether or not territory or individuals come under the control of any member states.

Phase 3: Admissibility

Admissibility concerns the satisfaction of Article 17 of the Rome Statute. In essence, Article 17 puts forward two hurdles; complementarity and gravity.

The principle of complementarity holds that the ICC will not take action if the subject of an investigation is already being, or has been, investigated or prosecuted at a national level.²⁴ This is to encourage prosecutions at a national level whilst simultaneously removing the burden from the ICC. However, the ICC will be able to step in where “the State is unwilling or unable genuinely to carry out investigation or prosecution”.²⁵

If a case is found to have been acted on at a national level, complementarity is examined by a case by case basis,²⁶ and each case is investigated in a

21 *Ibid*, Rome Statute, Article 5.

22 *Supra*, Article 12 (2.b).

23 *Ibid*, Policy Paper on Preliminary Examinations, para 40.

24 *Ibid*, Rome Statute, Article 17 (1.a-c)

25 *Supra*, Article 17 (1.a)

26 *Ibid*, Policy Paper on Preliminary Examinations, para 46.

variety of ways. Inactivity is one way that a State can be found unwilling or unable, and this can take a variety of forms, such as the “existence of laws that serve as a bar to domestic proceedings, such as amnesties, immunities or statutes of limitation; [and] the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible”.²⁷ Other indicators of unwillingness include proceedings taken for the purpose of shielding a person, unjust delay, and proceedings that are not independent or impartial.²⁸ Finding an inability for the sake of complementarity concerns whether or not the relevant authorities are able to exercise their judicial powers.²⁹

With respect to the gravity requirement³⁰ the ICC is committed to only prosecuting the most severe crimes. Gravity is considered on the basis of the “scale, nature, manner of commission, and impact”³¹ of the crimes. The Office of the Prosecutor has put forward that they look at both “quantative and qualitative”³² aspects when determining whether or not the gravity requirement is met.

In considering the scale, it is the number of direct and indirect victims and extent of the damage that is considered.³³ Nature of the crimes concerns the specific elements of the crimes such as killings, crimes against children and persecution.³⁴ When examining the manner of commission of the crimes the Office of the Prosecutor will examine the “means employed to execute the crime”,³⁵ including to what level the crimes could be considered

27 *Supra*, para 48.

28 *Supra*, paras 51-54.

29 *Supra*, para 57.

30 *Ibid*, Rome Statute, Article 17 (1.d).

31 Office of the Prosecutor, **Regulations of the Office of the Prosecutor**, ICC-BD/05-01-09, November 23rd April 2009, regulation 29(2).

32 *Ibid*, Policy Paper on Preliminary Examinations, para 61.

33 *Supra*, para 62.

34 *Supra*, para 63.

35 *Supra*, para 64.

systematic or part of a plan or policy. The impact of crimes concerns the suffering and “social, economic and environmental damage inflicted on the affected communities.”³⁶

If both complementarity and gravity are satisfied then the situation will be deemed admissible under Article 17 of the Rome Statute, and the examination will move onto phase 4.

Phase 4: Interests of Justice

Article 53(1)(c) allows the Prosecutor not to initiate an investigation where “substantial reasons [exist] to believe that an investigation would not serve the interests of justice.”³⁷ Whereas the term ‘interest of justice’ has never been fully defined, the ICC is a judicial body that seeks to end impunity and therefore the term ‘interest of justice’ is not so broad ‘as to embrace all issues related to peace and security.’³⁸

The interest of justice requirement is a “countervailing”³⁹ consideration. The prosecutor does not have to prove that there is an interest of justice, but she must determine that there are no special circumstances that would hinder interest of justice. Such special considerations include gravity, interest of victims (in both “seeing justice done”⁴⁰ as well as “essential interests such as their protection”⁴¹), the circumstances of the accused and the current peace process.⁴²

It is also worth noting that the interest of justice requirement is applied

36 *Supra*, para 65.

37 *Ibid*, Rome Statute, Article 53(1.c).

38 Office of the Prosecutor, **Policy Paper on the Interests of Justice**, ICC-OTP-2007 September 2007, p 8.

39 *Supra*, p 2.

40 *Supra*, p 5.

41 *Supra*, p 5.

42 *Supra*, pp 4-8.

“only in exceptional circumstances”⁴³ in order for it to not be applied too liberally. Phase 4 therefore has an inbuilt review mechanism written into the statute. Article 53(3)(b) gives the Pre-Trial Chamber the opportunity to review a decision not to initiate an investigation on the basis of the interests of justice requirement or admissibility.

In the case of an examination being conducted *proprio motu* by the Prosecutor, such as the examination into the Palestinian Situation, there is an additional requirement in order to begin a criminal investigation. Under Article 15 (4) the prosecutor is required to present the findings of the preliminary examination to the Pre-Trial chamber.⁴⁴ It is the Pre-Trial chamber that will assess whether or not there is a reasonable basis crimes under the Rome Statute were committed in the Palestine situation.

It is only once all these phases are completed and satisfied that the Prosecutor can begin a criminal investigation.

Who is the subject of a preliminary examination?

Because a preliminary examination is distinct from a criminal investigation, it does not examine individual responsibility.

What principles apply in a preliminary examination?

There are three general principles for a preliminary examination; independence, impartiality and objectivity.⁴⁵ Impartiality demands that the Prosecutor “apply consistent methods and criteria, irrespective of the States or Parties involved”.⁴⁶

But it “does not mean an ‘equivalence of blame’ between different persons and groups within a situation, or that the Office must necessarily prosecute

43 *Supra*, p 3.

44 *Ibid*, Rome Statute, Article 15(4).

45 *Ibid*, Policy Paper on Preliminary Examinations, section III.

46 *Supra*, para 28.

all sides, in order to balance-off perceptions of bias. Rather it requires the Office focuses its efforts objectively on those most responsible for the most serious crimes within the situation in a consistent manner, irrespective of the States or parties involved'.⁴⁷

How does the Prosecutor gather information during a preliminary examination?

Whilst the office does not have investigative powers of its own at this stage, it can gain additional information from States, Organs of the UN, intergovernmental and non-governmental organizations, and other reliable sources.⁴⁸ It will also ensure that "in the interest of fairness, objectivity and thoroughness, all relevant parties are given the opportunity to provide information to the Office"⁴⁹ in an effort to guarantee that all sides are able to tell their sides of the story.

How long will the preliminary examination take?

There is no specific time line or deadline for a preliminary examination. It is down to the prosecutor to decide whether to 'decline to initiate an investigation where information fails to satisfy the factors set out in article 53(1)(a)-(c)'⁵⁰ or whether to 'continue to collect information on crimes and relevant national proceedings in order to establish a sufficient factual and legal basis to render a determination'.⁵¹ The decision to allow an unlimited time span 'ensures that analysis is adjusted to specific features of each particular situation'.⁵²

47 *Supra*, para 66.

48 *Supra*, para 12.

49 *Supra*, para 33.

50 *Supra*, para 14.

51 *Supra*, para 14.

52 *Supra*, para 89.

What happens if the Prosecutor decides there is no reasonable basis to initiate an investigation?

If the preliminary investigation is initiated by either a State referral, or a referral by the Security Council, either that State or the Security Council, depending on who made the referral, is given the opportunity to request that the Pre-Trial Chamber review the decision of the prosecutor and decide whether there is in fact a basis for investigation.⁵³

However, '[t]his does not preclude the Office from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.'⁵⁴

What happens if the Prosecutor does find a reasonable basis for initiating an investigation?

If the Prosecutor determines that all the above mentioned preliminary situation requirements are met then the Office of the Prosecution will be able to initiate a criminal investigation – or in the case of a 12(3) Declaration, request permission from the Pre-Trial Chamber to initiate an investigation.

However, Article 16 of the Rome Statute allows the United Nations Security Council to block any further action by the ICC in the interests of international peace and security for 12 months. These 12 months can be renewed each year.

53 *Ibid*, Rome Statute, Article 53(3)(a).

54 *Ibid*, Policy Paper on Preliminary Examinations, para 91.

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