AMNESTY INTERNATIONAL QUESTIONS AND ANSWERS

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Amnesty International's response to the ICC Office of the Prosecutor's statement that it cannot investigate crimes committed during the Gaza conflict

On 3 April 2012, the Office of the Prosecutor of the International Criminal Court (ICC) issued an update on its preliminary examination of the situation in Palestine. This preliminary examination was initiated after the Palestinian Authority (PA) submitted a declaration to the ICC in January 2009, in the aftermath of the 22-day conflict in Gaza and southern Israel, to determine whether the ICC could open an investigation into crimes committed during that conflict. The Office of the Prosecutor concluded that it is unable to proceed with investigating and prosecuting these crimes unless the relevant United Nations bodies (in particular, the Secretary General and General Assembly) or the ICC Assembly of States Parties (made up of 121 states that have ratified the Rome Statute of the ICC (Rome Statute)) decide that Palestine qualifies as a state for the purpose of acceding to the Rome Statute (see: http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf).

In response, Amnesty International issued a press release (copied at the end of this document) criticizing the decision and arguing that the Prosecutor should instead seek a judicial ruling on the issue from the ICC's Pre-Trial Chamber.

These Questions and Answers provide additional background information to explain Amnesty International's position.

Neither the PA nor Israel have ratified the Rome Statute, and the UN Security Council has not referred the situation to the ICC. Doesn't the ICC lack jurisdiction in any case?

States that have not ratified the Rome Statute have the ability under Article 12(3) of the statute to issue a declaration to the ICC accepting its jurisdiction over certain crimes committed in its territory by anyone, regardless of nationality, and committed by its nationals elsewhere. The PA issued such a declaration to the ICC on 22 January 2009 – almost immediately after a ceasefire ended the devastating conflict – accepting its jurisdiction over crimes "committed on the territory of Palestine since 1 July 2002." This declaration would potentially cover crimes under international law committed by both sides during the Gaza-Israel conflict from 27 December 2008 to 18 January 2009. Amnesty International documented evidence that war crimes were committed by both Israeli forces and Palestinian armed groups during the conflict (see *Operation 'Cast Lead': 22 Days of Death and Destruction,* http://www.amnesty.org/en/library/info/MDE15/015/2009/en).

Similarly, Cote d'Ivoire, which has not ratified the Rome Statute, made a declaration accepting the jurisdiction of the ICC on 18 April 2003.

Why must Palestine be determined to be a state in order for the ICC to proceed with an investigation?

The ability to accept the jurisdiction of the ICC under Article 12(3) can only be exercised by a "state." The validity of the PA's declaration depends on whether Palestine can be considered a state within the meaning of the Rome Statute and this must be established before an ICC investigation can proceed on the basis of the declaration.

Does Amnesty International think that Palestine is a state?

Amnesty International does not take a position on the question of whether Palestine is a state. As a human rights organization, our concern is respect for the human rights of Palestinians and Israelis, including access to justice, truth and reparation.

If Amnesty International takes no position on Palestinian statehood, why is it critical of the Office of the Prosecutor's statement?

Although Amnesty International takes no position on whether Palestine is a state, it recognizes that the question is central to whether the ICC has jurisdiction over crimes committed during the Gaza-Israel conflict on the basis of the PA's declaration.

Given that access to justice for victims of war crimes by both sides is at stake, Amnesty International is calling for an independent judicial determination of the issue by the ICC judges, rather than a political determination by external bodies where the matter will likely remain unresolved indefinitely while victims continue to be denied justice.

Furthermore, delegating this decision to a political body undermines the vital independence of the Court and exposes the ICC to political influence over justice issues.

The Office of the Prosecutor's position establishes another a major barrier to justice for the victims and fails to address the fact that the Prosecutor has yet to seek an independent judicial determination from the Pre-Trial Chamber on the questions surrounding the ICC's jurisdiction in this situation, despite the fact that the preliminary examination has been ongoing for more than three years.

Why does Amnesty International oppose the UN or the ICC Assembly of States Parties determining whether Palestine qualifies as a state?

Amnesty International does not oppose political processes that establish statehood. However, in this case, the issue of whether Palestine is a "state" is disputed and is unlikely to be resolved by UN bodies expediently. Palestinian President Mahmoud Abbas submitted an application for full UN membership for the State of Palestine to UN Secretary-General Ban Ki-moon on 23 September 2011, but the UN Security Council has yet to vote on the matter. The issue has effectively been put on hold, due in large part to the opposition of the US government. While the Israeli government and some legal scholars argue that Palestine does not meet the requirements of statehood, a number of leading international law experts have expressed the view that the Palestinian Authority is entitled to make such a declaration under Article 12(3) of the Rome Statute and that the ICC judges should determine its validity.

Furthermore, the Office of the Prosecutor's basis for assessing the need for the United Nations or the ICC Assembly of States Parties to make the determination is flawed. The statement argues that the United Nations or the ICC Assembly of States Parties need to determine that "Palestine is a state for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court in accordance with Article 12 (1)". A broad approach has been taken to accession of the Rome Statute, including the acceptance of the Cook Islands accession, even though it is not a United Nations member state. The approach largely relies on the practice of the

UN General Assembly considering any cases of uncertainty as to whether a state is recognised as such for the purpose of depositing an instrument of ratification. It must be noted that the Palestinian Authority did not attempt to become a state party to the Rome Statute by lodging an instrument of accession, but rather made a declaration under Article 12(3) accepting the ICC's jurisdiction. The question of ICC's jurisdiction is distinct from the ability to accede to the Rome Statute and the ICC judges, not an external political body, are best suited to resolve it.

Why does Amnesty International support a judicial determination on the issue?

The interpretation of the Rome Statute is the role of the judges. The key issue is whether the Palestine is a state within the meaning of the Rome Statute. Therefore a judicial determination by an independent panel of judges who have expertise in international law and the Rome Statute could promptly resolve the issue of whether or not the Palestine qualifies as a state for the purposes of Article 12(3), and thus whether the PA declaration accepting the jurisdiction of the ICC is valid.

On what basis could the ICC judges make a judicial determination?

The ICC Pre-Trial Chamber is currently the only judicial body that can conduct such a legal process. Article 19(3) of the Rome Statute states: "[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility." However, as the wording suggests, the process can only be commenced by the Prosecutor. As he has yet to seek a ruling, the ICC judges have not been able to consider the issue.

How long has Amnesty International been calling for the Prosecutor to seek a ruling of the Pre-Trial Chamber?

Amnesty International first called for the Prosecutor to seek a ruling of the Pre-Trial Chamber in September 2010, when the organization determined that neither the Israeli authorities nor the Hamas *de facto* administration had conducted effective national investigations into the crimes committed during the Gaza conflict (see: *Time for international justice solution for Gaza conflict victims* (http://www.amnesty.org/en/library/info/MDE15/021/2010/en). Most recently, our calls to the ICC Prosecutor were repeated in: *Palestinian Authority: The Palestinian bid for UN membership and statehood recognition* , (http://www.amnesty.org/en/library/info/MDE21/003/2011/en) .

What would be the benefit if the ICC has jurisdiction?

If the PA's declaration is found to be valid, it could provide access to justice and reparation before the ICC for both Palestinian and Israeli victims who are being denied a remedy by the local authorities. A finding that the ICC has jurisdiction could also prompt Israel and the Hamas *de facto* administration to conduct effective national investigations and, if sufficient admissible evidence is found, prosecute suspected perpetrators, as Amnesty International has called on them to do since the conflict ended.

Why does Amnesty International call the Prosecutor's statement "dangerous"?

There are two reasons for this:

· Firstly, by making a non-judicial finding that the ICC cannot act without a determination by the United Nations or the ICC Assembly of States Parties that the Palestinian Authority is a state, the Office of the Prosecutor is sending a message to those who committed

crimes under international law that they are currently beyond the reach of international justice. Such impunity perpetuates an environment where human rights violations by all sides can continue, and increases the risk of further civilian casualties. Palestinian armed groups continue to fire indiscriminate rockets into Israel, and the Israeli military continues to conduct indiscriminate and disproportionate attacks in the Gaza Strip (see, for example, *All sides must protect civilians in Gaza and Israel following ceasefire announcement* , http://www.amnesty.org/en/library/info/MDE15/014/2012/en).

· Secondly, the Office of the Prosecutor's decision to form its own position in favour of a political determination, rather than seeking a judicial ruling by the judges, creates the danger that the Office of the Prosecutor will be subject to allegations of political bias and failing to act independently by relying on external political bodies to determine its jurisdiction. This could threaten the credibility of the ICC, especially at a time when the ICC is being criticized for focussing solely on Africa and avoiding more politically challenging situations.

Now that the Prosecutor has made this statement, what is Amnesty International calling for?

Despite its recent statement, the Office of the Prosecutor has not closed its preliminary examination into the situation in Palestine and therefore remains seized of the matter. On this basis, Amnesty International is calling on the Office of the Prosecutor to reconsider the position in its statement, and is urging the Prosecutor again to seek a judicial ruling on the jurisdiction of the ICC in this situation.

What other steps has Amnesty International called for to achieve justice, truth and reparation for victims of the 2008-2009 Gaza-Israel conflict?

Most recently, Amnesty International called on the UN General Assembly to reconsider the report of the UN Fact-Finding Mission on the Gaza Conflict at its 66th session, as recommended by the UN Human Rights Council in March 2011. Amnesty International urged the General Assembly to refer the report (also known as the "Goldstone report") to the Security Council with the recommendation that it refer the Gaza situation to the ICC Prosecutor pursuant to Article 13(b) of the Rome Statute. Should the Security Council make such a referral, the ICC Prosecutor could open an investigation into crimes committed during the conflict without any further ruling on the validity of the PA declaration. The General Assembly did not take action on the matter during its 66th session, and Amnesty International is not aware of any initiative of the Security Council to debate the issue.

Amnesty international has also called on all states to exercise universal jurisdiction over crimes under international law, including those documented in the 2008-2009 Gaza conflict. States should investigate and, if sufficient admissible evidence is found, prosecute crimes under international law committed during the conflict before their national courts, regardless of the nationality of the victims or suspects.