

## An Explanatory Note on Palestine's Complaint before the ICC

### Summary

On Friday 25<sup>th</sup> July 2014, the Minister of Justice in Palestine's unity government and the General Prosecutor at the Court of Justice of Gaza filed a war crimes complaint at the International Criminal Court (ICC).

Even though Israel has not ratified the ICC's Rome Statute, this does not mean that this procedure will not go ahead. As a matter of fact, on 22<sup>nd</sup> January 2009, 4 days after the end of Israel's « Operation Cast Lead » attacks on Gaza, Palestine accepted the ICC's jurisdiction for crimes committed on its territory by lodging a Declaration of competence under article 12.3 of the Rome Statute.

While this initiative did not come to a successful conclusion, the reasons that led to its failure were political, not legal. The Prosecutor's Office only decided to close the case after substantial amounts of pressure had been exerted by high-level officials. The Judges of the ICC themselves never had the opportunity to examine the case. That is to say, no final decision rejecting Palestine's claims has been made as of today.

The current procedure is quite straightforward. It has already been used by the Court in other cases. For instance, Laurent GBAGBO is currently being tried before the ICC on the basis of a Declaration which is identical to the one filed by Palestine in 2009. The Court's action into crimes allegedly committed in Ukraine is also based on a mere Declaration of acceptance of the Court's jurisdiction – as this country had either signed or ratified the Rome Statute. Consequently, **Palestine's 2009 Declaration is amply sufficient to satisfy the requirement of the ICC's jurisdiction.** There is no need for Israel to ratify the Rome Statute or for the Security Council to intervene on behalf of Palestine. For the first time in history, the people of Palestine is given the power to use on its own an effective international procedure.

The effectiveness of an ICC procedure has already been demonstrated by the ICC Prosecutor's investigations into the situation in Palestine between January 2009 and April 2012. While these investigations were suspended at the end of that period under the consideration that Palestine's status as a State was unclear, recent developments have resolved any doubts about Palestinian statehood.

Palestine has joined UNESCO as a member State and the United Nations as a non-member observer State. In spite of opposition from the United States, the « State of Palestine » takes an active part in Security Council meetings. **Legally speaking, there are no obstacles to the current procedure. Palestine's complaint will undoubtedly go ahead as long as it gets sufficient political support.**

In order to prevent Palestine from seeking justice before the ICC, Western officials have repeatedly threatened their Palestinian counterparts with reprisals should they decide to go to ICC. This kind of blackmail can only be stopped by a large-scale mobilization of civil society.

Prosecution before the ICC is the only legal threat that the Israeli government takes seriously. Between January 2009 and April 2012, the Israeli army conducted no major operations against Gaza. It is worth noting that in November 2012, less than six months after the suspension of the ICC Prosecutor's investigations, Israel resumed its massive attacks on Palestinian civilians.

## **Q&A on the procedure before the ICC**

### ***1/ What crimes does the complaint target ?***

On Friday 25<sup>th</sup> July 2014 at 6:54 AM, Mr Saleem AL-SAQQA, the Minister of Justice in Palestine's unity government and Mr Ismail JABR, the General Prosecutor at the Court of Justice of Gaza filed a war crimes complaint at the International Criminal Court (ICC). The complaint was handed over to the ICC's Prosecutor, Mrs Fatou BENSOUDA, by Mr Gilles DEVERS, advocate at the bar of Lyon (France). It asks for the opening of an investigation into actions committed by the Israeli armed forces in June and July 2014.

The complaint targets the following violations of international law, all of which are war crimes according to the ICC's Statute :

- Wilful killing
- Attacks on civilians
- Attacks causing incidental loss of life or injury to to civilians and excessive damage
- Destruction and appropriation of property
- Crime of colonization
- Crime of apartheid
- Violations of the right to fair trial.

### ***2/ What is the International Criminal Court (ICC) ?***

- The ICC is an international institution that is distinct and independent from the United Nations Organization (UNO).
- The Court tries individuals not States.
- Its criminal jurisdiction covers natural persons only.
- The Rome Statute establishing the ICC was signed in 1998. It came into force in 2002, and the Court began work the same year.
- The ICC has jurisdiction over crimes against humanity, the crime of genocide, war crimes and the crime of aggression committed on or after 1<sup>st</sup> July 2002.
- The Court can exercise its jurisdiction over crimes committed on the territory of States which have accepted its jurisdiction (territoriality principle) or over nationals of these States who allegedly committed a crime under the Statute of the Court (active personality principle).

Thus, as France has recognized the ICC's jurisdiction, the Court is competent for crimes committed either on French soil or by French nationals abroad (even on the territory of a State which does not accept the ICC's jurisdiction).

### ***3/ Why does the ICC have jurisdiction over acts committed in Gaza ?***

States can accept the ICC's jurisdiction in two ways.

According to the first method, the State signs and ratifies the Rome Statute and becomes a party to the ICC. This is the path followed by all EU member States for instance.

The Statute's drafters left also open the possibility for States not party to the ICC to accept the Court's jurisdiction by filing a Declaration of competence under article 12.3 of the Statute.

This second possibility is much less cumbersome as it can be carried out by the State's Minister of Justice.

The Statute's drafters came up with this procedure in order to avoid States on whose territory crimes are being committed from being unable to file a complaint because of the severe institutional disruption which is common in times of armed conflict. Several States have accepted the ICC's jurisdiction by filing a Declaration under art. 12.3, such as **Côte d'Ivoire and, more recently, Ukraine.**

On 22<sup>nd</sup> January 2009, in the aftermath of « Operation Cast Lead », Palestine filed a Declaration under article 12.3 of the Statute and accepted the ICC's jurisdiction.

The complaint filed by Mr Saleem AL-SAQQA, the Minister of Justice in Palestine's unity government and Mr Ismail JABR, the General Prosecutor at the Court of Justice of Gaza is based upon this 2009 Declaration of competence.

As a matter of fact, **Palestine's 2009 Declaration is amply sufficient to found the ICC's jurisdiction**, as were the Declarations handed in by Côte d'Ivoire and Ukraine. There is no need of an intervention by the Security Council. Even though Israel has signed but not ratified the Rome Statute, the ICC is competent for crimes committed on Palestinian soil on and since 2002.

Thus, **the ongoing Israeli military operations are undoubtedly subject to the ICC's jurisdiction.** The Palestinian people do not need to get the aggressor's approval to go before the ICC – they can act on their own, addressing the Court directly and without having to undergo any filtering process.

***4/ Some people say that Palestine is not a State and therefore cannot resort to the ICC...***

Even in 2009, the existence of a Palestinian State was backed by various elements.

Today, Palestine's statehood cannot longer be doubted.

- Palestine is a member State the United Nations Organization for Education, Science and Culture (UNESCO) ;
- Palestine is a non-member observer State at the United Nations Organization (UNO) and takes an active part in Security Council meetings despite US objections ;
- The State of Palestine has been recognized by 138 other States ;
- On 2<sup>nd</sup> February 2014, Palestine signed and ratified 15 major international treaties, including the 4<sup>th</sup> Geneva Convention of 12th August 1949 and its Additional Protocol, the 1989 Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which were signed in 1966.

Palestine's quality as a State cannot longer be questioned under general international law. Neither can it be doubted under the ICC's Statute.

As a matter of fact, the current ICC Prosecutor, Mrs. Fatou BENSOUA, recently declared that the Prosecutor's Office had left the door open in April 2012 for Palestine to return before the ICC once it would have been [recognized as a State by the UN General Assembly](#).

## ***5/ What are the aims of the current procedure?***

Prosecution of crimes before the ICC includes three stages: the opening of an investigation can lead to the confirmation of charges which will in turn be followed by a trial. These three stages are preceded by a preliminary analysis during which the Prosecutor determines whether a situation warrants investigation by the Court.

During this preliminary phase, the Prosecutor, apart from assessing whether there are reasons to believe that an investigation would not serve the interests of justice – a situation which has never presented itself as of today – must determine whether two criteria are met.

Firstly, there must be sufficient indications that a crime within the jurisdiction of the Court has been or is being committed. This condition is easily met. At this stage, according to the Court's practice, the information available to the Prosecutor is neither expected to be "comprehensive" nor "conclusive". Moreover, there is no need to identify or to track down the authors of the alleged crimes.

Secondly, the Prosecutor must determine whether the alleged crimes reach a certain threshold of gravity and whether relevant national proceedings have been initiated against their authors.

In the case of Palestine, the existence of crimes within the jurisdiction of the Court cannot be seriously challenged. Neither can the gravity of the crimes committed in Gaza. As for the existence of national proceedings, it is clear that the ongoing Israeli occupation prevents Palestinian authorities from taking relevant domestic legal action whereas Palestinians victims cannot expect redress from Israeli courts.

Consequently, the opening of an investigation by the ICC's Prosecutor for crimes committed in Gaza is a perfectly realistic perspective in the middle term. An investigation would lead to public hearings before the Preliminary Chamber of the Court. Palestinian victims would be able to participate to the proceedings alongside the State of Palestine. At this point, Israel will have to make a choice: either it defends its actions in court or it takes the risk to ignore proceedings which could result in its leadership being sentenced for war crimes.

In the short term, *i.e.* even before leading to the opening of an investigation, the complaint will trigger a preliminary analysis by the Prosecutor. The mere existence of this process will provide the people of Gaza with minimal protection against further attempts on their physical integrity. As a matter of fact, from January 2009 until April 2012, the existence of a preliminary analysis by the Office of the Prosecutor deterred Israel from conducting large-scale military operations against the population of Gaza. It is worth noting that in November 2012, less than six months after the suspension of the ICC Prosecutor's investigations, Israel resumed its massive attacks on Palestinian civilians.

## ***6) Why should civil society mobilize in favour of Palestine's complaint ?***

President ABBAS has [warned Israel](#) on several occasions that Palestine would go before the ICC in case of new attacks against Palestinian civilians. On 9<sup>th</sup> July 2014, he accused Israel of committing [genocide](#) in Gaza. At the Security Council meeting of 22<sup>nd</sup> July 2014, the Palestinian Ambassador to the Un, Riyadh MANSOUR, [called for action before the International Criminal Court](#). The complaint filed by the Palestinian

Minister of Justice and the General Prosecutor at the Court of Justice of Gaza is in line with these prior declarations.

However, Palestine's decision to go before the ICC is hardly welcomed by Western States who generally oppose criminal prosecution against their Israeli ally. As a matter of fact, Western officials have repeatedly threatened their Palestinian counterparts with reprisals (including the suspension of aid payments) should they decide to go to the Hague.

The complaint filed by the Palestinian Minister of Justice and the General Prosecutor at the Court of Justice of Gaza provides the Palestinian people with the perspective of seeking the justice that has been denied them for over sixty years. By going before the ICC, the Palestinian government merely pursues the legitimate aim of empowering the victims of Israeli war crimes. Sadly, it now faces the Western governments' determination to perpetuate Israel's impunity.

This kind of blackmail can only be stopped by a large-scale mobilization of civil society.

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International law is not the preserve of political leaders or legal scholars; it belongs to humanity as a whole. Unless it wants the very notion of « human rights » to be meaningless, the international community cannot tolerate any longer the state of impunity granted to Israel.

Everyday, Palestinians suffer death, injury and destruction from an army which knows neither honour nor mercy and uses disproportionate force and state-of-the-art technology to systematically tear apart a whole society. Israel's war aims can be summed up in one sentence: spreading terror among the Palestinian population by killing as many people and causing as much material damage as possible. In the long run, these tactics aim at perpetuating the occupation of Palestine as a whole.

The very concept of humanity is denied if we allow one single State to prevent a whole people from exercising its sovereign rights and to go unpunished while repeatedly committing war crimes and crimes against humanity.

Today, our hearts go out to the Palestinians in Gaza who risk their lives by the mere fact of having been born as Palestinians in Gaza. The systematic and normalized violence imposed upon them is nothing short of terrorism against the law of nations.

By bombing Gaza, Israel does not only kill Palestinians. It also undermines the very foundations of international law, the very belief in our common humanity.

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