



Situation in Palestine | Summary of Preliminary Examination Findings

1. On 20 December 2019, the Prosecutor [announced](#) that following a thorough, independent and objective assessment of all reliable information available to her Office, the preliminary examination into the Situation in Palestine had concluded with a determination that all the statutory criteria under article 53(1) of the Rome Statute for the opening of an investigation had been met.¹ The Prosecutor announced that she was satisfied that: (i) there was a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip; (ii) potential cases arising from the situation would be admissible; and (iii) there were no substantial reasons to believe that an investigation would not serve the interests of justice.

2. In particular, as set out in the Prosecutor's request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine,² the Office has found that there is a reasonable basis to believe that, in the context of the 2014 hostilities in Gaza, members of the Israel Defense Forces ("IDF") committed the war crimes of: intentionally launching disproportionate attacks in relation to at least three incidents which the Office has focussed on (article 8(2)(b)(iv)); wilful killing and wilfully causing serious injury to body or health (articles 8(2)(a)(i) and 8(2)(a)(iii), or article 8(2)(c)(i)); and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Conventions (article 8(2)(b)(xxiv), or 8(2)(e)(ii)).³ With respect to the admissibility of potential cases concerning crimes allegedly committed by members of the IDF, due to limited accessible information in relation to proceedings that have been undertaken and

¹ ICC-OTP, [Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction](#), 20 December 2019.

² [ICC-01/18-12](#), 22 January 2020, paras. 93-100.

³ Based on the information available, the hostilities that took place in Gaza between 7 July and 26 August 2014 may be classified as either an international or non-international armed conflict; alternatively, it may be considered that two different conflicts (one international and the other non-international) existed in parallel during the relevant period. However, it is not necessary at the preliminary examination stage to reach a conclusive view on classification of the armed conflict. Accordingly, the Prosecution has taken into account the possible classifications of the 2014 armed conflict and the related possible legal qualifications of the relevant alleged acts of the alleged perpetrators.

the existence of pending proceedings in relation to other allegations, the Office's admissibility assessment in terms of the scope and genuineness of relevant domestic proceedings remains ongoing at this time and will need to be kept under review in the context of an investigation.⁴

3. The Office has further found that there is a reasonable basis to believe that members of *Hamas* and Palestinian armed groups ("PAGs") committed the war crimes of: intentionally directing attacks against civilians and civilian objects (articles 8(2)(b)(i)-(ii), or 8(2)(e)(i)); using protected persons as shields (article 8(2)(b)(xxiii)); wilfully depriving protected persons of the rights of fair and regular trial (articles 8(2)(a)(vi) or 8(2)(c)(iv)) and wilful killing (articles 8(2)(a)(i), or 8(2)(c)(i)); and torture or inhuman treatment (article 8(2)(a)(ii), or 8(2)(c)(i)) and/or outrages upon personal dignity (articles 8(2)(b)(xxi), or 8(2)(c)(ii)). The Office has concluded that the potential cases concerning crimes allegedly committed by members of *Hamas* and PAGs would be admissible pursuant to article 17(1)(a)-(d) of the Statute.

4. In addition, there is a reasonable basis to believe that, in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes under article 8(2)(b)(viii) in relation, *inter alia*, to the transfer of Israeli civilians into the West Bank since 13 June 2014. The Office has concluded that the potential cases that would likely arise from an investigation of these alleged crimes would be admissible pursuant to article 17(1)(a)-(d) of the Statute.

5. The Prosecution further considers that the scope of the situation encompasses an investigation into crimes allegedly committed in relation to the use by members of the IDF of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel.

6. In its examination of the available information the Prosecution has been mindful of the nature of the determination under article 53(1), the low threshold applicable, as well as its object and purpose.⁵ Moreover, the Prosecution's limited powers at the preliminary examination stage have inevitably restricted the scope of its findings summarised above. While the Prosecution has

⁴ See [Georgia Article 15 Decision](#), para. 39 (noting that "[i]f (some of) those potential cases are not investigated or prosecuted by national authorities, the criterion provided for in article 53(1)(b) of the Statute, with respect to complementarity, is satisfied"); see also para. 46 ("In any case, the Chamber finds it unwarranted to attempt to conclusively resolve this question in the present decision, considering that there exist other potential cases that would be admissible") and para. 50 (finding that a potential case could be inadmissible). *But see Judge Kovács Separate Opinion*, para. 58 (suggesting that the Majority should have assessed the admissibility of all the potential cases identified).

⁵ See e.g. [Bangladesh/Myanmar Article 15 Decision](#), paras. 126-130; [Georgia Article 15 Decision](#), para. 63; [Kenya Article 15 Decision](#), para. 205.

been able to determine that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed by members of the parties to the conflict, it has not been able, nor is it required, to come to a determination on *all* allegations received.

7. In this context, the Office recalls that the crimes identified during a preliminary examination should be considered as examples of relevant criminality within a situation, in light of the threshold requirement of determining whether “*a crime within the jurisdiction of the Court has been or is being committed*”.⁶ Accordingly, once the threshold for initiating an investigation is met, the Prosecutor may proceed with an investigation into the situation as a whole and not just the particular acts or incidents identified and brought forward to substantiate that threshold.⁷ To do otherwise would be to pre-determine the direction of a future investigation, and narrow its scope, based on the limited information available at the preliminary examination stage. It would convert the facts provisionally identified as meeting this threshold into binding parameters that would regulate the scope of any future investigative inquiries. This approach would be inconsistent with the Prosecutor’s duty of independent and objective investigation and prosecution, as set out in articles 42, 54 and 58 of the Statute.⁸

8. In particular, as the Appeals Chamber has stressed in the context of another situation, restricting the permitted scope of an investigation to the factual information obtained during a preliminary examination would erroneously inhibit the Prosecutor’s truth-seeking function.⁹ The Appeals Chamber further stressed that the Prosecutor is mandated, under article 54(1)(a) of the Statute to ‘extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally’. It further recalled that under article 54(1)(b) of the Statute, the Prosecutor is required to ‘[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court’; and that the Prosecutor’s duty, according to article 54(1) of the Statute, is ‘to establish the truth’. Accordingly,

⁶ [Statute](#), article 53(1)(a) (emphasis added).

⁷ See [Kenya Article 15 Decision](#), paras. 74-75, 205; [Georgia Article 15 Decision](#), paras. 63-64.

⁸ See Appeals Chamber, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, (Afghanistan Appeals Judgment) [ICC-02/17-138](#), 5 March 2020, para. 61; [Bangladesh/Myanmar Article 15 Decision](#), paras. 126-130; [Kenya Article 15 Decision](#), paras. 74-75, 205; Pre-Trial Chamber I, *Decision on the Prosecutor’s request for authorization of an investigation*, [ICC-01/15-12](#), 27 January 2016, paras. 63-64.

⁹ [Afghanistan Appeals Judgment](#), para. 61. See also Pre-Trial Chamber III, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, [ICC-01/19-27](#), 14 November 2019, paras. 126-130; [Kenya Article 15 Decision](#), paras. 74-75, 205; Pre-Trial Chamber I, *Decision on the Prosecutor’s request for authorization of an investigation*, [ICC-01/15-12](#), 27 January 2016, paras. 63-64.

the Appeals Chamber emphasised that, in order to obtain a full picture of the relevant facts, their potential legal characterisation as specific crimes under the jurisdiction of the Court, and the responsibility of the various actors that may be involved, the Prosecutor must carry out an investigation into the situation as a whole.¹⁰

9. In conclusion, the crimes identified above are illustrative only. The Prosecutor's investigation will not be limited only to the specific crimes that informed the assessment at the preliminary examination stage. The Office will be able to expand or modify the investigation with respect to the acts identified above or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as the cases identified for prosecution are sufficiently linked to the situation.¹¹ In particular, the situation in Palestine is one in which crimes allegedly continue to be committed. | OTP

¹⁰ [Afghanistan Appeals Judgment](#), para. 60.

¹¹ See [Afghanistan Appeals Judgment](#), para. 79. See also [Kenya Article 15 Decision](#), paras. 74-75, 205; [Georgia Article 15 Decision](#), paras. 63-64; [Burundi Article 15 Decision](#), paras 192-194; [Bangladesh/ Myanmar Article 15 Decision](#), para.124.