



COMMUNICATIONS TO THE ICC CONCERNING THE SITUATION IN GAZA

The International Criminal Court has received over 200 communications from Palestinian citizens alleging that the Israeli military targeted civilians and non-military buildings and illegally used weapons such as white phosphorous against Palestinian civilians in densely populated residential areas in Gaza in January 2009. The complaints claim that this has devastated the Palestinian infrastructure and created a humanitarian catastrophe. A Palestinian rights group, the International Coalition against Impunity (ICI), called on the ICC to look into the death and injury of hundreds of Palestinians, including women and children. The ICC wants the ICC to investigate and try Israeli and US leaders for war crimes. Conversely, Hamas has also been accused of war crimes, including indiscriminate rocket attacks on Israeli civilians and the use of civilians as human shields.

The ICC Prosecutor, Luis Moreno Ocampo, is considering whether the ICC has jurisdiction to investigate alleged Israeli war crimes in Gaza. However, neither Israel nor Palestine falls under the jurisdiction of the court because Israel is not an ICC State Party and Palestine is not recognized as a sovereign state. The ICC can try individuals only if the accused or suspect is a citizen of an ICC State Party or a state that has especially accepted the ICC's jurisdiction, or if the crime took place on the territory of a State Party or a state accepting the Court's jurisdiction. This is what the Palestinian National Authority (PNA) is now seeking to do. It has recognized the court's jurisdiction over the alleged crimes in a letter dated January 22, 2009. In February 2009, the Palestinian Authority presented a declaration to the ICC accepting the Court's jurisdiction for acts committed on Palestinian territory since the ICC's jurisdiction began on July 1, 2002.

In order to open an investigation absent a referral by the UN Security Council or an ICC State Party, the ICC Prosecutor must present evidence to and secure the permission of a three-judge panel of the Pre-Trial Chamber. This means that the judges would also have to agree with the Prosecutor that the PNA could legally lodge a declaration accepting the Court's jurisdiction. The Palestinian Authority wants the ICC's jurisdiction to extend to its territories, but its territories are not recognized as an independent state. In its request for an investigation, the PNA relies on Article 12(3) of the Rome Statute which says that a State, even if it is not a party to the Rome Statute, "may, by declaration lodged with the [Court's] Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question." The key word in Article 12(3) is state. Only a state may accept, by declaration, the Court's jurisdiction. The Palestinian territories do not currently constitute a state under international law. Further, the 1998 Rome diplomatic conference, which established the ICC, invited only UN Member States to participate then as signatories to the Statute. Palestine was given observer status and not designated as a potential signatory. The Prosecutor is almost certain not to deal with the Palestinian Authority as a state in the face of these circumstances.

Given the present situation, only the Security Council is in a position to refer the Gaza situation to the Court. The US, an ally to Israel, as a permanent member would almost certainly veto any such referral. However, if the ICC eventually determines that it has jurisdiction in this situation, both Israeli and Palestinian actions during the conflict will be subject to investigation and prosecution. The question of trying Israeli or Palestinian citizens depends on the Court's decision on particular events as constituting eligible crimes.

On September 15, 2009 a UN fact finding team headed by South African Judge Richard Goldstone issued an official UN Human Rights Council report which concluded that both Israel and Palestinian forces committed





war crimes in the recent conflict in Gaza. The investigation found evidence indicating that both sides committed serious violations of international human rights and humanitarian law in Gaza during 2008 and 2009.

The report declares that Israel must be held accountable for its actions during the war. Further, it states that Israeli operations were planned in all their phases as a deliberately disproportionate attack to terrorize the civilian population. The report determined that Palestinian groups had committed war crimes, and potential crimes against humanity in their repeated rocket attacks on Israel.

The report recommends that authorities in both Israel and Gaza be required to investigate the allegations and report to the UN Security Council within six months. If no domestic action has taken place within that time, the report recommends that the Security Council refers the situation to the ICC.

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