



النهضة العربية للديمقراطية والتنمية
Arab Renaissance for Democracy & Development

The Question
of Palestine



In the wake of the ICC's Pre-Trial Chamber's decision concerning the Court's territorial jurisdiction over the Palestinian territories occupied by Israel in 1967: Challenges and Opportunities

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Editor: Dr. Anis Kassim



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Preface

In 2021, the Arab Renaissance for Democracy and Development (ARDD)'s Question of Palestine Program, as parts of its Al Nahada Thought Center's 'Palestine 70 Years on: Priorities for Action', launched a number of webinars intended to shed light on current issues related to the Question of Palestine. The first of this series was a webinar, held on March 11, on the International Criminal Court's decision concerning its jurisdiction over relevant crimes committed in the occupied Palestinian territory since 2014. An expert opinion on the implication of the Court's decision was prepared by the Palestinian Judge Dr. Ahmed Al-Ashkar ahead of the webinar.

The present paper includes Dr. Al-Ashkar's analysis as updated after the webinar. It provides an overview of the general the context surrounding the Court's decision, expectations as well as some concerns including the potential limitation of the investigation process to Palestinians, notwithstanding the Court's jurisdiction extending to both Palestinians and Israelis, equally. The paper attempts to unpack factors related to the timing of the ruling, the Court's spatial jurisdiction over the case of Palestine and the Court's mandate over individuals suspected of committing crimes within the Court's jurisdiction.

The paper includes a number of important recommendations, primarily to the Palestinian leadership, to prepare effectively to bring to trial the occupation masterminds and anticipate the not unlikely latter's defense for inadmissibility on a number of grounds. Serious and robust preparation for the ICC trial, the author infers, should include a number of measures, such as: (*) to form a team of international lawyers and analysts to assist the Palestinian Authority in the process;

- (*) to unify the Palestinian judiciary in the West Bank and Gaza and carry out effective investigations over Palestinian alleged perpetrators;
- (*) to support human rights organizations, especially in the West Bank and Gaza, to secure technical documentation of Israeli crimes;
- (*) to form an official team of the public the prosecution, including the Ministry of Foreign Affairs and the Ministry of Justice, and allow individuals to submit complaints against crimes committed by the occupying power;
- (*) to prepare for a list of suspected Israeli military commanders and officials for prosecution.
- (*) to build investigative files for victims to submit complaints.
- (*) to create a national archive of victims of crimes committed during Israeli military attacks, in connection with settlement expansion and forceful displacement.
- (*) to amplify and benefit from relevant international and local efforts supporting Palestine's path to justice and accountability and mobilize relevant expertise, including among Palestinians in the diaspora.

ARDD strongly believes such conclusions and recommendations are worth pursuing. ARDD is grateful to Dr. Ahmed Al-Ashkar, author of this paper, for his insightful and informative contribution; to Dr. Anis Kassim for his involvement both in the webinar and for his useful review of the paper, prior to publication.

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Introduction

This paper aims to shed light on the challenges and opportunities associated with decision of the Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court’s (the “Court”) on the Court’s territorial jurisdiction over the Palestinian territory occupied by Israel in 1967.

On 5 February 2021, the Court had decided by majority that its territorial jurisdiction over the situation in Palestine, a State Party to the Rome Statute, extends to the territory occupied by Israel since 1967, namely the Gaza Strip and the West Bank, including East Jerusalem.

The paper provides an overview of the general context surrounding this decision, expectations as well as concerns regarding the investigation. The paper consists of two main parts. The first part addresses the general context of the Palestinian situation and its legal framework before the Court, including, the historical framework of interactions between the State of Palestine and the Court and a breakdown of the details surrounding the Court’s ruling of the Chamber. Furthermore, the paper attempts to unpack the determining factors related to the timing of the ruling and the Court’s spatial jurisdiction over the case of Palestine, and the Court’s mandate over the criminal liability of individuals suspected of committing crimes within the Court’s jurisdiction.

The second part discusses what Palestinians need to do to bring to trial the occupying power, especially with regards to the latter’s possible defence for inadmissibility under Article 17 of the Court’s Statute and with reference to ‘the Principle of Complementarity’ under Article 19. The paper then offers a number of concrete recommendations.

I. The general context and legal framework of the Situation of Palestine before the International Criminal Court

This section presents the general and legal contexts of the ‘situation in Palestine’ before the Court, and the outcomes of the Chamber I’s decision issued by the Court on 5 February 2021, at the prosecutor’s request, regarding the Court’s territorial jurisdiction over Palestine.¹

¹ ICC-CPI-202100205-PR1566, 5 February 2021.

1. The history of the Court's relationship with Palestine

Procedures taken throughout the relationship of the Court with the State of Palestine	
Date	Procedure(s)
22/1/2009	State of Palestine submits its first declaration pursuant to Article 12(3) of the Rome Statute
3/4/2012	After former prosecutor, Luis Moreno Ocampo, opened a preliminary examination into Palestine, he announces that he was declining to proceed with to investigation, due to his uncertainty as to whether the state of Palestine constituted a state under international law
1/1/2015	The state of Palestine lodges its second Article 12(3) declaration, accepting the Court's jurisdiction for international crimes committed within its territory from 13 June 2014
2/1/2015	Palestine deposits its accession instrument with the UN secretary-general, and as such becomes a State Party to the Rome Statute
16/1/2015	Prosecutor Fatou Bensouda announces the opening of a second preliminary examination into the Situation in Palestine after it became a State Party to the Rome Statute
20/12/2019	Prosecutor Fatou Bensouda announces that the preliminary examination into the Situation in Palestine has concluded with the determination that all the statutory criteria under the Rome Statute for the opening of an investigation have been met
22/12/2019	Pursuant to Article 19(3) of the Rome Statute, the prosecutor requests from the Chamber a ruling on the scope of the territorial jurisdiction of the International Criminal Court in Palestine
22/1/2020	The Court's Chamber issues an order setting the procedure and the schedule for the submission of observations, at the prosecutor's request, under Article 19(3) of the Rome Statute related to the scope of the Court's territorial jurisdiction in the Situation in the State of Palestine
5/2/2021	The Chamber of the Court decides, by majority, that the Court's territorial jurisdiction in the Situation in Palestine, a State Party to the Court's Rome Statute, extends to the occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the Court on 17 July 1998; it entered into force on 1 July 2001, pursuant to its article 126. On 22 December 2009,² the State of Palestine submitted its first declaration pursuant to Article 12(3) of the Rome Statute, which allows states to accept the Court's jurisdiction. The then prosecutor, Luis Moreno Ocampo,

² UN document PCNICC/1999/INF/3.

opened a preliminary investigation on the situation in Palestine, but on 3 April 2012 announced that he would not proceed with the investigation, due to his uncertainty as to whether Palestine constituted a state under international law. Still, the former prosecutor said 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.³

On 29 November 2012, the UN General Assembly adopted Resolution 67/19, recognizing Palestine’s status as ‘non-member observer state’ of the United Nations’, while encouraging the UN Security Council to allow Palestine to become a full Member State. The State of Palestine lodged its second Article 12(3) declaration on 1 January 2015, accepting the Court’s jurisdiction over international crimes committed within its territory, from 13 June 2014. On 2 January 2015, the State of Palestine deposited its instrument of accession to the UN Secretary General, and thus became a party to the Rome Statute. Following its accession, the State of Palestine took part in the Assembly of State Parties (the “Assembly”) becoming the 30th state to ratify Resolution RC/6, which activated the Court’s jurisdiction over the crime of aggression. Additionally, the State of Palestine contributed to the Court’s budget and has voted on several matters before the Assembly. In 2017, Palestine was elected as member of the executive committee, assisting the Assembly in fulfilling its responsibilities within its various mandates.⁴

On 16 January 2015, upon receipt of a referral made pursuant to Article 12(3) of the Rome Statute, the Prosecutor Fatou Bensouda, in accordance with Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor, opened a preliminary examination of the situation in Palestine, ‘in order to establish whether the Rome Statute criteria for opening an investigation are met’. Specifically, the Prosecutor considered issues of jurisdiction, admissibility and the interests of justice in making this determination under Article 53(1) of the Rome Statute. On 20 December 2019, the Prosecutor announced that:

following a thorough, independent and objective assessment of all reliable information available to her Office, the preliminary examination into the Situation in Palestine has concluded with the determination that all the statutory criteria under the Rome Statute for the opening of an investigation have been met. However, given the legal and factual issues attaching to this situation, pursuant to Article 19(3) of the Rome Statute, the Prosecutor requested from the Chamber a jurisdictional ruling on the scope of the territorial jurisdiction of the International Criminal Court under Article 12(2)(a) of the Rome Statute in Palestine. On 28 January 2020, the Court’s Chamber issued an order setting the procedure and the schedule for the submission of observations on the Prosecutor’s request under Article 19(3) of the Rome Statute related to the scope of the Court’s territorial jurisdiction in the situation in the state of Palestine.⁵

As per the Prosecutor’s request for the Chamber to rule on the scope of the Court’s territorial jurisdiction under Article 12(2)(a) of the Rome Statute on Palestine, a number of Palestinian legal institutions observed that it was not strictly necessary for the Prosecutor to request a ruling as it is within the Prosecutor’s authority to open a formal investigation to that effect. The Pros

3 Al-Haq Questions and Answers: Palestine and Jurisdiction at the International Criminal Court: <https://www.alhaq.org/advocacy/16807.html>, Published on 30 April 2020.

4 Ibid

5 Preliminary examination, State of Palestine, <https://www.icc-cpi.int/palestine>

ecutor herself, in her initial request, noted that she was satisfied that ‘the Court does indeed have the necessary jurisdiction in this situation’; however, what the Prosecutor was seeking was mere confirmation. While supportive of the Prosecutor’s decision to move the situation forward, Palestinian human rights organizations noted that it would have been preferable to simply open an investigation, and deal with issues of jurisdiction as they arise.⁶

The Prosecutor’s request to Pre-Trial Chamber for a ruling on the scope of the Court’s territorial jurisdiction on the Situation in Palestine was not necessary. The Prosecutor has the authority to open a formal investigation without seeking the approval of the Court’s judges.

2. Analysis of the rationale behind the Chamber’s decision

Following the decision regarding the Court’s jurisdiction over the occupied Palestinian territory, Judge Marc Perrin de Brichambaut appended a partly separate opinion on the reasons for which Article 19(3) of the Statute is applicable in the present situation. Presiding Judge Péter Kovács appended a partly dissenting opinion, in which he disagrees with the fact that Palestine qualifies as ‘[t]he State on the territory of which the conduct in question occurred’ for the purposes of Article 12(2)(a) of the Statute⁷, but states that “the Court’s territorial jurisdiction in the Situation in Palestine extends – in a quasi-automatic manner and without any restrictions – to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.”

Eventually, the main issues considered in the aforementioned ruling of the Court centered on four main points: (a) Palestine is a state for the purposes of the Rome Statute and must be treated as any other state party; (b) relevance of UN General Assembly Resolution 67/19 regarding the territorial jurisdiction of the Court; (c) the Court does not adjudicate border disputes; (d) the Oslo Accords are not pertinent to the jurisdiction of the Court. The related arguments are discussed below.

a. Palestine is a state for the purposes of the Rome Statute and must be treated as any other state party

The Chamber held that, in accordance with the ordinary meaning given to its terms in their context and in light of the object and purpose of the Statute, the reference to the state on the territory of which the conduct in question occurred’ in Article 12(2)(a) of the Statute must be interpreted as a reference to a state party to the Rome Statute. The Chamber found that, regardless of its status under general international law, Palestine’s accession to the Statute followed the correct and ordinary procedure and that the Chamber has no authority to challenge and review the outcome of the accession procedure conducted by the General Assembly. Palestine has thus agreed to subject itself to the terms of the ICC Rome Statute and has the right to be treated as any other state party for matters related to the implementation of the Statute. Palestine’s ac

⁶ Al-Haq Questions and Answers: Palestine and Jurisdiction at the International Criminal Court. Previous reference.

⁷ Previous reference.

cession to the Rome Statute was granted after it was accorded a ‘non-member observer state’ status at the United Nations, pursuant to General Assembly Resolution 67/19, issued during the sixty-seventh session of the General Assembly on 29 November 2012.⁸

This argument suggests that the Chamber’s decision has no bearing on the legal position of the State of Palestine. The Court only confirmed the legally unquestionable matter of Palestine being a state party to the Rome Statute according to the Court’s procedures. Although this has no particular added value in terms of legal interpretation, it is a response to the attacks against the State of Palestine within the General Assembly and its enjoyment of rights and responsibilities, just like any other state party.

The Chamber’s decision has no bearing on the legal status of the State of Palestine: it merely acknowledges Palestine’s accession to the Rome Statute, which the Chamber had no authority to challenge.

b. Resolution 67/19 adopted by the General Assembly regarding the territorial jurisdiction of the Court

The present author believes that the Court, in deciding on its territorial jurisdiction on the situation in Palestine, relied on existing international decisions on the question of Palestine under international law. The Court referred to the UN General Assembly’s sixty-seventh session resulting in Resolution RES/67/19/A, recognizing Palestine’s non-member observer State status by the United Nations in November 2012. The Chamber noted that, among similar resolutions, the UN General Assembly Resolution 67/19, “reaffirmed the right of the Palestinian people to *self-determination* and to *independence* in their State of Palestine on the Palestinian territory occupied since 1967”. On this basis, the majority (Judge Reine Adélaïde Sophie Alapini-Gansou and Judge Marc Perrin de Brichambaut), concluded that the Court’s territorial jurisdiction in the Situation in Palestine extends to the territory occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.

c. The Court does not adjudicate border disputes

The Court responded to the legal arguments and clarified that its decision does not have any political nature. Some arguments had pointed to the absence of clear or final Palestinian borders, thus the Court’s decision on its territorial jurisdiction could potentially prejudice the question of borders and adjudicate the border dispute between the State of Palestine and the occupying state of Israel. The Court denied the said argument and allegations set forth and clarified that constitutionally it is not within its power to determine matters of statehood that would bind the international community. Therefore, any territorial determination by the Chamber for the purpose of defining its territorial jurisdiction for criminal purposes has no bearing on the scope of Palestine’s territory.

Any Chamber’s determination for the purpose of defining its territorial jurisdiction for criminal purposes has no bearing on the scope of Palestine’s territory.

⁸ Distr.: General 4- December 2012, https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19

d. The Oslo Accords are not pertinent to the jurisdiction of the Court

The protocols annexed to the Oslo Accords hindered the exercise of the jurisdiction of the Palestinian criminal courts and their ability to prosecute nationals of the occupation state who commit crimes on the Palestinian territory. This caused contrasting judgments by Palestinian courts, such as in the case of the Jenin Justices of the Peace Court concerning criminal action number 885/2014 in 11/01/2015, which ruled that Palestinian courts have jurisdiction over crimes committed by nationals of the occupying power in Palestinian territory, as the State of Palestine has an observer state status in the UN and is party to international instruments and conventions, including the Rome Statute.

The Court considers that the recognition of Palestine as a state leads to a new reality beyond the Oslo Accords and restores its position, under international law, as a sovereign state under occupation.⁹ Supporters of Israel relied on the argument that Palestine waived its right to prosecute Israel through the Oslo Accords which would automatically prevent the Court's jurisdiction. The Chamber found that the arguments regarding the Oslo Accords in the context of the present proceedings are not pertinent to the resolution of the issue under consideration, namely the scope of the Court's territorial jurisdiction in Palestine. Issues relevant to jurisdiction only apply when the Prosecutor submits an application for the issuance of a warrant of arrest or summons individuals to appear before it.

The Chamber considered that these issues may be raised by interested states based on Article 19 of the Statute, rather than in relation to a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor arising from the referral of a situation by a state under Articles 13(a) and 14 of the Statute. As a consequence, the Chamber did not address these arguments. The Chamber found that the Oslo Accords do not affect the scope of the Court's territorial jurisdiction in Palestine.

3. Temporal jurisdiction of the Court in the Situation in Palestine

Article 11 of the Rome Statute set rules defining the temporal jurisdiction of the Court; paragraph 1 of the article states that “the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. Therefore, the Court absolutely cannot exercise its jurisdiction retrospectively with respect to crimes committed before the entry into force of this Statute.”¹⁰

Regarding the temporal jurisdiction with respect to countries that become members after its entry into force, Article 1(2) clarifies that if a state becomes a party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that state, unless that state has made a declaration under article 12(3) which states that “if the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question”.

9 For further reading, The Legal Agenda, Beirut, In the Name of the Palestinian People <https://legal-agenda.com/%D8%A8%D8%A7%D8%B3%D9%85-%D8%A7%D9%84%D8%B4%D8%B9%D8%A8-%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A-%D8%A7%D9%84%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86%D9%8A/>

10 Article 11 of the Rome Statute: jurisdiction *ratione temporis*.

As mentioned above, the State of Palestine submitted its first declaration pursuant to Article 12(3) of the Rome Statute on 22 January 2009, before it became a state party to the Rome Statute. The then prosecutor declined to proceed with the investigation due to the lack of clarity about Palestine’s legal position in international law.

Once this aspect was resolved with UN General Assembly Resolution 67/19 of 2012, and pursuant to Palestine’s second Article 12(3) declaration on 1 January 2015, the Court’s temporal jurisdiction extends to the international crimes committed on Palestinian territory after 13 June 2014. These include the crimes committed by the occupying power during its war on Gaza, known as “Operation Protective Edge”, which started on 8 August 2014,¹¹ and the subsequent practices that may fall under Articles 5, 6, 7 and 8 of the Rome Statute, including settlement expansion, the annexation of Jerusalem and Palestinian forced displacement.

4. Territorial jurisdiction of the Court in the situation of Palestine

Article 12 of the Rome Statute provides the preconditions for the exercise of jurisdiction in a state that becomes a party to the Rome Statute and accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5. In paragraph 2 of Article 12, it clearly states that “in the case of [A]rticle 13(a) or (c), the Court may exercise its jurisdiction if one or more of the States that are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3”. Pursuant to paragraph (b), the Court has jurisdiction in the territories of the State of which the person accused of the crime is a national. Considering Article 13 of Rome Statute,¹² the Court’s jurisdiction extends to both Israeli nationals who are accused of crimes within the Court’s jurisdiction, as well as to Palestinians, as the situation of Palestine extends to cover all crimes committed on Palestinian territory, including the Gaza Strip, West Bank and Jerusalem, regardless of the nationality of the perpetrator. The Pre-Trial Chamber I decision supported this when it concluded that the Court’s territorial jurisdiction in the situation in Palestine extends to the territory occupied by Israel since 1967.

The Court’s jurisdiction extends all relevant crimes committed on the territory of the State of Palestine, including Gaza, the West Bank and Jerusalem, regardless of the nationality of the perpetrator.

¹¹ The 2014 Gaza war, also known as ‘Operation Protective Edge’, was a military operation launched by Israel on 8 July 2014 in the Hamas-ruled Gaza Strip. Izz ad-Din al-Qassam Brigades hit back in the battle of Al Asf Al Makoul, and the Islamic Jihad Movement in Palestine responded with Al Bonyan Al Marous Operation after a wave of violence brought about by the kidnapping and burning of child Mohammed Abu Khdeir at Givat Shaul by settlers on 2 July 2014, the detention of hundreds of prisoners freed through the Gilad Shalit prisoner exchange and widespread protests in Jerusalem, 48-Arab areas and the West Bank that intensified after an Israeli ran over two Arab workers in Haifa. See: https://ar.wikipedia.org/wiki/%D8%A7%D9%84%D8%AD%D8%B1%D8%A8_%D8%B9%D9%84%D9%89_%D8%BA%D8%B2%D8%A9_2014

¹² Article 13 of the Rome Statute states:

The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with Article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

5. The Court's jurisdiction over individuals suspected of crimes that fall within its competence

The Court's jurisdiction over individuals suspected of crimes that fall within its competence and may be projected in the case of Palestine may be detailed through the following points:

a. Jurisdiction over natural persons

Article 25(1) and (2) of the Rome Statute confirms the Court's jurisdiction over natural persons who commit a crime within the jurisdiction of the Court and shall be individually responsible and liable for punishment, in accordance with its Statute. Meaning that in spite of the identity or nationality of natural persons, criminal liability shall be enforced and the crime be punishable by law.

b. Irrelevance of official capacity

Article 20 of the Rome Statute clearly states the irrelevance of the official capacity of the accused, stipulating that the law shall apply equally to all persons without any distinction based on official capacity. In particular:

official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.¹³

This indicates that any government/ state official (Palestinian and/or Israeli) can be investigated by the Court's within its jurisdiction. It is not unlikely to have the prime ministers, presidents or leaders, etc. of Palestine or Israel equally investigated by the Court.

All persons in an official capacity in Palestine and Israel as the occupying power, are subject to the Court's jurisdiction equally.

¹³ Article 27 of the Rome Statute states:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

c. Criminal responsibility of military commanders and other superiors

Article 28 of the Rome Statute confirms that, in addition to other grounds for criminal liability under this Statute for crimes within the jurisdiction of the Court, there are conditions related to the responsibility of military commanders and other superiors pursuant to Article 28(1), whereby a military commander or person effectively acting as a military commander shall be criminally liable for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control, as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

With respect to superior and subordinate relationships, Article 28(2) states that a superior shall be criminally liable for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes.
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior.
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Accordingly, military commanders and other superiors, Israeli and or Palestinian, if investigated, shall be required to prove eligibility to exemption of criminal responsibilities stated in Article 28(1) and (2) which could apply to Palestinian officials in the West Bank if they prove they lack actual control over Gaza Strip. This would be difficult for Israeli officials as their army is official and is subject to the authority of its commanders and the Israeli prime minister. However, the Palestinian President could be responsible, as the head of Fatah, in case it is proven that any of Fatah's military branches participated in any military criminal activities, unless proven otherwise, in line with Article 28.

6. Elements of criminal responsibility of individuals contributing to crimes within the Court's jurisdiction

In accordance with the Rome Statute, a person shall be criminally liable for crimes committed within the jurisdiction of the Court; individually, jointly with another or through another person, regardless of whether that other person is criminally liable, which is linked to acts covered in Article 25(3), if he/she:

- a. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.
- b. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.
- c. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional, and shall either be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or be made in the knowledge of the intention of the group to commit the crime.
- d. In respect of the crime of genocide, directly and publicly incites others to commit genocide.
- e. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Reflecting Article 25 on the situation in Palestine, it may be possible to identify individuals who participated in, contributed to and intervened in the realization of elements of relevant crimes committed in occupied Palestinian territories, including companies that contributed to the building of settlements, sold weapons to the occupation and incited the displacement of the Palestinian people, demolished their homes and supported in various ways the settlement enterprise. Additionally, in accordance with Article 25, politicians who incited to crimes and intentionally and directly support the occupying power's commission of crimes may also face criminal liability.

II. Prosecuting the occupation - What Palestine needs to do

The election of Karim Khan as the new prosecutor poses a challenge requiring Palestinians to study prosecutor Bensouda's approach and then build on it to face expected obstacles and invest in opportunities. Prosecutor Bensouda held a preliminary examination to ascertain whether the alleged crimes are within the Court's jurisdiction or are under open investigation. Therefore, the Prosecutor required the Chamber to issue a decision regarding the territorial jurisdiction of the Court after she concluded that all criteria had been met in the Situation in Palestine.¹⁴ It is essential to pay careful attention to the next phases and what is required from the Palestinian side, which could be summarized as follows,

Challenges to the admissibility of a case pursuant to Article 17 instead of Article 19 (principle of complementarity)

Article 17 of the Rome Statute set rules related to admissibility. The principle of complementarity is the most important of all; it states that the Court's jurisdiction is complementary to national criminal jurisdictions. This principle will stir controversy in the Situation in Palestine and could be one of the greatest challenges hindering Palestinians' goal of prosecuting the leaders of the occupation. It is expected that parties supporting the occupation will hold on to this principle to challenge the admissibility of the case under the pretext that the Israeli judiciary is capable of prosecuting Israelis. Article 17 outlines a set of rules related to this principle, which we will address and project on the Situation in Palestine:

1. Cases where a ruling of inadmissibility is obligatory

Article 17(1) states that a case is inadmissible where:

- a. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the state is unwilling or unable to genuinely carry out the investigation or prosecution.
- b. The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state to genuinely prosecute.
- c. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20(3).
- d. The case is not of sufficient gravity to justify further action by the Court.

2. Criteria to determine the unwillingness of a State to prosecute in a particular case

Article 17(2) outlines the elements that determine the unwillingness to prosecute of a particular State. The Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of these elements exist, as applicable:

¹⁴ Al-Haq Questions and Answers: Palestine and Jurisdiction at the International Criminal Court. Previous reference.

- a. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, referred to in Article 5.
- b. There has been an unjustified delay in the proceedings, which in the circumstances is inconsistent with an intent to bring the person concerned to justice.
- c. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. Inability to prosecute in a particular case

In order to determine the inability to prosecute in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to bring the accused to trial, or the necessary evidence and testimony, or otherwise unable to carry out its proceedings. This will negatively affect the Palestinian case due to the division within the Palestinian judiciary in the West Bank and Gaza Strip. The instability in Palestine has led to the ineffectiveness of the judicial authority, particularly when the president issued decree number 17 of 2019 to dissolve the Supreme Judicial Council, all panels of the High Court and the courts of appeal, and form a transitional Judicial Council,¹⁵ followed by an amendment to the law on the Judicial Authority and the formation of a new council. This raised the concerns and protests of the Palestinian Bar Association, human rights organizations and civil society organizations. Additionally, the occupation's control over the Palestinian territory limits, to a large degree, Palestinian institutions' ability to function.¹⁶

4. Inadmissibility... Prosecuting the occupation or the resistance?

Reflecting the aforementioned assumptions on the situation in Palestine, Israel can challenge admissibility if its leaders are investigated for crimes committed during the 'Operation Protective Edge'. However, it would be harder to do so in the case of the crime of its settlement, as settlements and forceful displacement require official authorisation and systematic policies.

Therefore, it is vital to study the occupation's way of conducting investigations about crimes committed on Palestinian territory.

Israel made a submission further to the Goldstone Report to the UN General Assembly; it was annexed in the second follow-up to the report of the UN Fact-Finding Mission on the Gaza Conflict.¹⁷ The report covered alleged investigations by the Office of the Military Advocate for Operational Affairs. The first report, submitted in July 2009 and titled "The Operation in Gaza",

¹⁵ The decree was published in the Palestinian gazette, special issue no 20, on 16/7/2019

¹⁶ Civil society organizations network and Palestinian Human Rights Organizations Council support the measures of the Bar Association: <https://www.alhaq.org/ar/palestinian-human-rights-organizations-council/17840.html>

¹⁷ Second follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict, Report of the Secretary-General, Sixty-fourth session, Agenda item 64 Report of the Human Rights Council, A/64/890, 11 August 2010.

describes the events leading to the Gaza Cast Lead Operation: “These included Hamas’s incessant mortar and rocket attacks from Gaza on Israel’s civilians (some 12,000 such attacks in the eight years prior to the Operation)” and the steadily increasing range and threat of such attacks, the abduction in 2006 of Israeli soldier Caporal Gilad Shalit, as well as “Israel’s numerous attempts to address the terrorist threat from Gaza through non-military means, including diplomatic overtures and urgent appeals to the United Nations.” Such report also described the IDF’s efforts to ensure compliance with the Law of Armed Conflict during the Cast Lead Operation, purportedly despite the significant operational challenges posed by the tactics of Hamas — in particular alleged Hamas’s intentional use of Palestinian civilians and civilian infrastructure as a cover for launching attacks, shielding combatants, and hiding weapons.¹⁸

While the Court has no temporal jurisdiction over the events mentioned in the Israeli report, this report illustrates Israel’s ability to misrepresent facts and claim it is conducting investigations and trials. This suggests that the occupying power will adopt the same approach to justify its crimes during the ‘Operation Protective Edge’, which will be a very serious basis to challenge the admissibility of the case. Palestine must be ready to respond and have a strong and equally engaged strategy.

The Israeli report in follow up to the Goldstone report proves the occupation’s ability to misrepresent facts and claim it is conducting investigations and trials. Palestine must be ready to respond and have a robust strategy.

According to Article 19(1), the ICC shall verify its jurisdiction in any cases presented to it. In its own motion, the Court may determine a case’s admissibility in accordance with Article 17. This Court’s authority is called the “general system,” which gives the Court the power to rule in any matter related to the public system at any time. Article 19(1) stipulates that the Court jurisdiction is part of the general policy, meaning that the Court can still, at any point, issue a ruling of inadmissibility, even if a challenge of admissibility fails. This puts Palestinians under pressure to fight a ruling of inadmissibility of their case.¹⁹

Additionally, Article 19(2) states that challenges to the admissibility of a case on the grounds referred to in Article 17 or challenges to the jurisdiction of the Court may be made by:

- (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58.
- (b) A state which has jurisdiction over a case, on the grounds that it is investigating or prosecuting the case or has investigated or prosecuted.
- (c) A State from which acceptance of jurisdiction is required under Article 12.

It is expected that Israel could use Article 19(2)(b) to challenge admissibility on the grounds that it is investigating or prosecuting the case or has investigated or prosecuted, although it is not a State Party to the Rome Statute.

¹⁸ Ibid.

¹⁹ Rome Statute, Article 17 (1): The Court shall satisfy itself that it has jurisdiction in any case brought before it.

Additionally, pursuant to Article 19(3), 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, which Prosecutor Bensouda requested regarding the Situation in Palestine, and a decision by the PTC was issued later.

A review of previous rulings of the Court regarding inadmissibility shows that it has set many related rules, demonstrated in the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011, titled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case according to Article 19(2)(b) of the Statute’. Kenya’s appeal noted that states have the primary responsibility to exercise criminal jurisdiction, stressing the Court does not replace states but complements them in that respect.

Article 17(1) discusses resolutions of jurisdictions’ conflicts between the Court and national jurisdiction, noting that the article does not only apply to the determination of a concrete case’s admissibility but also preliminary admissibility rulings.

Meanwhile, Article 19 relates to the existing case’s admissibility, where the two determining factors for existing cases at the Court are the concerned individual and the defendant’s conduct. The judiciary must commit investigate indicted persons and defendants’ conducts in case of inadmissibility under the basic law.²⁰

A state challenging admissibility on the grounds that it is conducting investigations must take serious measures directed at ascertaining whether a certain individual is responsible for the alleged conduct, by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. The suggestion that there should be a presumption in favor of domestic jurisdictions does not contradict this conclusion, but it is true only to the extent that there actually are, or have been, investigations and/or prosecutions at national level. If the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible.²¹

It is expected that Israel will challenge the admissibility of the case, whether during the investigation, in accordance with Article 17, or during the lawsuit, in accordance with Article 19. However, Court’s ruling regarding Kenya indicates the possibility to dismiss investigations that are not serious in terms of suspected individuals or their conduct.

It does not appear very promising for the Palestinians, in regards to benefiting from challenging the admissibility, when the prosecutor looks into the Palestinian resistance and criminal violations to the Rome Statute, as Palestine has not taken any measures to investigate, which means that if this continues to do so, it is very probable that official and leading parties may be prosecuted, leaving Palestine no chance to challenge the admissibility of that, especially that the third phase of investigations “involves assessments as to complementarity and gravity”.

²⁰ Look, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-01/11 OA, 30 August 2011.

²¹ Ibid

Given that the role of the Court is to only intervene where States have failed to meet their international obligations, the principle of complementarity applies when the State concerned is “unwilling or unable genuinely to carry out the investigation or prosecution” into the relevant crimes. Such scenarios may arise where the state is protecting persons suspected of international crimes, where there is unjust delay into beginning investigations, or in cases where evidence of the commission of investigations or proceedings that are not independent or impartial. Additional scenarios have arisen where governments have been unable to hold to account armed opposition groups.²²

It is possible to use the lack of gravity of the acts of resistance and argue that it was legitimate defence, for inadmissibility. Gravity requires that the “scale, nature, manner of commission, and impact” of the crimes warrant the involvement of the Court. 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.²³ It is possible to challenge the admissibility due to the scale of the case that allows the Court to take different measure pursuant to Article 17 (1) (d) that should be invested in, in order to obtain an order banning the prosecution of the Palestinian resistance to Israeli occupation.²⁴

22 Al-Haq Questions and Answers: Palestine and Jurisdiction at the International Criminal Court, previous reference.

23 Ibid

24 Article 17 (1) states: Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) 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.
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.
- (d) The case is not of sufficient gravity to justify further action by the Court

Recommendations:




1. The Palestinians should Form a team of specialists in international law, and international lawyers and analysts, to plan for the next steps after the Chamber decision; define priorities, necessary steps; prepare arguments and respond to expected counterarguments.
2. Unite the Palestinian judiciary in the West Bank and Gaza to empower it to carry out its role in investigations through civil and military public prosecution and enhance Palestine's ability to challenge the admissibility in line with the principle of complementarity in Articles 17 and 19 of the Rome Statute.
3. Support human rights organizations, especially in the West Bank and Gaza, to secure technical documentation of the occupation's crimes and build investigative files for victims to submit complains.
4. Form an official team of the public prosecution, the Ministry of Foreign Affairs and the Ministry of Justice and allow individuals to submit complaints against crimes committed by the occupation.
5. Eliminate any obstacles resulting from the division and unite the Palestinian efforts to build investigative files to be submitted to the general prosecutor of the Court.
6. Build an investigative file about the settlement and annexation of Jerusalem, and document the violations in Jerusalem, in collaboration with various bodies and Jordan.
7. Have official Palestinian authorities list suspected Israeli military commanders and officials for prosecution.
8. On the domestic front, persist on moving forward toward prosecution by the Court, despite international and political pressure.
9. Create a national archive of victims of the crimes of Israeli war, settlement and forceful displacement, to use during investigations.
10. Intensify international political, human rights and academic efforts supporting Palestine's path in prosecuting the occupation leaders by establishing a network of human rights, national and international organizations, and employing the expertise of the supporters of the Palestinian cause and the Palestinians in the diaspora.



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