

PALESTINE

Procedural History

51. The situation in Palestine has been under preliminary examination since 16 January 2015.¹¹
52. The Office has received a total of 98 communications pursuant to article 15 in relation to the situation in Palestine since 13 June 2014.

Preliminary Jurisdictional Issues

53. On 1 January 2015, the Government of the State of Palestine lodged a declaration under article 12(3) of the Statute accepting the jurisdiction of the ICC over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”. On 2 January 2015, the Government of the State of Palestine acceded to the Statute by depositing its instrument of accession with the UN Secretary-General. The Statute entered into force for the State of Palestine on 1 April 2015.

Contextual Background

West Bank and East Jerusalem

54. In June 1967, an international armed conflict (the Six-Day War) broke out between Israel and neighbouring states, as a result of which Israel acquired control over a number of territories including the West Bank and East Jerusalem. Immediately after the end of the Six-Day War, Israel established a military administration in the West Bank, and adopted laws and orders effectively extending Israeli law, jurisdiction and administration over East Jerusalem. In November 1981, a separate Civilian Administration was established to “run all regional civil matters” in the West Bank. On 30 July 1980, the Knesset passed a ‘Basic Law’ by which it established the city of Jerusalem “complete and united” as the capital of Israel.
55. Pursuant to the Oslo Accords of 1993-1995, the Palestine Liberation Organization and the State of Israel formally recognised each other, and agreed on a progressive handover of certain Palestinian-populated areas in the West Bank to the Palestinian National Authority (or Palestinian Authority, “PA”). Under the 1995 Interim Agreement, 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 Israeli-Palestinian security control; Area C – full civil and security control by Israel).

¹¹ [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.](#)

56. The peace talks between the parties grounded to a halt in 1995 and were followed over the years by a number of rounds of negotiations including the Camp David Summit of 2000, the 2002/2003 Road Map for Peace, as well as intermittent peace talks and related initiatives since 2007. To date, no final peace agreement has been reached and a number of issues remain unresolved, including the determination of borders, security, water rights, control of the city of Jerusalem, Israeli settlements in the West Bank, refugees, and Palestinians' freedom of movement.

Gaza

57. On 7 July 2014, Israel launched 'Operation Protective Edge', which lasted 51 days. According to the Israeli authorities, the objective of the operation was to disable the military capabilities of Hamas and other groups operating in Gaza, neutralise their network of cross-border tunnels and halt their rocket and mortar attacks against Israel. The operation consisted of three phases: after an initial phase focussed on air strikes, Israel launched a ground operation on 17 July 2014; a third phase from on 5 August onwards was characterised by alternating ceasefires and aerial strikes. Several Palestinian armed groups participated in the hostilities, most notably the respective armed wings of Hamas and the Palestinian Islamic Jihad as well as the al-Nasser Salah al-deen Brigades. The hostilities ended on 26 August 2014 when both sides agreed to an unconditional ceasefire.

Alleged Crimes

58. The following summary of alleged crimes is without prejudice to any future determinations by the Office regarding the exercise of territorial or personal jurisdiction by the Court. It should not be taken as indicative of, or implying any particular legal qualifications or factual determinations regarding the alleged conduct. Additionally, the summary below is without prejudice to the identification of any further alleged crimes which may be made by the Office in the course of its continued analysis.

West Bank and East Jerusalem

59. *Settlements activities:* the Israeli authorities have allegedly been involved in the settlement of civilians onto the territory of the West Bank, including East Jerusalem, and the forced removal of Palestinians from their homes in the West Bank and East Jerusalem. Settlement-related activities have reportedly included the confiscation and appropriation of land; the planning and authorisation of settlement expansions and, in at least one instance, of a new settlement; constructions of residential units and related infrastructures in the settlements; the regularisation of constructions built without the required authorisation 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.

60. In particular, in recent years, Israeli authorities are alleged to have endorsed plans and taken a number of administrative steps for the construction of thousands of residential units in the West Bank, including in East Jerusalem. According to the UN Office of the High Commissioner for Human Rights (“OHCHR”), Israeli authorities have advanced settlement plans for 2,264 housing units in Area C in 2016, while plans for 710 units reached a final approval stage in the same year. With regards to East Jerusalem, between 2014 and the end of 2016, plans for at least 6,157 units were advanced. In addition, according to official Israeli data, construction work began on 2,884 new dwellings in 2016 in the settlements and 4,196 remained until active construction at the end of that year. These figures do not include construction in East Jerusalem which Israel considers an integral part of its capital.
61. In March 2017, for the first time in decades, Israel’s security cabinet reportedly approved the construction of an entirely new settlement to ensure the relocation of the residents of the Amona outpost, who had been evacuated in February 2017 following a December 2014 ruling by the Israeli High Court of Justice.
62. Israeli authorities are also alleged to have been involved in the demolition of Palestinian property and eviction of Palestinian residents from homes in the West Bank and East Jerusalem. Between 1 August 2016 and 30 September 2017, according to figures published by the UN Office for the Coordination of Humanitarian Affairs, Israeli authorities have confiscated and/or demolished 734 Palestinian-owned structures, including 180 residential inhabited structures, of which 48 were located in East Jerusalem. These demolitions and evictions reportedly resulted in the alleged displacement of 1,029 individuals, including 493 women and 529 children. Moreover, during the reporting period, Israeli authorities have reportedly continued to advance plans to relocate Bedouin and other herder communities present in and around the so-called E1 area, including through the seizure and demolition of residential properties and related infrastructure.
63. *Other alleged crimes:* in addition to allegations directly related to settlement activities, the Office has also received information regarding the purported establishment of an institutionalised regime of systematic discrimination that allegedly deprives Palestinians of a number of their fundamental human rights.

Gaza conflict

64. The conflict in Gaza between 7 July and 26 August 2014 resulted in a high number of civilian casualties, significant damage to or destruction of civilian buildings and infrastructure, and massive displacement. According to multiple sources, 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 reportedly injured as a result of the hostilities. Figures reported by various sources, however, differ on the number of overall casualties, the proportion of civilian-to-combatant casualties, and the

proportion of civilian casualties that were incidental to the targeting of military objectives.

65. It has been reported that the conflict also had a significant impact on children. Reportedly, more than 500 Palestinian children and one Israeli child were killed, and more than 3,000 Palestinian children and around 270 Israeli children were wounded during the conflict. In addition, several instances of child recruitment by Palestinian armed groups have been reported.
66. All parties are alleged to have committed crimes during the 51-day conflict. It has been alleged that the Israel Defense Forces directed attacks affecting civilians and civilian objects, such as attacks on or affecting: residential areas and buildings; medical facilities, ambulances, and medical personnel; UN Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) schools serving as designated emergency shelters; and various other civilian objects and infrastructure. In addition, it has been alleged that members of Palestinian armed groups committed crimes in relation to, *inter alia*, rocket and mortar attacks launched against Israel, the alleged use of protected persons as shields, and the alleged ill-treatment and execution of persons accused of collaborating with Israel.

Subject-Matter Jurisdiction

67. The preliminary examination of the situation in Palestine raises specific challenges relating to both factual and legal determinations. In the latter respect, the Office has in particular to consider the possible challenges to the Court’s jurisdiction, and/or to the scope of any such jurisdiction.
68. A number of novel and/or complex legal issues have also arisen in relation to the Office’s analysis of crimes allegedly committed in the West Bank and East Jerusalem and during the 2014 Gaza conflict. In conducting its analysis, the Office has sought to address key legal issues through an in-depth and thorough study of the applicable law and relevant commentary. Some of these issues are briefly highlighted below.
69. With regard to the specific legal regime applicable to the situation in the West Bank, Israel considers that the area should not be viewed as occupied territory but as a “disputed territory”, subject to competing claims, whose status will ultimately be resolved in the course of peace process negotiations. For this reason, Israel has taken the position to reject the *de jure* application of the Geneva Conventions to the territory but to apply humanitarian provisions *de facto*. On the other hand, 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. On 23 December 2016, the UN Security Council adopted resolution 2334

which 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”.

70. With respect to the Office’s analysis of the 2014 Gaza conflict, the appropriate legal characterisation of the conflict presents several difficulties in light of the *sui generis* nature of the conflict. While most agree on the existence of an armed conflict, the classification of the conflict as one of an international or non-international character, or both existing in parallel, remains subject to significant debate and diverging views. In this respect, the controversy stems primarily not from the facts but rather turns on different legal perspectives. The classification of the 2014 Gaza conflict has an impact on the Office’s analysis of particular crimes allegedly committed during the 2014 conflict. While a number of crimes of possible relevance to the situation are substantially similar in the context both of international and non-international armed conflicts, certain war crimes provisions under the Statute appear to be applicable to international armed conflicts only.
71. The analysis of alleged crimes committed in the course of the 2014 Gaza conflict raises other issues concerning the interpretation and application of various conduct of hostilities offences under article 8 of the Statute. Many of such issues have yet to be addressed by the Court and, in some instances, involve international humanitarian law concepts which may lack consensus among States, experts and academics.

OTP Activities

72. During the reporting period, the Office has continued to consider relevant submissions and other available information on issues pertaining to the exercise of territorial and personal jurisdiction by the Court in Palestine.
73. In the past year, the Office has also progressed in its analysis of the alleged crimes committed by both parties to the 2014 Gaza conflict as well as certain alleged crimes committed in the West Bank and East Jerusalem since 13 June 2014. In addition, the OTP continued to closely follow relevant developments and events in the region.
74. In order to conduct its legal and factual analysis, the Office has reviewed and assessed a large body of information from various types of sources, including publicly available information as well as information and materials provided to the Office by relevant individuals, local and international NGOs, international organisations, and States. Consistent with standard practice, the Office has subjected such information to rigorous source evaluation, including in terms of the reliability of the sources and credibility of the information received. In this regard, the Office has continued to take steps to verify and corroborate a number

of relevant factual issues, including, for example, by requesting additional information from relevant actors.

75. In relation to the 2014 Gaza conflict, the Office has focused on certain reported incidents, out of the thousands previously documented by the Office and compiled in comprehensive databases. In this regard, the Office has sought to select incidents which appear to be the most grave in terms of the alleged harm to civilians and civilian objects and/or are representative of the main types of alleged conduct, such as in terms of the *modus operandi* employed, the types of alleged targets or objects affected by attacks, and the geographical areas which appear to have been particularly affected during the conflict. Additionally, the Office prioritised incidents for which there was a range of sources and sufficient information available to enable an objective and thorough analysis. Specifically, the Office has sought to gather additional information on, and cross-check, certain key facts relevant for the assessment of the requisite elements of potentially applicable crimes under the Statute, such as information related to the circumstances of an alleged attack, the presence and nature of any military objective, the weapons used, any precautionary measures taken, the intent and knowledge of alleged perpetrators, and the level and nature of any resulting damage.
76. With regard to the situation in the West Bank and East Jerusalem, the Office has focused its analysis on settlement-related activities, in particular as they relate to alleged movement of persons into and from the territories in question. During the reporting period, the Office has continued to gather pertinent information and closely followed factual, legislative and judicial developments on the ground, including processes related 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.
77. The Office also continued to engage and consult with State authorities and intergovernmental and non-governmental organisations on issues relevant to the preliminary examination. This included, for example, a series of meetings with different relevant stakeholders held at the seat of the Court, such as a meeting with senior officials and representatives of the Government of the State of Palestine in June 2017. During the reporting period, the latter also continued to submit monthly reports to the Office with information on alleged ongoing crimes as well as other developments relevant to the preliminary examination.

Conclusion and Next Steps

78. The Office has made significant progress in its assessment of the relevant factual and legal matters necessary for the determination of whether there is a reasonable basis to proceed with an investigation. In particular, the Office has reviewed thousands of pages of material and drafted multiple analytical products. This assessment will continue, under the strict guidance of the Statute

and with a view to reaching conclusions on jurisdictional issues within a reasonable time frame. In accordance with its policy on preliminary examinations, the Office will also assess information on potentially relevant national proceedings, as necessary and appropriate. Any alleged crimes occurring in the future in the context of the same situation could also be included in the Office's analysis.