

INSS Insight No. 1123, January 3, 2019

The Preliminary Examination of the ICC Prosecutor: Update for 2018

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In December 2018, the Prosecutor of the International Criminal Court (ICC) published her annual report on the preliminary examinations conducted by her office. The examination of "the situation in Palestine" includes an examination of alleged crimes committed in the Gaza Strip and the West Bank, including East Jerusalem, since June 2014, by all the parties involved – Israelis and Palestinians. The current report indicates a number of development. First, events in Gaza examined include alleged crimes committed during the Great March of Return protests earlier in 2018 and the round of violence this past November. Second, the current report mentions explicitly, for the first time, albeit without specifics, that the examination regarding the West Bank includes allegations of crimes against humanity committed by Israelis. Finally, the report indicates that the Prosecutor's Office has reached an advanced stage of the assessment required for determining whether there is a reasonable basis for opening an investigation, and that the Prosecutor intends to complete the preliminary examination as soon as possible.

In December 2018, the Prosecutor of the International Criminal Court (ICC) published her annual report on the preliminary examinations conducted by her office: on Colombia, Guinea, Iraq (regarding the UK), Nigeria, the Gabonese Republic, Venezuela, Ukraine, the Philippines, Bangladesh/Myanmar, and Palestine. The preliminary examination of "the situation in Palestine" includes an examination of alleged crimes committed in the Gaza Strip and the West Bank, including East Jerusalem, since June 2014, by all the parties involved – Israelis and Palestinians. The preliminary examination is conducted by the Prosecutor in order to determine whether there is a reasonable basis for opening a criminal investigation.

The Gaza Strip

Previous reports on the preliminary examination regarding Gaza dealt only with Operation Protective Edge (2014) and crimes allegedly committed by IDF soldiers and members of Palestinian armed groups at that time. With regard to these alleged crimes, the 2018 report explains that the Prosecutor focused on the gravest, most representative, and best documented incidents.

Apart from Operation Protective Edge, the current report includes detailed factual reference to the events that occurred in the Gaza arena since March 30, 2018 in the context of the Great March of Return protests. It notes that the Prosecutor's Office has gathered information regarding crimes allegedly committed by both sides as part of the violence that occurred in the context of the demonstrations along the border, which require further assessment. Inter alia, the report states that the means used by IDF soldiers against people who participated in the demonstrations resulted in over 170 deaths and over 19,000 injured, including children, journalists, and medical workers. It also states that while most of the demonstrators were engaged in non-violent protest, some approached the border fence and committed violent acts such as throwing various explosive devices, deploying incendiary kites and balloons into Israel, and attempting to infiltrate into Israel. The report mentions the international commission of Inquiry established by the UN Human Rights Council to investigate the events, and investigations of certain incidents carried out by the IDF.

In addition, the report refers to intensified hostilities between Israel and Palestinian armed groups in Gaza in November, and states that over two days the Palestinian groups fired over 400 rockets and mortar shells toward Israel, killing at least one civilian and wounding dozens of others. It is noted that the IDF attacks were directed primarily against Palestinian armed groups and their infrastructure, but in certain cases caused civilian casualties.

The West Bank and East Jerusalem

As in the Prosecutor's previous report, the examination of alleged crimes in the West Bank and East Jerusalem focuses on the involvement of Israeli authorities in the settlements, including confiscation of land, expansion of settlements, construction of residential units and infrastructures, the regularization of construction without the required authorization (outposts), and financial incentives to encourage relocation to settlements. There is also reference to the involvement of Israeli authorities in the demolition of Palestinian property and the removal of Palestinians from their homes, including Bedouin and other communities in the E1 area.

Unlike previous reports, the current report also refers – though without specific details – to information received regarding other crimes allegedly committed by Israeli officials in the West Bank, which may fall under the definition of crimes against humanity. Specifically, according to the report, the allegations relate to crimes of persecution, transfer and deportation of civilians, and apartheid. Crimes against humanity are crimes committed as part of a widespread or systematic attack directed against a civilian population, pursuant to a policy. In the previous report there was indirect reference to

allegations related to the crime of apartheid, but in the current report this crime is mentioned explicitly.

In addition, the report refers to allegations that the Palestinian security and intelligence services in the West Bank committed the crime against humanity of torture against civilians held in detention facilities under their control. It states that these allegations require further assessment, and gives no further details.

Admissibility in Court

According to the Court's statute, one of the conditions for opening an investigation is the assessment of the admissibility of potential cases based on two parameters – complementarity and gravity. Regarding gravity, the report simply describes the criteria of the Prosecutor's Office on this aspect. However, there is more detailed reference to the question of complementarity, which examines the existence of genuine national proceedings of investigation or prosecution in relation to cases under examination. Such proceedings block the intervention of the ICC, which is intended to deal only with cases that are not properly dealt with by the state involved, as it is only complementary and secondary to national criminal jurisdiction.

Regarding the West Bank and East Jerusalem, the report states that there is no indication of any relevant national investigations or prosecutions. The Prosecutor provides an explanation for this: the Palestinian authorities are unable to exercise jurisdiction over Israelis who are allegedly involved, while the Israeli government has consistently maintained that activity relating to the settlements is not unlawful, and the High Court of Justice has determined that the issue of the government's settlement policy is not justiciable. This highlights the difficulty that Israel faces – the inability to use the principle of complementarity to block the progress of the case regarding the settlements in the Court. Settlement establishment has been a declared policy of Israeli governments, under the claim that it is legal, and therefore there is no cause for investigation. At the same time, the report states that the Prosecutor's Office considered a number of rulings issued by the High Court of Justice regarding the legality of certain governmental actions relating to settlement activity. It seems that the Prosecutor's statement regarding the absence of national investigations does not refer to the question of complementarity with respect to other crimes examined in the West Bank not related to the settlements, including those allegedly committed by Palestinians.

With regard to Gaza, the report states that available information indicates that all the relevant incidents in Operation Protective Edge involving crimes allegedly committed by members of the IDF are or have been under "some form of investigative activities" at the national level by the military justice system. In order to meet the principle of

complementarity (so that a case will not be admissible in the Court), investigations alone are not sufficient: the state is also required to be able and willing to carry out investigations genuinely (for example, not for the purpose of shielding the person involved from criminal responsibility). The report does not refer to the genuineness of Israel's "investigative activities." As for the alleged crimes of Palestinian armed groups during Operation Protective Edge, it states that available information does not suggest any conflict of jurisdiction between the Court and any relevant states (in other words, the question of complementarity and its requirements does not arise, and in this aspect the Court is not prevented from exercising its jurisdiction). In addition, there is no reference to admissibility (complementarity and gravity) with respect to the events of 2018 at the Gaza-Israel border. As mentioned, the report states that they require further examination.

The preliminary examination of the situation in Palestine has been ongoing since early 2015, and the current report indicates a number of developments. First, the reference in the current report to events in the Gaza arena relating to the Great March of Return protests and the round of violence last November clarifies that the preliminary examination regarding Gaza has moved beyond Operation Protective Edge, to encompass also alleged crimes committed during these events. This shows that the Prosecutor's Office is prepared to add suspected crimes to its examination according to the latest developments on the ground.

Second, along with the focus on settlements, the current report mentions explicitly for the first time, albeit without specifics, that the examination regarding the West Bank also includes allegations of crimes against humanity committed by Israelis, including the crime of apartheid. There is also a first reference to allegations of a crime against humanity committed by the Palestinian authorities in the West Bank. Previous reports did not mention an examination of Palestinian authorities' conduct in this area, except for a general statement in the 2016 report regarding allegations of incitement to violence against Israelis by Palestinian political leaders and groups (there was also a statement regarding alleged violent attacks by Palestinian assailants that were not attributed to the Palestinian leadership).

Finally, the report indicates a significant development in the progress of the preliminary examination of the situation in Palestine. The preliminary examination generally takes place in four phases. According to the current report, the examination has advanced from the second phase, which focuses on whether there is a reasonable basis to believe that the alleged crimes fall within the Court's jurisdiction, to the third phase – which focuses on the admissibility of potential cases (according to complementarity and gravity). The report also states explicitly that the Prosecutor's Office has reached an advanced stage of the assessment required for determining whether there is a reasonable basis for opening

an investigation, and that the Prosecutor intends to complete the preliminary examination as early as possible.

If at the end of the preliminary examination a decision is made to open an investigation, the Court's Pre-Trial Chamber can, at the Prosecutor's request, issue arrest warrants for specific persons if there are reasonable grounds to believe that they have committed crimes within the Court's jurisdiction and their arrest appears necessary. If arrest warrants are issued, the 123 member states of the ICC, including all the countries of Western Europe, are obliged to cooperate with the Court and extradite any such persons found on their territory. Therefore, arrest warrants against senior Israeli figures would have a substantive impact and severely restrict their ability to travel - and this is just at the investigation stage, even before the commencement of a trial. It is too soon to estimate if indeed there will be an investigation with respect to Israel. It is in Israel's interest to take such implications into account while making decisions on matters relevant to the ongoing examination, including the performance of its own genuine investigations.