

The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine

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Today, Friday, 16 January 2015, the Prosecutor of the International Criminal Court (ICC), Mrs. Fatou Bensouda, opened a preliminary examination into the situation in Palestine.

The Prosecutor's decision follows the Government of Palestine's accession to the Rome Statute on 2 January 2015 and its declaration of 1 January 2015, lodged under article 12(3) of the Rome Statute – the Court's founding treaty – accepting the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014."

Upon receipt of a referral or a valid declaration made pursuant to article 12(3) of the Statute, the Prosecutor, in accordance with Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor, and as [a matter of policy and practice](#), opens a preliminary examination of the situation at hand. Accordingly, the Prosecutor has opened a preliminary examination into the situation in Palestine. The Office will conduct its analysis in full independence and impartiality.

A preliminary examination is not an investigation but a process of examining the information available in order to reach a fully informed determination on whether there is a reasonable basis to proceed with an investigation pursuant to the criteria established by the Rome Statute. Specifically, under article 53(1) of the Rome Statute, the Prosecutor must consider issues of jurisdiction, admissibility and the interests of justice in making this determination. The Office gives due consideration to all submissions and views conveyed to the Office during the course of a preliminary examination, strictly guided by the requirements of the Rome Statute in the independent and impartial exercise of its mandate.

There are no timelines provided in the Rome Statute for a decision on a preliminary examination. Depending on the facts and circumstances of each situation, the Office will decide whether to continue to collect information to establish a sufficient factual and legal basis to render a determination; initiate an investigation, subject to judicial review as appropriate; or decline to initiate an investigation.

Background and legal analysis

The Office previously conducted a preliminary examination of the situation in Palestine upon receipt of a purported article 12(3) declaration lodged by the Palestinian National Authority on 22 January 2009. The Office carefully considered all legal arguments submitted to it and, after thorough analysis and public consultations, concluded in April 2012 that Palestine's status at the United Nations (UN) as an "observer entity" was determinative, since entry into the Rome Statute system is through the UN Secretary-General (UNSG), who acts as treaty depositary. The

Palestinian Authority's "observer entity", as opposed to "non-member State" status at the UN, at the time meant that it could not sign or ratify the Statute. As Palestine could not join the Rome Statute at that time, the Office concluded that it could also not lodge an article 12(3) declaration bringing itself within the ambit of the treaty either, as it had sought to do.

On 29 November 2012, the UN General Assembly (UNGA) adopted Resolution 67/19 granting Palestine "non-member observer State" status in the UN with a majority of 138 votes in favour, 9 votes against and 41 abstentions. The Office examined the legal implications of this development for its own purposes and concluded, on the basis of its previous extensive analysis of and consultations on the issues, that, while the change in status did not retroactively validate the previously invalid 2009 declaration lodged without the necessary standing, Palestine would be able to accept the jurisdiction of the Court from 29 November 2012 onward, pursuant to articles 12 and 125 of the Rome Statute. The Rome Statute is open to accession by "all States," with the UNSG acting as depositary of instruments of accession.

On 2 January 2015, Palestine deposited its instrument of accession to the Rome Statute with the UNSG. As outlined in the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, "the Secretary-General, in discharging his functions as a depositary of a convention with an 'all States' clause, will follow the practice of the [General] Assembly in implementing such a clause [...]." The practice of the UNGA "is to be found in unequivocal indications from the Assembly that it considers a particular entity to be a State." In accordance with this practice and specifically UNGA Resolution 67/19, on 6 January 2015, the UNSG, acting in his capacity as depositary, accepted Palestine's accession to the Rome Statute, and Palestine became the 123rd State Party to the ICC. It was welcomed as such by the President of the Assembly of States Parties to the Rome Statute.

Likewise, on 7 January 2015, the Registrar of the ICC informed President Abbas of his acceptance of the article 12(3) declaration lodged by the Government of Palestine on 1 January 2015 and that the declaration had been transmitted to the Prosecutor for her consideration.

The Office considers that, since Palestine was granted observer State status in the UN by the UNGA, it must be considered a "State" for the purposes of accession to the Rome Statute (in accordance with the "all States" formula). Additionally, as the Office has previously stated publicly, the term "State" employed in article 12(3) of the Rome Statute should be interpreted in the same manner as the term "State" used in article 12(1). Thus, a State that may accede to the Rome Statute may also lodge a declaration validly under article 12(3).

For the Office, the focus of the inquiry into Palestine's ability to accede to the Rome Statute has consistently been the question of Palestine's *status* in the UN, given the UNSG's role as treaty depositary of the Statute. The UNGA Resolution 67/19 is therefore determinative of Palestine's ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration.

The Office of the Prosecutor of the ICC conducts independent and impartial investigations and prosecution of the crimes of genocide, crimes against humanity and war crimes. The Office of the Prosecutor has opened investigations in nine situations: Uganda; Democratic Republic of the

Congo; Darfur (Sudan); Central African Republic; Kenya; Libya; Côte d'Ivoire and Mali. The Office is also conducting preliminary examinations relating to the situations in Afghanistan, Colombia, Georgia, Guinea, Honduras, Iraq, Nigeria and Ukraine.

[Declaration lodged by Palestine pursuant to article 12\(3\) of the Rome Statute | 1 January 2015.](#)

[OTP Policy Paper on Preliminary Examinations | November 2013.](#)

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