

*the PA's January 2009 letter on the ICC website at [www.icc-cpi.int](http://www.icc-cpi.int).*

### ***Situation in Palestine***

1. On 22 January 2009, pursuant to article 12(3) of the Rome Statute, Ali Khashan acting as Minister of Justice of the Government of Palestine lodged a declaration accepting the exercise of jurisdiction by the International Criminal Court for "acts committed on the territory of Palestine since 1 July 2002."
2. In accordance with article 15 of the Rome Statute, the Office of the Prosecutor initiated a preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation. The Office ensured a fair process by giving all those concerned the opportunity to present their arguments. The Arab League's Independent Fact Finding Committee on Gaza presented its report during a visit to the Court. The Office provided Palestine with the opportunity to present its views extensively, in both oral and written form. The Office also considered various reports with opposing views. In July 2011, Palestine confirmed to the Office that it had submitted its principal arguments, subject to the submission of additional supporting documentation.
3. The first stage in any preliminary examination is to determine whether the preconditions to the exercise of jurisdiction under article 12 of the Rome Statute are met. Only when such criteria are established will the Office proceed to analyze information on alleged crimes as well as other conditions for the exercise of jurisdiction as set out in articles 13 and 53(1).
4. The jurisdiction of the Court is not based on the principle of universal jurisdiction: it requires that the United Nations Security Council (article 13(b)) or a "State" (article 12) provide jurisdiction. Article 12 establishes that a "State"

### **A2. INTERNATIONAL CRIMINAL COURT, RESPONSE TO THE GOVERNMENT OF PALESTINE'S REQUEST TO BECOME A PARTY TO THE ROME STATUTE, THE HAGUE, 3 APRIL 2012.**

*In January 2009, in the wake of Israel's Operation Cast Lead (OCL) against Gaza, the Palestinian Authority (PA) wrote to the International Criminal Court (ICC) formally acknowledging the ICC's jurisdiction over the occupied territories and asking to become a signatory to the ICC's founding treaty, the Rome Statute. The purpose was twofold: (1) to lay the procedural groundwork to be able to request an international war crimes tribunal to investigate Israeli actions during OCL; and (2) to build the case for international recognition of Palestinian statehood. The wording of the Rome Statute is such that only states may join and submit appeals to the ICC.*

*Since its submission three years ago, the Palestinian request had been the subject of heated debate within the ICC as to whether the PA technically could be allowed to become a signatory. One automatic consequence of the ICC's decision to reject the request was that the PA could not seek a war crimes tribunal. The only remaining avenue for such an eventuality, a request by the UN Security Council for a tribunal, was highly unlikely. The ICC response to the PA, reproduced below, can be found along with*

- can confer jurisdiction to the Court by becoming a Party to the Rome Statute (article 12(1)) or by making an ad hoc declaration accepting the Court's jurisdiction (article 12(3)). The issue that arises, therefore, is who defines what is a "State" for the purpose of article 12 of the Statute? In accordance with article 125, the Rome Statute is open to accession by "all States," and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a "State," it is the practice of the Secretary-General to follow or seek the General Assembly's directives on the matter. This is reflected in General Assembly resolutions which provide indications of whether an applicant is a "State." Thus, competence for determining the term "State" within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute.
5. In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term "State" under article 12(3) which would be at variance with that established for the purpose of article 12(1).
  6. The Office has been informed that Palestine has been recognized as a State in bilateral relations by more than 130 governments and by certain international organizations, including United Nations bodies. However, the current status granted to Palestine by the United Nations General Assembly is that of "observer," not as a "Non-member State." The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. While this process has no direct link with the declaration lodged by Palestine, it informs the current legal status of Palestine for the interpretation and application of article 12.
  7. The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.