



AL - HAQ

PALESTINE

AND TERRITORIAL JURISDICTION
at the International Criminal Court (ICC)





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AL-HAQ
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Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity¹

-Preamble, Rome Statute of the International Criminal Court

The International Criminal Court (ICC) was established as means for victims to pursue justice and accountability for the large-scale commission of international crimes. In doing so, the Court seeks to end the culture of impunity which has protected those most responsible for atrocity crimes, such as genocide, crimes against humanity, war crimes and the crime of aggression.

The commission of such international crimes has been commonplace in Palestine since 1948, and in particular since 1967. Forced displacement, the excessive and deadly use of force, the construction and maintenance of an Annexation Wall and illegal Israeli settlements, the closure of Gaza, Operation Protective Edge of 2014, the attacks and killing of unarmed civilian protestors as part of the Great Return March, and more, have been either ignored or approved by the Israeli military and justice system.²

At present, Palestinians live under occupation, in exile, and under an institutionalised regime of racial domination and oppression.³ House demolitions,

raids by the Israeli military, attacks by Israeli settlers, and impending annexation⁴ are everyday facets of Palestinian life.

The process currently taking place at the ICC is therefore, for millions of Palestinians, the final chance for justice and accountability. This Q&A seeks to provide a comprehensive and accessible introduction to outside observers to the Situation in the State of Palestine before the ICC, and to allow for future developments in the pursuit of justice for Palestinians to be understood.



WHAT IS THE INTERNATIONAL CRIMINAL COURT?

The goal of the Court is “to put an end to impunity for the perpetrators of the most serious crimes of concern to the International Community as a whole and thus contribute to the prevention of such crimes”⁵

-Preamble, Rome Statute

The ICC is a permanent international court established to investigate and prosecute persons suspected of the most serious international crimes, namely war crimes, crimes against humanity, and the crimes of genocide and aggression.⁶ Based in The Hague, the Netherlands, the Court was established by the *Rome Statute of the International Criminal Court* and is made up of four main organs.⁷

The first is the Presidency, made up of three of the Court’s Judges, and is broadly responsible for overseeing the administration of the ICC, excluding the Office of the Prosecutor (OTP), and the external relations of the Court as an organisation.⁸

Second, the Chambers, or “Divisions” of judges, are made up of the Pre-Trial Chamber (PTC), Trial Chamber, and Appeals Chamber, and collectively serve as the ICC’s judicial body.⁹ The PTC is responsible for judicial actions which take place before the opening of a trial, including authorising criminal investigations where necessary, deciding on various procedural issues which may arise, and the issuing of arrest warrants.¹⁰ It is the PTC that, at the time of writing, has responsibility for the situation in the State of Palestine. The Trial Chamber, meanwhile, is responsible for hearing and presiding over criminal trials related to international crimes, whereas the Appeals Chamber hears all issues which have been appealed from the PTC and Trial Chamber.¹¹

Third, the OTP is the organ responsible for investigating and prosecuting those suspected of war crimes, crimes against humanity, and the crimes of genocide and aggression, and is headed by the current Prosecutor, Ms Fatou Bensouda. The OTP, therefore, conducts all of the ICC’s preliminary examinations and criminal investigations, and operates similar to a public prosecutor in domestic legal systems.¹²

Fourth, the Registry provides support to all other organs of the ICC and is broadly responsible for the day-to-day work in the Court’s management and external affairs as an organisation.¹³

Additionally, the Assembly of States Parties (ASP) serves the Court’s management oversight and legislative body, made up of States which have ratified and acceded to the *Rome Statute*. While not a primary organ, the ASP is responsible for issues such as the Court’s budget, the election of Judges, the Prosecutor, and drafting and adopting the Rules of Procedure and Evidence, as well as other secondary documents for the Court.¹⁴

Finally, it is worth mentioning the issue of legal representation for defendants and victims. The ICC does not have an organ which provides defence, which is instead fully independent and *ad hoc*, and may be chosen by each individual defendant.¹⁵ For victims, the Registry has set up a number of bodies to provide assistance, including the Victims Participation and Reparations Section, the Victims and Witnesses Section, the Office of Public Counsel for Victims, and the Trust Fund for Victims.¹⁶ Victims may be represented by a lawyer of their own choosing. For those unable to afford legal representation, the Court may make legal aid available, or provide for representation by the Office of Public Counsel for Victims, assistance free of charge.¹⁷ Applications to take part as a victim are submitted via a standard application form.¹⁸



WHAT IS THE “SITUATION IN THE STATE OF PALESTINE”?

The situation in Palestine is rapidly deteriorating and war crimes and crimes against humanity are allegedly frequently committed to entrench Israeli control over Palestinian territory and the Palestinian people.¹⁹

-Al-Haq (2018)

The “Situation in the State of Palestine” also “Palestine Situation” or “Situation in Palestine” is the broad term given to the ICC’s activities with regards international crimes, notably war crimes and crimes against humanity, being perpetrated in Palestine – “situations” are part of the terminology used by the Court to categorise preliminary examinations, criminal investigations, trials, and other functions of the ICC geographically. As such, other notable situations include those of Afghanistan, Sudan, Bangladesh/Myanmar, and more.

Palestine’s history at the ICC is complicated, and stretches back to 22 January 2009, when the State of Palestine submitted its first declaration pursuant to Article 12(3) of the *Rome Statute*, which allows States to accept the jurisdiction of the ICC. Article 12 generally sets out the requirements which need to be met for a situation to fall under the jurisdiction of the Court, whereas Article 12(3) specifically governs States which are not Party to the *Rome Statute* to accept the Court’s jurisdiction.²⁰

Immediately following this, also in 2009, the former Prosecutor, Luis Moreno Ocampo, opened a preliminary examination into Palestine, but on 3 April 2012 announced that he was declining to proceed to investigation, due to his uncertainty as to whether the State of Palestine constituted a State under international law.²¹ However, the former Prosecutor outlined that “[t]he Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations ... resolve the legal issue” of statehood.²²

Accordingly, on 29 November 2012, the UN General Assembly adopted Resolution 67/19, recognising Palestine’s “non-member observer State status in the United

Nations”,²³ and further encouraging the UN Security Council to allow Palestine to become a full Member State.²⁴

The State of Palestine lodged its second Article 12(3) declaration on 1 January 2015, accepting the ICC’s jurisdiction for international crimes committed within its territory from 13 June 2014.²⁵ The very next day, 2 January 2015, Palestine deposited its accession instrument with the UN Secretary-General, and as such became a State Party to the *Rome Statute*.²⁶ As a consequence of this, the Prosecutor opened the second preliminary examination into the situation in the State of Palestine on 16 January 2015.²⁷

Following its accession, the State of Palestine has taken part in the Assembly of States Parties to the International Criminal Court (ASP). Palestine served as the 30th State to ratify Resolution RC/6, which activated the Court’s jurisdiction over the crime of aggression, has contributed towards the Court’s budget, and has voted on matters before the Assembly. Further, in 2017, Palestine was elected a member of the ASP Bureau, an executive committee which assists the ASP in complying with its various mandates.²⁸

From 2015 to 2019, Prosecutor Fatou Bensouda conducted a preliminary examination into war crimes and crimes against humanity in the Occupied Palestinian Territory, detailed in her Office’s annual reports on preliminary examinations over multiple years.²⁹ Having concluded that war crimes were taking place in Palestine, that these crimes are admissible in line with the rules of the ICC, and that an investigation would serve the interests of justice, the Prosecutor announced that she was closing her preliminary examination on 20 December 2019.³⁰ However, before opening an investigation, the Prosecutor made a submission to the PTC, under Article 19(3) of the *Rome Statute*, asking it to confirm that the territory the Court has jurisdiction over in Palestine encompasses the West Bank, including East Jerusalem, and Gaza.

It was not strictly necessary for the Prosecutor to do this as it is within her power to open a formal investigation without seeking the approval of the Judges. The Prosecutor herself, in her initial *Request*, noted that she was satisfied that “the Court does indeed have the necessary jurisdiction in this situation”³¹ – rather, what the Prosecutor has sought is *confirmation* of this fact. While supportive of her decision to move the situation forward, Palestinian human rights organisations have noted that it would have been preferable to simply open an investigation,

and deal with issues of jurisdiction as they arise.³²

*The Prosecution respectfully requests Pre-Trial Chamber I to rule on the scope of the Court's territorial jurisdiction in the situation of Palestine and to confirm that the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.*³³

-Prosecutor of the International Criminal Court (2020)

As part of this stage in the situation, the PTC also requested the submission of *amicus curiae* submissions, in line with Rule 103 of the *Rules of Procedure and Evidence*.³⁴ As of the deadline for such submissions, 16 March 2020, the PTC has accepted and received a total of 43 *amici* briefs, 10 victims representations briefs and one submission from the State of Palestine.³⁵

The PTC is expected to decide on this issue before the end of May 2020, though it is possible that this may be delayed in light of the COVID-19 pandemic, as the Prosecutor has already submitted, and was granted, a request for an extension on her follow up response to the submitted *amici* briefs.³⁶

Ideally, following the PTC's decision the Prosecutor will begin an investigation into international crimes committed in Palestine since June 2014, the earliest point in time covered by the Court's jurisdiction. A considerable amount of research has been done by international bodies into such crimes already, including a comprehensive 2019 report by the UN Commission of Inquiry which investigated the use of force against Palestinian protestors in Gaza as part of the Great Return March.³⁷ Similarly, a 2015 UN Commission of Inquiry conducted research into breaches of international law, amounting to international crimes, committed as part of Israel's Operation Protective Edge in Gaza.³⁸ All the material and evidence from these inquiries may be submitted to the Court as part of an investigation.



WHAT IS A PRELIMINARY EXAMINATION, AND HOW IS IT DIFFERENT TO AN INVESTIGATION?

*On behalf of the Palestinian victims that we represent, we urge in the interests of justice, that an impartial and transparent investigation is opened without delay, where the senior Israeli politicians and military commanders who through their policies and plans have perpetrated grave crimes against the Palestinian people, are held to account.*³⁹

-Al-Haq, Al-Mezan, and PCHR (2019)

Preliminary Examinations

There are a number of ways a preliminary examination can begin. Situations may be referred by the UN Security Council, by a State Party to the *Rome Statute*, or by a State on the basis of an Article 12(3) declaration, such as in the case of Palestine.⁴⁰ Additionally, the Prosecutor may begin an examination acting *proprio motu*, or on her own initiative, into crimes within the ICC's jurisdiction,⁴¹ in which event she needs express authorisation from the PTC before proceeding to investigation.⁴² This is not necessary in any other scenario.

It is important to be aware that a preliminary examination is **not** the same as a criminal investigation. Rather, a preliminary examination is conducted by the OTP to see if a number of criteria, noted below, are met – based on this, the Prosecutor may then proceed towards opening an investigation, or close the situation.

In carrying out preliminary examinations, the OTP is broadly guided by the principles of independence, impartiality, and objectivity,⁴³ in attempting to pursue accountability, an end to impunity, and to contribute towards the prevention of international crimes.⁴⁴

The Prosecutor has outlined her procedure for preliminary examinations as being carried out in four distinct "phases". "Phase 1" involves initial assessments as to whether alleged crimes are "manifestly outside the jurisdiction of the

Court” or not, and whether they are the subject of pre-existing examinations or investigations.⁴⁵

“Phase 2” concerns questions of jurisdiction, including temporal, material, and territorial or personal jurisdiction.⁴⁶ Each of these forms of jurisdiction must be satisfied for the examination to progress, unless the situation has been referred by the UN Security Council which has the power to “set aside the territorial and personal parameters” of the Court.⁴⁷ The Prosecutor has been satisfied that each criteria has been met in the situation in the State of Palestine, notwithstanding her request for confirmation as to the scope of territorial jurisdiction, which concerns whether the crimes in question took place on the territory of a State Party to the *Rome Statute*, or on board a vessel or aircraft belonging to a State Party.

“Phase 3” involves assessments as to complementarity and gravity. Given that the role of the Court is to only intervene where States have failed to meet their international obligations, the principle of complementarity requires the State concerned to be “unwilling or unable genuinely to carry out the investigation or prosecution” into the relevant crimes.⁴⁸ Such scenarios may arise where the State is shielding persons suspected of international crimes, where there is unjust delay into beginning investigations, or where there is evidence of the commission of investigations or proceedings which are not independent or impartial.⁴⁹ Additional scenarios have arisen where governments have been unable to hold to account armed opposition groups.

Gravity, meanwhile, requires that the “scale, nature, manner of commission, and impact” of the crimes warrant the involvement of the ICC.⁵⁰ This is assessed in light of the number of victims, the extent of damage and suffering caused, in particular, bodily and psychological harm, the means employed in the execution of such crimes, among other factors.⁵¹

Finally, “Phase 4” concerns the “interests of justice”. While this term has not yet been defined, the Prosecutor does not need to prove that there is an interest of justice in proceeding but must rather determine that doing so would not frustrate such interests.⁵² It is the official policy of the OTP that the “interests of justice” will only be invoked in exceptional circumstances, and that the presumption is in favour of investigation and prosecution.⁵³

Criminal Investigations

Once the above Phases are complete, the Prosecutor can usually proceed to investigation, save for instances where she has acted *proprio motu* and needs authorisation from the PTC. Whereas preliminary examinations largely deal with procedural issues, during the investigation stage the Prosecutor will begin investigating substantive crimes and identifying specific perpetrators. This includes the collection and examination of evidence,⁵⁴ the interviewing of suspects, victims, and witnesses,⁵⁵ and ultimately the charging⁵⁶ and arrest⁵⁷ of accused persons. In the situation in the State of Palestine, the Prosecutor has concluded it is appropriate to proceed to the investigation stage.⁵⁸



WHAT ARE *AMICUS CURIAE* SUBMISSIONS?

The amicus curiae mechanism is important for building and maintaining the legitimacy of any international criminal tribunal, but especially for a permanent tribunal such as the ICC.⁵⁹

-Sarah Williams, Hannah Woolaver, and Emma Palmer (2020)

Amicus curiae, or “friend of the Court”, submissions are essentially expert opinions which a Court, including the ICC, may request on complicated points of law. While the system, particularly at the ICC, has come under critical scrutiny⁶⁰ it is generally considered to be an important contributor towards the Court’s legitimacy.

When the Court considers that it would be helpful to receive *amicus curiae* submissions, it may solicit requests to file from observers and experts who are interested in doing so. Following this, the Chamber has full discretion over which requests, and how many, to accept.⁶¹ Previous to the situation in the State of Palestine, the Afghanistan situation held the record for the highest number of accepted *amici* at 15, including from one State, Afghanistan.⁶²

In the Situation in the State of Palestine, the Prosecutor herself requested the PTC to allow for *amici* due to the number of “interested and relevant parties”. She told the Chamber that “the volume of potentially relevant practice and scholarship underlines the desirability of having an open, participatory process to settle this question”.⁶³

As noted above, in the Palestine situation the PTC has accepted a total of 43 *amici*, including seven from States: Australia,⁶⁴ Austria,⁶⁵ Brazil,⁶⁶ the Czech Republic,⁶⁷ Germany,⁶⁸ Hungary,⁶⁹ and Uganda.⁷⁰ Regrettably, all other States which submitted individual *amici* did so in opposition to an investigation. However two separate *amici* were submitted from international organisations including the League of Arab States,⁷¹ representing 22 States, and the Organisation of Islamic Cooperation,⁷² representing 57 States. The State of Palestine, as the State Party concerned, also submitted its observations.⁷³

Further submissions, with a roughly equal number on each side, were made by prominent academics, including from Palestine,⁷⁴ bar associations,⁷⁵ civil society organisations,⁷⁶ and, notably, the Office of Public Counsel for Victims.⁷⁷

Following an extension, the Prosecutor is to respond to these submissions by 30 April 2020, ahead of the expected decision by the PTC.



CAN VICTIMS PARTICIPATE AT THIS STAGE?

Stresses the central importance that the Rome Statute accords to the rights and needs of victims, in particular their right to participate in judicial proceedings and to claim reparations, and emphasizes the importance of informing and involving victims and affected communities in order to give effect to the unique mandate of the Court towards victims⁷⁸

-Assembly of States Parties to the Rome Statute of the International Criminal Court (2017)

Yes – A total of 10 submissions, similar to those of *amicus curiae* briefs, were made by lawyers on behalf of victims, with all but one submission representing Palestinians. A considerable number of these submissions have been made on behalf of hundreds of victims. These submissions provide the views and concerns of victims, in line with the question of territorial jurisdiction posed by the PTC.⁷⁹

The ICC recognises two types of victims who may participate at any stage of Court proceedings: individuals who have suffered harm as a result of international crimes, and organisations or institutions when their property dedicated to specific purposes, such as religion, education, art, science, humanitarianism, and medical treatment, is similarly harmed.⁸⁰

Victims submissions in the situation in the State of Palestine have included submissions on behalf of individual Palestinian victims from the West Bank, including East Jerusalem, and the Gaza Strip from eminent international and Palestinian lawyers, including Raji Sourani, Nada Kiswanson van Hookydonk, Fergal Gaynor, Chantal Meloni, Katherine Gallagher, Liesbeth Zegveld, and Steven Powles submitting on behalf of Addameer, the Palestinian Prisoner Support and Human Rights Association. These victims will continue to be represented at every subsequent stage of the proceedings.



HOW DOES ARTICLE 19(3) WORK?

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

-Article 19(3), Rome Statute

Article 19(3) allows the Prosecutor to request confirmation on questions of jurisdiction, however there is significant debate as to when she may do so. While the question of when this may be done is not addressed in the text of Article 19(3), the title of Article 19 appears to relate itself specifically to “[c]hallenges to the jurisdiction of the Court or the admissibility of a case” (emphasis added).⁸¹ It is therefore not clear that the Prosecutor is capable of evoking Article 19(3) at this stage, before a “case” has begun to be built.

... we consider Article 19(3) of the Statute inapplicable at this stage as it pertains narrowly to ‘cases’ before the ICC rather than ‘situations’.⁸²

-PCHR, Al-Haq, Al Mezan, and Al-Dameer (2020)

The Prosecutor has previously sought a ruling on jurisdiction under Article 19(3) in the situation in Bangladesh/Myanmar, regarding the forced deportation of the Rohingya people from Myanmar into Bangladesh.⁸³ However, in its decision the PTC did not believe it was necessary to “enter a definite ruling on whether article 19(3) of the Statute is applicable at this stage of the proceedings”, and instead proceeded under another provision of the *Rome Statute*.⁸⁴ Meanwhile, in his partially dissenting opinion, Judge Marc Perrin de Brichambaut disagreed with the Prosecutor’s approach:

I conclude that article 19(3) of the Statute can be applied only when the proceedings have reached the stage of a case identified by the Prosecutor.⁸⁵

-Judge Marc Perrin de Brichambaut (2018)

As such, it remains unclear what approach the PTC will take in the situation in the State of Palestine: the Court may provide a ruling, or it may decline to do so, and decide that Article 19(3) is inapplicable at this stage.



HOW DOES ARTICLE 12(2) WORK?

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

-Article 12(2), *Rome Statute*

In simple terms, Article 12(2) is the provision of the *Rome Statute* which shapes the ICC's jurisdiction. While this jurisdiction can come in multiple forms, the form relevant for Palestine is territorial jurisdiction, which covers all individuals, regardless of nationality, in the territory of the State. This is the specific provision of the *Rome Statute* which the Prosecutor has requested clarification on – and is currently the focus of the situation.

Opposition to a criminal investigation into Israeli crimes committed in the Occupied Palestinian Territory tends to focus on the question of Palestinian statehood, and the sovereign territorial claim by the State of Palestine. Below is a summary of the main arguments raised in *amici curiae* submissions on such matters.

Statehood

... an analysis as to statehood appears to be necessary, given the prerequisite found in Article 12, as well as the corpus of argumentation outlined in amici applications in preparation of the current proceedings.⁸⁶

-Professor Richard Falk (2020)

On this first issue of statehood, it is important to point out the use of the term “State” in the text of the Article. Due to the inclusion of this word, several *amici* submissions,⁸⁷ as well as a legal position paper issued by the Attorney General of Israel but not submitted to the Court,⁸⁸ argue that Palestine does not constitute a State under international law, and as such, that Article 12(2) is inapplicable.

A considerable number of Palestinian and international human rights organisations, academics, and other observers put forward compelling arguments in *amici* submissions refuting such a position. Al-Haq, along with its partner organisations, the Palestinian Center for Human Rights (PCHR), Al Mezan, and Al-Dameer, noted that Palestinian sovereignty over the West Bank, including East Jerusalem, and the Gaza Strip has been consistent since the British Mandate in the early 20th Century, having been in “abeyance” ever since.⁸⁹ Professor John Quigley, of Ohio State University, provides extensive historical analysis supporting this fact.⁹⁰

Further submissions, such as those by Professors William Schabas⁹¹ and Richard Falk⁹², note that the PTC does not have the legal authority to make decisions on the statehood of a State Party to the *Rome Statute*. Instead, the judges must consider whether Palestine’s status as a State Party is legitimate and must do so by looking at Palestine’s accession to the *Rome Statute*.

As noted above, in Part II, Palestine’s accession came when it deposited its documents with the Secretary-General of the UN, who then accepted them. The Secretary-General is not empowered to make legal decisions as to statehood by deciding what accessions to accept or not accept.⁹³ Rather, the decision as to whether to accept or not is based on the “practice of the General Assembly”.⁹⁴ With regard the State of Palestine the General Assembly’s recognition of Palestine as a non-member State observer to the UN satisfied the Secretary-General that Palestine’s accession to the *Rome Statute*, which is open to “all States”,⁹⁵ was, and remains, valid.

Territorial Jurisdiction

*... the International Court of Justice was able to distinguish between the sovereign territory of Israel and the occupied territory of Palestine. Cannot the Pre-Trial Chamber do the same thing, in order to respond to the Prosecutor’s request?*⁹⁶

-Professor William Schabas (2020)

The second objection to Article 12(2)’s applicability is that the West Bank, including East Jerusalem, and the Gaza Strip are supposedly not to be understood as the territory of the State of Palestine. In *amici* submissions, challenges were made to the continuity of territorial claims made by the State of Palestine,⁹⁷ suggesting that Palestine’s jurisdictional claim cannot extend to territory annexed by the State of Israel in order to construct illegal settlements in the West Bank,⁹⁸ and that the Oslo Accords serve as a barrier to ICC jurisdiction.⁹⁹

The legal rules which apply to Palestine’s territorial and jurisdictional claim, and therefore the ICC’s jurisdiction, must be understood in connection to the right to self-determination enjoyed by the Palestinian people, as well as the obligation on the Court to interpret relevant legal principles in accordance with human rights norms,¹⁰⁰ and the object and purpose of the *Rome Statute*¹⁰¹ to end impunity for international crimes.

*... the object and purpose of the Rome Statute and the jurisdiction regime of the ICC is to respect lawful and de jure ... sovereignty ... [not] aggression, occupation, or colonization.*¹⁰²

-Professors Asem Khalil and Halla Shoaibi (2020)

The International Court of Justice has recognised that the Palestinian right to self-determination extends to the entirety of the Occupied Palestinian Territory, i.e. the West Bank, including East Jerusalem, and the Gaza Strip, and constitutes a fundamental norm of international law, which creates binding obligations on all States to bring the unlawful situation to an end.¹⁰³

The UN Security Council has declared illegal Israeli settlements in the West Bank, including East Jerusalem, as being fundamentally incompatible with international law,¹⁰⁴ and they may further be constitutive of the war crime and crime against humanity of the transfer of civilian population into occupied territory.¹⁰⁵ Professors Asem Khalil and Halla Shoaibi of Bir Zeit University show, in their *amicus* submission, that the Oslo Accords which divided the West Bank into Areas A, B, and C, cannot prevent the ICC from exercising jurisdiction – this is because, while Palestine does not have the physical power to enforce its laws in areas under the *de facto* control of Israel, it does have the *de jure* right to create and to enforce laws in those areas, and this includes the right to confer jurisdiction to the ICC.¹⁰⁶

The Gaza Strip, meanwhile, is recognised as territory which remains under the occupation of Israel, and a part of the larger Palestinian territorial unit, and as such is also covered by the Palestinian right to self-determination.¹⁰⁷

This right, as well as the broader mission of the Court to end impunity, as noted by PCHR, Al-Haq, Al Mezan and Al-Dameer, clearly links the territory of Palestine to the territory over which the Palestinian people enjoy a right to self-determination i.e. the West Bank, including East Jerusalem, and the Gaza Strip.¹⁰⁸ It follows from this that the territory over which the ICC may exercise jurisdiction over is the same.



WHAT HAPPENS IF THE PRE-TRIAL CHAMBER CONCLUDES IT DOES/DOES NOT HAVE JURISDICTION?

... the Prosecution, which has conducted a preliminary examination since 16 January 2015, stands prepared to open an investigation once the Court's jurisdictional scope is confirmed.¹⁰⁹

-Prosecutor of the International Criminal Court (2020)

There are four possible scenarios for the PTC's decision: (i) the Chamber rules that it has full jurisdiction; (ii) the Chamber rules that it has partial jurisdiction, over fragments of the Occupied Palestinian Territory; (iii) the Chamber rules that the Court does not have jurisdiction; or (iv) the Chamber does not provide a ruling.

There is also the fundamental question of whether a decision by the Chamber will be binding on the Prosecutor. In his dissenting opinion in the context of Myanmar/Bangladesh, Judge Marc Perrin de Brichambaut argued that a decision given under Article 19(3) would be "tantamount to an advisory opinion, which is of no binding value to the parties".¹¹⁰ It is worth noting that the Prosecutor has contested this, arguing in her submission that such a decision "would not be an abstract 'advisory opinion.' Rather, it would be a decision on jurisdiction that would concretely advance the proceedings".¹¹¹ As such, it remains to be seen whether the Prosecutor must strictly adhere to a decision from the PTC, or whether she can interpret an unsatisfactory decision as merely "advisory".

Nonetheless, what follows assumes that the PTC's decision **is binding**.

Should the PTC rule that the ICC has full jurisdiction, in line with scenario (i), the Prosecutor remains free to immediately open her investigation into international crimes committed within the territory of Palestine.

It is also possible that the PTC may rule that the Court has only partial jurisdiction. In scenario (ii), the Prosecutor might then be free to open an investigation only into those fragments of the Occupied Palestinian Territory which the Chamber

has designated as being within its jurisdiction. For example, the PTC could rule that the West Bank and Gaza are within its jurisdiction, but not East Jerusalem, or that the West Bank, including East Jerusalem is, but not Gaza. While possible, it is difficult to see how this would be reconciled with the *Rome Statute*'s object and purpose, or with the broader body of applicable international law.

If the PTC rules in the negative, as in scenario (iii), the OTP may not be able to proceed to investigation.

Finally, in scenario (iv), where the PTC refuses to provide a ruling outright, the Prosecutor will remain free to proceed to investigation over the entirety of the Occupied Palestinian Territory.

It is important to note that each possible outcome may be appealed to the Appeals Chamber, and that a positive ruling at this stage may not prevent the issue from being raised again later, at the investigative or trial stages. In addition, it should be expected that all attempts by the Prosecution to conduct a full and free investigation will be challenged by the State of Israel outside of the Court's framework, most likely by refusing access and visas to OTP staff, and attempts to intimidate in order to deter such staff from continuing with the process.

In the past, Prime Minister of Israel, Benjamin Netanyahu, has threatened sanctions on the Court,¹¹² and sought to delegitimise it and its work as an anti-Semitic institution.¹¹³ The Prosecutor, Fatou Bensouda, referred to such tactics as regrettable attempts at a character assassination of her, her Office, and the Court at large.¹¹⁴ This follows similar action taken by the United States. John Bolton, former National Security Advisor to the Trump Administration, has famously threatened the Court,¹¹⁵ whereas Mike Pompeo, the US Secretary of State, has denounced the Court as a "renegade, so-called court" and an "unaccountable political institution masquerading as a legal body",¹¹⁶ and has issued personal threats against members of its staff.¹¹⁷



WHERE CAN I STAY UPDATED?

Al-Haq will continue to follow up on all developments in the situation in the State of Palestine – material and information will be made available on Al-Haq's website (alhaq.org),¹¹⁸ Twitter (@alhaq_org),¹¹⁹ and Facebook page,¹²⁰ as well as through our newsletter.¹²¹

PCHR can be found at its website (pchrgaza.org),¹²² Twitter (@pchrgaza),¹²³ and Facebook page.¹²⁴

Al Mezan is active at its website (mezan.org),¹²⁵ Twitter (@AlMezanCenter),¹²⁶ and Facebook page.¹²⁷

Finally, Al-Dameer can be reached at their website (aldameer.org),¹²⁸ and Facebook page (in Arabic).¹²⁹

Further information may be found on the Court's website,¹³⁰ and its specific page for the Palestine situation.¹³¹

(Endnotes)

1 Preamble, *Rome Statute of the International Criminal Court (Rome Statute)* (adopted 17 July 1998).

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AL - HAQ

About AL-HAQ

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah in the Occupied Palestinian Territory (OPT). Established in 1979 to protect and promote human rights and the rule of law in the OPT, the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. Al-Haq conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. Al-Haq has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists- Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), ESCR-Net – The International Network for Economic, Social and Cultural Rights, the Palestinian Human Rights Organizations Council (PHROC), and the Palestinian NGO Network (PNGO). In 2018, Al-Haq was a co-recipient of the French Republic Human Rights Award, whereas in 2019, Al-Haq was the recipient of the Human Rights and Business Award.

