

Palestine and the International Criminal Court

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1. What is the International Criminal Court and why is it important?

In 1998, more than 160 States convened in Rome and negotiated the *Rome Statute of the International Criminal Court*. The *Rome Statute*, which established The International Criminal Court (the "ICC" or the "Court"), was the culmination of years of negotiation and discussion, and came into force on 1 July 2002.

The *Rome Statute* builds and expands on existing obligations derived from international law and grants the Court power to investigate, prosecute and punish perpetrators of "the most serious crimes of concern to the international community as a whole", namely, war crimes, crimes against humanity, genocide and the crime of aggression.¹

States have the primary responsibility to investigate and prosecute war crimes, crimes against humanity and genocide. The Court has been designed to complement the work of national judicial systems. Based on this "complementarity principle", the ICC serves the international community by dealing with alleged crimes that states are unwilling or unable genuinely to deal with themselves. As such, the ICC seeks to ensure accountability for the most heinous crimes that are left unaddressed by national authorities, and to fill a gap where the victims' rights to justice are not fulfilled. The Court has been established with the highest fair trial and due process standards in mind, with the necessary judicial checks and balances drawing from the experiences of the founding states.

All States are obliged to ensure the investigation and prosecution of grave crimes, as part of their long-standing commitments under international law, in respect for victims' rights to justice and in accordance with the international commitment to address impunity for international crimes.²

2. Is the Rome Statute system universal?

No, not yet. However, 123 states have ratified³ the *Rome Statute* and every year States Parties to the *Rome Statute* collectively invite "States not yet parties to the Rome Statute of the International Criminal Court, to become parties [...] as soon as possible" in addition to issuing a general call to "all States Parties to intensify their efforts to promote universality".⁴

The European Union is a strong promoter of the universality of the Rome Statute⁵ has included adherence to the values of the Rome Statute and its ratification as part of the "acquis communautaire" to be fulfilled prior to becoming a member of the EU.⁶ The African states, the

¹ An amendment to define "crime of aggression" was agreed to in 2010 and means the planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another State. The ICC cannot exercise its jurisdiction over crimes of aggression until the amendment has been ratified by thirty States Parties and upon further decisions by the majority of the States Parties to the Rome Statute (not before 1 January 2017).

² The preamble to the Rome Statute of the International Criminal Court recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". The 1949 Geneva Conventions require States to search for persons alleged to have committed, or ordered to have committed, grave breaches and to try or extradite them. According to the [ICRC](#), customary international law provides that States must investigate war crimes under their jurisdiction. The obligation to investigate and prosecute is found in a number of treaties; Genocide Convention, Article VI; Hague Convention for the Protection of Cultural Property, Article 28; Convention against Torture, Article 7; Chemical Weapons Convention, Article VII(1); Amended Protocol II to the Convention on Certain Conventional Weapons, Article 14; Ottawa Convention, Article 9; Second Protocol to the Hague Convention for the Protection of Cultural Property, Articles 15–17.

³ Palestine becomes the 123rd State party to the Rome Statute when the Statute enters into force, on 1 April 2014.

⁴ [Assembly of States Parties Resolution ICC-ASP/13/Res.5, December 2014](#)

⁵ See EU Decision and Action Plan on the ICC, 2011

⁶ See also [EU's calls for universality in December 2014](#), including calls on Ukraine and Iraq to ratify the Rome Statute.

largest regional block of State Parties to the ICC, also views universal ratification as a key objective, joined by the United Nations Secretary General and many others.⁷

3. What are the underlying principles of the Rome Statute?

In recognising that genocide, crimes against humanity and war crimes threaten the peace, security and well-being of the world, the preamble to the *Rome Statute* demonstrates the determination of the States Parties “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. The preamble also declares that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.

States Parties to Rome Statute are obliged to abide by the Statute and states who have signed the Rome Statute are obliged not to act in ways that may defeat the object and purpose of the Statute, which are to ensure accountability and justice for the most serious crimes.

4. How can a state seize the Court? What is the difference between accession and ad-hoc recognition of the Court’s jurisdiction?

By acceding to the Rome Statute of the International Criminal Court on 1 January, 2015, Palestine becomes a State Party on 1 April 2015 (date of the entry into force of the Statute for Palestine), granting the ICC jurisdiction over any future grave crimes committed in Palestine after that date. This means that Palestine also becomes a member of the Assembly of State Parties, the political body of the Rome Statute and may, for example, appoint and elect judges and other senior officials to the Court, vote on resolutions, etc. Palestine is the fifth member of the Arab League to join the ICC and signify its commitment to justice and the rule of law, after Jordan, Tunisia, Comoros and Djibouti.

The *Rome Statute* allows states to grant the ICC ad-hoc jurisdiction for a particular situation or length of time, known as an Article 12(3) declaration. On 1 January 2015, parallel to acceding to the Statute, Palestine submitted such a declaration giving the Court retroactive jurisdiction over grave crimes committed on its territory or by its nationals since 13 June 2014, prior to becoming a State Party to the Statute.⁸

5. How was the ICC seized with the Palestinian situation?

The Rome Statute provides that a “State” can grant its jurisdiction to the Court by becoming a Party to the *Rome Statute* or by making an ad-hoc declaration accepting the Court’s jurisdiction.⁹ In 2009, the Palestinian government submitted a 12(3) declaration, granting the Court retroactive jurisdiction for “acts committed on the territory of Palestine since 1 July 2002”. Three years later, in April 2012, the Prosecutor of the ICC announced his uncertainty as to whether Palestine qualified as a State for the purposes of the *Rome Statute*, and deferred the decision to the UN or eventually the Court’s Assembly of States Parties.

Based on the vote of the United Nations General Assembly on November 29, 2012, to admit Palestine as a non-member observer state to the UN, the ICC Prosecutor accepted Palestine’s 12(3) declaration to the Rome Statute received by the Court on January 1, 2015. On 6 January 2015, the

⁷ See for instance [Statement by ambassador to Lesotho to the UN on behalf of African state parties to the Rome Statute at the 13th session of the Assembly of states parties to the Rome Statute, New York, December 8 2014](#); [Secretary-General's message to opening of 12th Session of the Assembly of States Parties of the International Criminal Court, The Hague, November 20 2013](#); [Opening Statement by UN High Commissioner for Human Rights at 27th session of the UN Human Rights Council, Geneva, September 8 2014](#).

⁸ Press release by the ICC: [“Palestine declares acceptance of ICC jurisdiction since 13 June 2014”](#), January 5 2015.

⁹ Article 12, Rome Statute of the International Criminal Court.

UN Secretary General, acting in his capacity as depositary, accepted Palestine's accession from January 2, 2015. Thus Palestine was welcomed as the 123rd State Party.

6. What crimes fall under the ICC's jurisdiction, in the case of Palestine?

Based on the Article 12 (3) Declaration, the Court has jurisdiction over all crimes listed in the Rome Statute (acts of genocide, crimes against humanity and war crimes) allegedly committed by individuals on the territory of Palestine or by Palestinian nationals since 13 June 2014. However, the Court can only exercise its jurisdiction if national authorities with jurisdiction are genuinely unable or unwilling to investigate and prosecute the crimes in question.

7. The ICC Prosecutor has opened a preliminary examination into the situation in Palestine. What does this mean?

On 16 January, the Prosecutor opened a preliminary examination into the situation in Palestine. This is not a full investigation. Rather, the aim of this examination is to ascertain whether there is a reasonable basis to launch a full investigation.

As part of the examination, the Prosecutor must satisfy that the alleged crimes are both within the jurisdiction of the Court and are admissible before the Court.¹⁰ During a preliminary examination, the Prosecutor can request and accept information from governments, international organisations and civil society, amongst other sources. The Prosecutor can also send a team to the location in question to assess or gather information.¹¹

There is no set timeframe for a preliminary examination. Currently (as of 19 February, 2015), preliminary examinations are being undertaken also in Afghanistan, Colombia, Georgia, Guinea, Honduras, Iraq, Nigeria and Ukraine. Some of these examinations have been ongoing for between five and ten years.

The Prosecutor has three options when it comes to these examinations; request authorisation to launch a full investigation, decline to open a full investigation, or continue with the examination.

8. How does the ICC examine jurisdiction?

Jurisdiction involves a determination of the legal parameters of the Court in relation to the concerned situation. In order to proceed, the Court must have temporal and material jurisdiction over the acts in question. That is, the Prosecutor must consider when and how the alleged crimes were committed. The Court must then determine that it has either personal or territorial jurisdiction. In the case of Palestine, the Court has jurisdiction over war crimes, crimes against humanity and genocide committed on the territory of Palestine, or by Palestinian nationals, since 13 June 2014. Issues of statehood, territory and nationality for the purpose of jurisdiction will be determined by the judges in the relevant chamber.

9. Who can challenge the Court's jurisdiction?

The Prosecutor may seek a ruling from the Court on jurisdiction on her own initiative ("*proprio motu*"). The accused or a person for whom an arrest warrant has been issued can challenge the jurisdiction of the Court and the admissibility of a case. In addition, the state that has jurisdiction over a particular crime can challenge the Court's jurisdiction, on the ground that it is investigating or prosecuting the case or has already investigated or prosecuted. The state from which acceptance of jurisdiction was required, in this case Palestine, can also challenge the Court's jurisdiction or the

¹⁰ Article 15, Rome Statute of the International Criminal Court.

¹¹ See also CICC [Q&A on Preliminary Examinations by the Prosecutor of the ICC](#).

admissibility of a case.¹² A person or State can only make the challenge once, as early as possible, prior to or at the start of the trial. In exceptional cases, the Court may grant a second challenge at a later date.

10. If the Court has jurisdiction, which cases are admissible?

Complementarity is one of the core principles of the ICC. The Court is designed to complement, or supplement, domestic judicial systems, to help them ensure that there is no impunity for the most serious crimes. Before launching an investigation, the Prosecutor must examine existing overlapping domestic proceedings, and assess how genuine they are. As part of the complementarity assessment in any situation, the Prosecutor looks for sham proceedings, trials undertaken with a view to shielding the perpetrators from the ICC. If there are no investigations or prosecutions at all, the case is admissible subject to the assessment of the other admissibility requirements: gravity and interest of justice.

Gravity involves an assessment of the scale, nature, manner and impact of the crimes. Cases must be of “sufficient gravity” to warrant investigation by the Court. There is no exact formula or equation for assessing gravity, but the Prosecutor’s assessment will include both quantitative and qualitative considerations.

If the requirements of complementarity and gravity are met, the Prosecutor can still decide not to go ahead with an investigation if she has substantial reason to believe that the *interests of justice* will not be met. This assessment includes consultation with victims and their representatives. The Prosecutor has been clear that a decision not to proceed on these grounds would be highly exceptional.

11. What happens if Palestine refers a “situation” to the ICC?

On 1 April 2015, when the Rome Statute enters into force for Palestine, Palestine will be able to refer situations to the Prosecutor as a State Party to the *Rome Statute*. The Prosecutor would then analyse the information contained in the referral as part of the preliminary examination, decide whether to initiate an investigation and determine which persons should be charged with crimes.¹³ In such a referral, Palestine should specify as far as possible, the relevant circumstances together with supporting documentation available to it. The referral gives the Prosecutor a procedural *shortcut*, because it would allow her, following a preliminary examination, to initiate an investigation without the authorisation (judicial review) of the Pre Trial Chamber as would otherwise be necessary under a *proprio motu* investigation.

12. What kind of “situation” can be referred to the ICC?

A referral can concern the entire territory or parts of it. When the Central African Republic (CAR) issued a self-referral to the ICC, it concerned the entire territory of CAR while the self-referral by Uganda limited itself to the situation in northern Uganda. A referral can also be limited to one event, such as the referral by the Union of the Comoros with respect to the “31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip”.

13. Does the State of Palestine need to take any further steps before an investigation can be opened?

No. As things stand, the Prosecutor can decide to open an investigation *proprio motu*, on her own initiative. If the Prosecutor does so, she will need to obtain authorisation from the Pre-Trial Chamber.

¹² Article 19, Rome Statute of the International Criminal Court.

¹³ Article 14, Rome Statute of the International Criminal Court.

14. When and how does an investigation start? How long does it normally take to start an investigation?

The decision to move from a preliminary examination to a formal investigation is at the discretion of the Prosecutor. She can take this decision once she has collected information providing a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed, that the case is not being genuinely tried in domestic courts, and that there are no substantial reasons to believe that an investigation would not serve the interests of justice (see below). There is no clear formula as to how long a preliminary examination may take.¹⁴

For those referred cases that have moved from preliminary examinations to investigations, the time between a referral and the initiation of an investigation has varied from 2 months to 2 years. If initiated *proprio motu*, judicial review is required (see above) which may further delay the initiation of a formal investigation. If the Pre-trial chamber judges refuse to give authorization, the Prosecutor may try again at a later stage.¹⁵

15. Who defines the cases and selects the alleged crimes to be investigated? Can Palestine "bring cases"?

As a State Party, Palestine can refer a situation (see above), but not bring cases against certain individuals. It is up to the Prosecutor to define the case and the individuals allegedly responsible based on the information she has collected and request the Pre-Trial Chamber to issue a warrant of arrest. The Pre-Trial Chamber can issue arrest warrants where there is reasonable ground to believe that the person has committed a crime within the jurisdiction of the Court and the arrest appears necessary in the eyes of the Court.

16. Who can provide information to the Prosecutor?

Anyone can provide information to the Prosecutor, and the Rome Statute provides that the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organisations, or other reliable sources that she deems appropriate. In his capacity as President of Palestine, Mr Abbas has issued a presidential decree setting up a National Committee to coordinate Palestinian actions and policies in relation to the ICC. The roles and functions of this Committee do however not change or adjust the responsibilities and mandate of the Prosecutor and the Court in relation to the rights and access of victims, witnesses, lawyers and defendants.

17. Does the accession grant ICC officials access to the Palestinian territory?

The access of the ICC officials is always dependent on the cooperation with states where they are acting. As long as Israel occupies and thereby controls access to and from the oPt (with the exception of the Gaza border with Egypt), the access of investigators and other ICC officials will be dependent on Israel's cooperation with the ICC. However, although lack of access will complicate investigations, it is not a precondition for an investigation.

The Court cannot try individuals *in absentia* which means that the Court is unable to proceed to trial unless the person appears before the Court, either voluntarily or by way of an arrest.

¹⁴ See for example, the preliminary examinations of: the situation of Georgia, began in 2008; the situation of Afghanistan since at least 2007; the situation of Guinea since 2009; the situations of Nigeria, and of Honduras and since at least 2010, all of which are ongoing.

¹⁵ Article 15, Rome Statute of the International Criminal Court.

18. What types of crimes did the Prosecutor investigate in the past?

As of January 2015, the Office of the Prosecutor is reportedly conducting investigations and judicial proceedings in 8 situations (Central African Republic, Côte d'Ivoire, Darfur (Sudan), Democratic Republic of the Congo, Kenya, Libya, Mali and Uganda), and conducting preliminary examination activities in 9 situations (Afghanistan, Colombia, Georgia, Guinea, Honduras, Iraq, Nigeria, Palestine and Ukraine).¹⁶ Since 2002, 21 cases in 9 situations have been brought by the Prosecutor before the Court. Most of the charges have been for crimes against humanity and war crimes, with only one arrest warrant issued for the crime of genocide against the President of Sudan.

19. What are the most likely potential cases that the Prosecutor would investigate in Palestine?

There is a detailed list of the possible crimes in articles 6, 7 and 8 of the *Rome Statute*, and all grave breaches of the Fourth Geneva Convention are listed as war crimes under the *Rome Statute*. Some of the potential allegations that could be made against Palestinian and Israeli nationals include deportation or forcible transfer of population, willful killings, extensive destruction and appropriation of property; willfully depriving a protected person of the rights of fair and regular trial; and the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies. The Court obviously operates on the principle that persons are innocent until proved guilty. As with any criminal court, a high burden of proof is required, and any charges made by the Prosecutor will depend on the evidence available.

20. Will the ICC only investigate leaders?

The ICC will not be able to bring to justice all individuals accused of committing crimes. The initial prosecutorial strategy of the ICC Prosecutor was to focus on investigating and prosecuting the most responsible perpetrators.¹⁷ Subsequently, the Prosecutor has explained that the required evidentiary standards might, in certain situations, force the Prosecution to adjust its approach by starting with mid- and high-level officials and then building upwards gradually to those most responsible. This is particularly true where investigation proves difficult or in light of lack of cooperation. If lower level perpetrators have allegedly committed particularly grave crimes, the Prosecutor could consider investigating them as well.¹⁸

21. Can the ICC investigate settlements that were built before 13 June?

Based on International Humanitarian Law, the Rome Statute criminalises the transfer, directly or indirectly, by the Occupying Power of its own population into the occupied territory. If the Prosecutor decides to investigate this, the Court will assess whether the Prosecutor has proven the individual responsibility for having committed, ordered, facilitated or contributed to such transfers, directly or indirectly, since 13 June 2014. Continuous crimes, or continuing crimes, refer to crimes that were committed before the Rome Statute entered into force, but have continued after its entry into force. Examples of this could include forcible disappearance, where the original crime was initiated prior to the Court's existence, but the disappearance is maintained long after the Court's entry into force. While the question of continuous crimes was discussed during the drafting of the Rome Statute, no definitive position was reached by the drafters. As such, a determination would be left to the discretion of the Court.

¹⁶ [ICC Website](#), as of 31 March 2015.

¹⁷ [Prosecutorial Strategy adopted in 2010, for the period 2010-2012.](#)

¹⁸ [OTP Strategic Plan 2012 -2015.](#)

22. Are states obliged to cooperate with the ICC?

According to Part 9 of the *Rome Statute*, all States Parties are obliged to cooperate fully with the Court and to support the investigation and prosecution of serious crimes. States not party to the Rome Statute and UN members are obliged to cooperate with the ICC for situations referred to by the United Nations Security Council, but may of course agree to cooperate with the Court on an ad-hoc basis.

23. Can Palestine withdraw from the Rome Statute?

Yes, as with any other State Party, it can. However, it will only be effective one year after the withdrawal. The withdrawal would not stop the Court from finishing a matter already under consideration by the Court at the time of the withdrawal becoming effective.