

The possibility for the ICC to investigate crimes allegedly committed on the territory of Palestine

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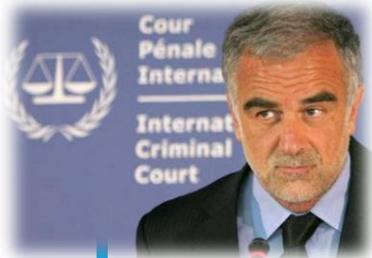


The 'saga'

Palestinian *Ad hoc* declaration recognising jurisdiction of the ICC



Palestine is not a state, but 'the Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations [...] resolve the legal issue.'



UNGA Resolution 67/19 granting Palestine the status of non-member observer state



Palestine is a state, 'nonetheless, at this stage, the Office has no legal basis to open a new preliminary examination.'



Accession to the Rome Statute



The Prosecutor opens a preliminary investigation

Second *Ad hoc* declaration



21 January 2009

3 April 2012

4 December 2012

November 2013

31 December 2014 – 2 January 2015

16 January 2015

Memo I – Preliminary Investigation

Memo II – Official Investigation

Preliminary Investigation

- In principle by definition preliminary investigation following an *ad hoc* declaration, but:
 - Article 12(3) ICC Statute: A state which is not a party to the Statute may, by declaration, accept the exercise of jurisdiction by the Court.
- Research questions:
 - Is recognition by the UNGA as a non-member state decisive?
 - If so, does Palestine have to issue a new declaration, or does the one of 2009 suffice?

Palestinian Statehood

The Montevideo Convention (1933)

- Permanent population
- Defined territory
- Government
- Capacity to enter into relations with other states

Palestine

- Possesses a permanent population and engages in international relations; but
- Does not have a government actually and effectively exercising control over a defined territory.

Palestinian Statehood

But, authors like Brownlie, Crawford & Shaw:

- Statehood is no longer merely a matter of fact, but also of law
- Modern criteria have to be set against that of (the lack of) an effective government

Modern Criteria

- Right to self-determination
- Competing territorial claims
- Degree of international recognition

Palestinian Statehood

Right to self-determination

- Palestinians occupied territory since 4th millennium BC
- British Mandate – Conservatory Clause of Article 80(1) UN Charter
- UNGA Partition Plan (1947) >< Self-Determination
- Widely internationally (UN) recognised

Competing territorial claims

- Israel does not claim territorial sovereignty, but merely contains that territory is ‘disputed’
- Claims based on self-determination are weaker
- Israel already has title to territory over significant part of ancient Palestine

Degree of international recognition

- Of particular relevance in case of emergence of new states
- Recognised as a state by +100 states at the time of lodging declaration, 135 at the time of writing

Palestinian Statehood

- Modern criteria appear to outbalance Palestine's failure to meet the combined Montevideo criteria of a defined territory and an effective government;

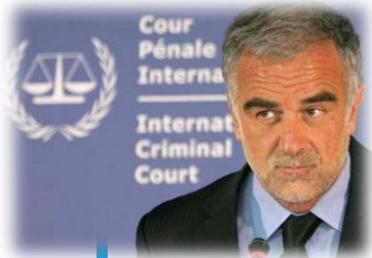
→ Research questions:

- Is recognition as a non-member state decisive?
 - No, although reinforcing right to self-determination and international recognition.
- If so, does Palestine have to issue a new declaration, or does the one of 2009 suffice?
 - No, the declaration of 2009 suffices.

Official Investigation

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Jurisdiction & Admissibility

- **Article 53(1) ICC Statute:**
 - **Temporal jurisdiction**
 - **Territorial and/or personal jurisdiction**
 - **Material jurisdiction**
 - **Evidence**
 - **Gravity**
 - **Complementarity**
 - **Interests of justice**

Temporal Jurisdiction

First *ad hoc* declaration



1 July 2002

Second *ad hoc* declaration



13 June 2014

Operation *Brother's Keeper*



12 June 2014
– 1 July 2014

Operation *Protective Edge*



7 July 2014 – 31 August 2014

Entry into force ICC Statute



1 April 2015

Israeli Settlements



Territorial/Personal Jurisdiction

- **Article 12(2) ICC Statute: The Court may exercise jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court *ad hoc*:**
 - (a) The State on the territory of which the conduct in question occurred;
 - (b) The State of which the person accused of the crime is a national.
- **Territory of Palestine, regardless of the nationality of the perpetrator:**
 - Israeli (Israeli army or Israel Defence Forces (IDF))
 - Palestinians (Hamas, Fatah and other armed groups)

Material Jurisdiction

- Article 5 ICC Statute: The Court has jurisdiction with respect to the following crimes: (a) The Crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.
- War crimes – contextual element:
 - No non-international armed conflict between Palestinian armed groups (Hamas and Fatah)
 - International armed conflict between Israel and Palestine
 - In any case, situation of occupation (settlements)

Evidence

- Article 53 ICC Statute: the Prosecutor shall initiate an investigation unless she determines that there is no reasonable basis to proceed.
- Sources: reports of Amnesty International, Human Rights Watch and media.

- **On Israeli and Palestinian side:**
 - **Article 8(2)(b)(iv):** intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians

- **On Israeli side:**
 - **Article 8(2)(b)(i):** intentionally directing attacks against individual civilians not taking direct part in hostilities
 - **Article 8(2)(b)(iii):** intentionally directing attacks against personnel or objects involved in a humanitarian assistance mission in accordance with the UN Charter
 - **Article 8(2)(b)(viii):** the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies

- **On Palestinian side:**
 - **Article 8(2)(b)(xxiii):** utilizing the presence of civilian or other protected person to render certain points or forces immune from military operations
 - **Article 8(2)(a)(i) or Article 8(2)(c)(iv):** Wilful killing *or* the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court X

Gravity

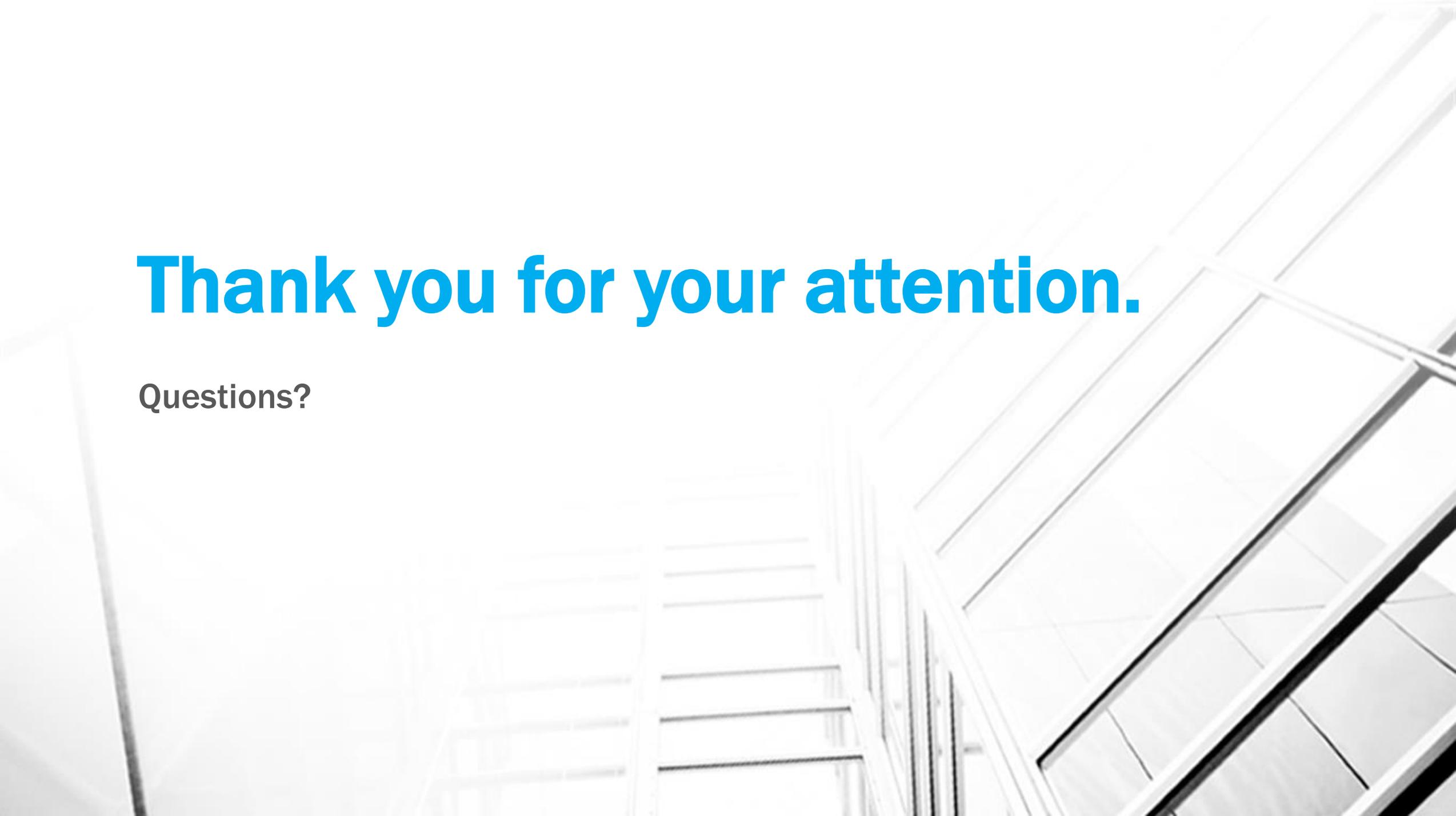
- Relevant criteria: number of victims, the scale of the crimes, the severity of the crimes, the systematic nature of the crimes, the manner in which they were committed, and the impact on victims
- The gravity threshold is to be assessed separately for different situations:
- Operation Brother's Keeper:
 - Six fatalities X
- Operation Protective Edge:
 - On Israeli side: at least 2.133 Palestinian fatalities; 1.489 believed to be civilians ✓
 - On Palestinian side: 4.881 rockets and 1.753 mortars fired; six civilian and 66 military fatalities X
- ~ *Flotilla* case (16 July 2015): "ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity" is sufficient
- Israeli settlement practice: since 13 June 2014, Israel announced at least 1.510 new settlements; throughout 2014, the Israeli authorities destroyed 590 Palestinian-owned structures, displacing 1.177 people ✓

Complementarity

- **Article 17 ICC Statute: The Court shall declare a case inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.**
 - **Israel examined twelve incidents and referred them to the Military Advocate General, who decided to order criminal investigations with regard to two of them.**
- **Except for these two incidents, the complementarity principle does not impede the ICC's jurisdiction.**

Interests of Justice

- **Article 53 ICC Statute:** In deciding whether to initiate an investigation, the Prosecutor shall consider whether ... (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
- **Severe pressure from Israel, European countries and the US not to recognize ICC jurisdiction because that could harm peace process, but:**
 - All Palestinian groups supported ICC jurisdiction
 - NGOs fiercely in favour of investigation
 - Prosecutor:
 - Exceptional in nature/presumption in favour of investigation
 - Interests of justice ≠ interests of peace



Thank you for your attention.

Questions?