



## **Five Years and Waiting: No Investigation in the Report of the Office of the Prosecutor on Preliminary Examinations 2019**

6 December 2019

On 5 December 2019, the Office of the Prosecutor of the International Criminal Court (ICC) released an advance Report of the Office of the Prosecutor on Preliminary Examinations 2019, including a six-page section on the Situation of Palestine. The report contained a number of unwarranted and disturbing omissions, including the exclusion of the Gaza Strip from territories occupied since 1967. Moreover, the report failed to highlight Israel's unlawful extension of sovereignty over Jerusalem in 1980 during the occupation, as an annexation in violation of Article 2(4) of the United Nations Charter and Article 47 of the Fourth Geneva Convention, a measure at the time condemned in the "strongest terms" as illegal under UN Security Council resolution 478 (1980). Critically, the Basic law to alter the legal status of Jerusalem itself is considered a violation of international law and which the international community is obliged to not recognize under Security Council mandate.

Throughout the report, both Israel and Palestine are treated as two equal parties to an ongoing conflict. Our organizations, Al-Haq, the Palestinian Center for Human Rights (PCHR) and Al-Mezan Center for Human Rights (Al-Mezan), warn that the failure to adequately address the context is misleading. The situation is one of a 52-year prolonged belligerent occupation, where one party to the conflict, Israel the Occupying Power has subjugated the occupied population, who remain under its effective control and administration. This places certain obligations on Israel, and the violation of laws governing its administration of the occupied territory, may amount to grave breaches and war crimes, with some acts reaching the threshold of crimes against humanity.

The tendency to give equivalence between Israel's targeting of civilians during the Great Return March and the acts of Palestinian protestors has led to some anomalies in the Report. For example, patently low-level public order issues such as stone throwing and "attempting to infiltrate into Israeli territory" are described in an aggravated manner as engagement in "violent acts". Further the use of makeshift implements such as incendiary kites and balloons, hardly reach the gravity threshold for consideration as war crimes within the jurisdiction of the Court.

Similarly, the Reports concerns that “allegations” received by the Office of the Prosecutor, that Palestinian Authority (PA) payments of what are essentially social welfare benefits accruing to the relatives of the deceased, who have been allegedly implicated in “attacks”, may give rise to Rome Statute crimes, will obviously be difficult to surmount a *mens rea* assessment. This raises the issue of why such an etiolated allegation is even present in the Report.

Again, the crimes against humanity of persecution, transfer and deportation of civilians, as well as the crime of apartheid, carried out by Israel in the context of the prolonged occupation are immediately followed by an equivalent Palestinian security alleged crime against humanity of torture and related acts against civilians held in detention centers. While undoubtedly human rights violations may occur in areas under PA control, and potentially war crimes, it is again unlikely that such violations amount to a policy or plan reaching the threshold of widespread or systematic attack against the civilian population, and the inclusion of CAH for both parties has all the hallmarks of a distorted quest for balance.

### *Legal Mischaracterization of the Occupied Palestinian Territory*

Our organizations reject and condemn in the strongest manner what can only be described as a territorial reordering by the Office of the Prosecutor, in describing the West Bank and East Jerusalem as under the ‘control’ of Israel, and therefore occupied territory, while presenting the Gaza Strip separately as an area of ongoing hostilities. This assessment is manifestly out of step with agreed international positions on the status of the West Bank, East Jerusalem and the Gaza Strip as comprising the occupied Palestinian territory since 1967, as determined by the myriad of UN Human Rights Council Resolutions<sup>1</sup>, UN General Assembly Resolutions<sup>2</sup>, UN Security Council Resolutions, the in-depth findings of UN Commissions of Inquiry, and an Advisory Opinion of the International Court of Justice.<sup>3</sup>

Our organizations remind that the territory of the West Bank, East Jerusalem and the Gaza Strip is internationally recognized as one territorial legal unit.<sup>4</sup> We further remind that the failure to include the status of the Gaza Strip as occupied territory resiles from previous reports of the Office of the Prosecutor, which

<sup>1</sup> UN Human Rights Council Resolution S-21/1 (23 July 2014).

<sup>2</sup> Peter Maurer, *Challenges to international humanitarian law: Israel's occupation policy*, International Review of the Red Cross, Vol. 94, Number 888, p.1506; International Criminal Court, Office of the Prosecutor, *Situation on Registered Vessels of the Comoros, Greece and Cambodia*, 6 November 2014, *Article 53 (1) Report*, p. 17; General Assembly resolutions A/Res/64/92, A/Res/64/94, to be read jointly.

<sup>3</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 , 9 July 2004, paras. 78 et seq., 113. Prior to this decision, Israel's status as occupying power was recognized by, inter alia, the Oslo Accords, the Israeli Supreme Court, the UNSC, the UNGA, and the U.S. State Department.

<sup>4</sup> UNGA 64/94, 10 December 2009, which calls on Israel to respect the territorial unity of the Occupied Palestinian Territory, and refers to Gaza as part of that territory; Article XI (1) of the Interim Agreement.

consider that “the prevalent view within the international community is that Israel remains an occupying power in Gaza despite the 2005 disengagement”.<sup>5</sup>

As such, the report feeds into Israel’s fragmentation of the occupied Palestinian territory, for the purposes of its colonialist territorial expansion, a fragmentation that is further entrenched by the application of different legal regimes in the West Bank, East Jerusalem and the Gaza Strip, the denial of freedom of Palestinian movement through its construction of Annexation Wall and checkpoints in and around the West Bank and Jerusalem, military walls, fences, buffer-zones, watchtowers and drone surveillance surrounding and imprisoning over 2 million people in the Gaza Strip, where Israel also retains undisputed control over the territorial water and airspace. Additionally, Israel’s continued effective control over all Palestinians through, *inter alia*, the Population Registry, denial of family reunifications, denial of return of Palestinian refugees, denial of freedom of movement of people, goods and services throughout the occupied territory, and the division of the Palestinian population through a discriminatory ID system, have fragmented families for decades throughout the OPT.

#### *Irrelevant Analysis of Non-Existent ‘Peace Process’*

Oddly, the report delves into issues which it considers are up for negotiation in a future peace process including, the “determination of borders, security, water rights, control of the city of Jerusalem, Israeli settlements in the West Bank, refugees, and Palestinians’ freedom of movement”.<sup>6</sup> Our organizations reiterate that Palestinians have rights of permanent sovereignty over their water and natural resources, rights that are protected during belligerent occupation under Article 55 of the Hague Regulations. We are particularly concerned that the Office of the Prosecutor does not mention the substantial submission from Palestinian civil society on the crime of pillage and Israel’s destruction of natural resources in the occupied Palestinian territory. While in a separate vein, the annexation of Jerusalem violates the most basic principles of non-acquisition of territory through use of force, and which the international community has a duty of non-recognition and to bring to an end. Similarly, the construction of settlements constitutes *inter alia* a flagrant violation of Article 49 of the Fourth Geneva Convention, and the inalienable nature of the rights freedom of movement and of Palestinian refugees to return, should not at this level need to be pointed out as rights which cannot be bartered away.

Al-Haq, Al-Mezan and PCHR are concerned at the narrow focus on so-called Operation Protective Edge, without any broader context as to the prolonged nature of the military occupation, the closure and blockade of the Gaza Strip after free fair and impartial elections in 2006, and the ongoing collective punishment of the protected Palestinian population in the Gaza Strip. As such, we condemn the

<sup>5</sup> International Criminal Court, The Office of the Prosecutor, “Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report” para. 27, available at: [https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article\\_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf)

<sup>6</sup> Office of the Prosecutor, Report on Preliminary Examinations 2019, Palestine, para. 9 (advance copy).

distorted analysis of the Office of the Prosecutor on Israel's military offensive on the Gaza Strip in 2014, as misleading. As the Office of the Prosecutor may recall, the hostilities, which lasted for some 51 days, were characterized as the most egregious and heaviest bombardments on the Gaza Strip since the occupation in 1967, where Israel carried out over 6,000 airstrikes in Gaza, on densely civilian populated areas, under Israeli occupation in a closed area under military siege.<sup>7</sup>

Nonetheless, the report fails to mention the grotesquely disproportionate loss of life whereby 2,251 Palestinians, including 1,462 civilians, were killed, to the 67 Israeli soldiers and six Israeli civilians killed during the 2014 offensive on the Gaza Strip.<sup>8</sup> In addition the report fails to address the widespread targeting and destruction of vital infrastructure, alongside the destruction of over 18,000 Palestinian family homes in the Gaza Strip. Nor does the report reference the findings of the UN Commission of Inquiry, which concluded for example that:

“The commission's investigations also raise the issue of why the Israeli authorities failed to revise their policies in Gaza and the West Bank during the period under review by the commission. Indeed, the fact that the political and military leadership did not change its course of action, despite considerable information regarding the massive degree of death and destruction in Gaza, raises questions about potential violations of international humanitarian law by these officials, which may amount to war crimes. Current accountability mechanisms may not be adequate to address this issue.”<sup>9</sup>

As such the report perpetuates the Israeli military security narrative and fails once again to address the “root causes” of the conflict and occupation, which victims in the OPT have repeatedly asked the international community to address.<sup>10</sup>

### *The Great Return March*

Again, the Great Return March is extrapolated from any context, including the situation of prolonged belligerent occupation and absent any meaningful engagement with the recent conclusions from March 2019 UN Commission of Inquiry. Our organizations remind that Israel, as Occupying Power is governed by the law enforcement paradigm when policing peaceful protests such as the Great Return March. Israel's use of force resulting in some 210<sup>11</sup> recorded killings to date were not just the result of “excessive and deadly force”, as the Report of the Office of the Prosecutor suggests hinting at an IHL framing, but the result of

<sup>7</sup> UN HRC, Commission of Inquiry 2014

<sup>8</sup> See *Commission Report Summary*, para 20; OCHA, “Key figures on the 2014 hostilities

Data featured in the Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict, available at: <https://www.ochaopt.org/content/key-figures-2014-hostilities>

<sup>9</sup> A/HRC/29/CRP.4” Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1” (24 June 2015) para. 672.

<sup>10</sup> A/HRC/29/CRP.4” Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1” (24 June 2015) p. 180, para. 668,

<sup>11</sup> Figures on File with Al-Haq as of 5 December 2019.

‘unnecessary’ use of force resulting in the arbitrary deprivation of the right to life as provided for under Article 6 of the International Covenant on Civil and Political Rights, the violation of which, in the context of the ongoing occupation, amounts to the war crime of willful killing. The choice of language in the Report is grossly out of context with the situation as one of law enforcement, and which has already been confirmed in the persuasive and in-depth conclusions of the UN Commission of Inquiry (CoI).<sup>12</sup>

At this juncture it should be noted that following the assessment of the CoI that “Serious human rights violations were committed which may amount to crimes against humanity”, the CoI recommended that the Government of Israel:

“Investigate promptly, impartially and independently every protest related killing and injury in accordance with international standards, to determine whether war crimes or crimes against humanity have been committed with a view to holding those found to be responsible accountable”<sup>13</sup>

In addition, it must be noted that the request of the Commission that the United Nations High Commissioner for Human Rights manage the dossiers on alleged perpetrators, to be provided to the International Criminal Court, has not yet been executed.<sup>14</sup> The preservation and verification of the evidence is imperative for the prosecution of serious crimes and the failure to transfer these materials represents an unwarranted impediment to the access of victims to justice.

In this regard, in *Isayeva v Russia I*, the European Court of Human Rights (ECtHR), criticized the long delays before the opening of an investigation and in that case criticized the failure to collect evidence of safe passage for civilians, noting that it was difficult for the ECtHR to establish how an effective investigation had been carried out. Similarly, given the potential access of the Office of the Prosecutor to all the collected evidence of the Commission of Inquiry, the failure to obtain this evidence undermines the credibility of the Courts examination.<sup>15</sup>

### *Israel’s Recent Military Offensives on the Gaza Strip*

The Report details Israel’s attacks on the Gaza Strip between 4-6 of May 2019, but fails to document the high toll death toll over the two days, resulting in the killing

<sup>12</sup> See section 2, A/HRC/40/CRP.2, “Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory” (18 March 2019)

<sup>13</sup> A/HRC/40/CRP.2, “Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory” (18 March 2019) para. 800.

<sup>14</sup> A/HRC/40/CRP.2, “Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory” (18 March 2019) para. 801.

<sup>15</sup> App. No. 57950/00, *Isayeva v. Russia*, 218-22 available at: [www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/](http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/).

of 23 Palestinians, including 14 civilians (three children and three women).<sup>16</sup> While the Report details the ‘targeted’ strikes leading to the deaths of 30 Palestinian ‘individuals’, it must be pointed out that these statistics include nine members of the al-Sawarka family killed in an airstrike - the ‘individuals’ included five children of which two were infants.

Finally, the delay in proceeding to investigation, with a preliminary examination that is now nearly five years stalled in the Office of the Prosecutor, and some ten years since Palestinians first petitioned the Court, is of grave concern. The victims of Israel’s crimes have the right to access the Court within a reasonable time. Accordingly, we urge the Prosecutor to move to investigation without any further and undue delay. Prolonged delays may be misconstrued for unwarranted political interference with the work of the Office of the Prosecutor, risking the reputation of impartiality and independence of the Court. In urging the immediate opening of an investigation Al-Haq, Al-Mezan and PCHR recall the old adage, “not only must Justice be done; it must also be seen to be done,” there must be no further delays.<sup>17</sup>

<sup>16</sup> PCHR, “Weekly Report On Israeli Human Rights Violations in the Occupied Palestinian Territory” (02– 08 May 2019), available at: <https://pchgaza.org/en/?p=12474>

<sup>17</sup> *R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233)