



A seminal step towards legal accountability and justice for victims, survivors and their families: ICC Prosecutor Fatou Bensouda's decision that she is ready to open an investigation into the situation in Palestine

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ICC Prosecutor Fatou Bensouda's [announcement](#) that she is ready to open a criminal investigation into the situation in Palestine is a seminal step towards achieving legal accountability and justice for the many victims, survivors and their families of alleged serious international crimes perpetrated by Israeli forces and their military and political leadership.

The potential for the investigation to effectively prevent or deter the commission of ongoing and future crimes, by countering the systemic impunity that has prevailed until now, is also very significant.

Last Friday, the ICC Prosecutor stated she is, “satisfied that there is a reasonable basis to proceed with an investigation into the situation in Palestine”, having concluded that all the statutory criteria under the Rome Statute have been met.

Her statement summarises: “I am satisfied that (i) war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip; (ii) potential cases arising from the situation would be admissible; and (iii) there are no substantial reasons to believe that an investigation would not serve the interests of justice.”

LPHR notes, however, the ICC prosecutor's concurrent announcement that before opening an investigation, she has requested a ruling from Pre-Trial Chamber I of the International Criminal Court in which she seeks: “confirmation that the “territory” over which the Court may exercise its jurisdiction, and which I may subject to investigation, comprises the West Bank, including East Jerusalem, and Gaza.”

In her accompanying [112-page Prosecutor's Request](#) to the Pre-Trial Chamber, Fatou Bensouda states that although it is her view that a determination on the scope of territorial jurisdiction is not required at this stage, and that the ICC “does indeed have the necessary jurisdiction in this situation”, she has decided that it is the prudent and transparent course to take given that “she is aware of the contrary views”.

These “contrary views” appear to principally derive from the Office of the Israeli Attorney General. At the same time as the ICC Prosecutor's announcement, the Israeli Attorney General released a [detailed memorandum](#) to explain why the ICC has no jurisdiction over Palestine. The memo argues that Palestine has failed to meet the necessary precondition of possessing



criminal jurisdiction over its territory by asserting that a sovereign Palestinian state does not exist at this time.

The Prosecutor's Request includes a thorough, clear and compelling factual and legal analysis supporting her unequivocal position that the “territory” over which the Court may exercise its jurisdiction under the Rome Statute comprises the West Bank, including East Jerusalem, and Gaza. It is LPHR's position that it appears inconceivable that the Pre-Trial Chamber could reach a contrary conclusion based on the comprehensive analysis by the Prosecutor in her Request.

LPHR also notes with interest paragraphs 93-100 of the Prosecutor's Request. These specific paragraphs underpin her finding that the relevant statutory criteria for opening an investigation have been met. LPHR outlines the key points below:

- Paragraph 93 is succinct and very significant: “The Prosecution has conducted a preliminary examination into the situation of Palestine. After a thorough analysis, the Prosecutor is satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine pursuant to article 53(1) of the Statute.”
- Paragraph 94 provides substantive analysis in relation to the 2014 hostilities in Gaza. It begins by stating: “On the basis of the available information, there is a reasonable basis to believe that war crimes were committed in the context of the 2014 hostilities in Gaza. In particular, there is a reasonable basis to believe that members of the Israel Defense Forces committed the war crimes of: intentionally launching disproportionate attacks in relation to at least three incidents which the Office has focussed on; wilful killing and wilfully causing serious injury to body or health; and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Conventions.”
- LPHR notes that these specific incidents could include military attacks against homes leading to large numbers of civilian casualties – which was a key and endemic feature of the 2014 hostilities in Gaza. It may also encompass documented attacks against specific areas, civilian shelters, hospitals, ambulances and paramedics.
- LPHR also notes that the opening part of Paragraph 94 should be read alongside Paragraphs 98, 99 and 100 of the Prosecutor's Request, which emphasise that the investigation “will not be limited only to the specific crimes that informed her assessment at the preliminary examination stage”, and that “the Prosecution will be able to expand or modify the investigation with respect to the acts identified above or other alleged acts, incidents, groups or persons”. This leaves open the possibility of a wide-ranging investigation covering many specific incidents that can potentially lead to charges of crimes against humanity, in addition to potential charges of war crimes.



- Paragraph 94 also provides an important caveat that the Prosecutor's decision to open an investigation has been made without making a crucial determination on the genuineness and scope of Israel's investigative processes vis-a-vis the 2014 hostilities in Gaza. It states that its admissibility assessment “remains ongoing at this stage and will need to be kept under review”, due to “limited accessible information in relation to proceedings that have been undertaken and the existence of pending proceedings in relation to other allegations”. In April this year, LPHR published a [short report](#) on this issue in specific relation to attacks against family homes during the 2014 hostilities in Gaza. The eleven key points made within this analysis appear to remain very relevant.
- Paragraph 95 focuses on the West Bank, including East Jerusalem. The Prosecutor asserts: “there is a reasonable basis to believe that in the context of Israel’s occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes in relation, inter alia, to the transfer of Israeli civilians into the West Bank since 13 June 2014.” The use of the term, “inter alia”, indicates that other war crimes allegedly committed on the territory of the West Bank, possibly including demolitions of private property and the forcible transfer of protected persons, could also have informed the Prosecutor's decision.
- Paragraph 95 also significantly states, “The Prosecution has further concluded that the potential case(s) that would likely arise from an investigation of these alleged crimes would be admissible pursuant to article 17(1)(a)-(d) of the [Rome] Statute.” Therefore, unlike its decision in relation to the actions of Israeli forces in Gaza during the 2014 hostilities, the Prosecutor is making clear that the admissibility assessment in the context of the West Bank is already fully satisfied in her view. This is presumably because there are no investigative proceedings for the Prosecutor to assess in regard to alleged crimes committed by members of Israeli authorities vis-a-vis the West Bank.
- Paragraph 96 states that alleged crimes committed against protesters in Gaza by Israeli forces are within the purview of the pending investigation: “The Prosecution further considers that the scope of the situation could encompass an investigation into crimes allegedly committed in relation to the use by members of the IDF of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel, which reportedly resulted in the killing of over 200 individuals, including over 40 children, and the wounding of thousands of others.”
- This is particularly relevant in light of the substantial findings made by the UN independent Commission of Inquiry into the 2018 Gaza Protests. The Commission found in its [report](#), published in March this year, that it has reasonable grounds to believe that all 189 fatalities it had investigated were caused by unlawful use of force – with the



possible exception of two incidents – and that medical workers, journalists, some children and some people with visible disabilities were shot intentionally.

- Paragraph 97 asserts, “The Prosecution has identified no substantial reasons to believe that an investigation into the situation would not be in the interests of justice.” This is particularly important to note in light of the judgment earlier this year by Pre-Trial Chamber II of the International Criminal Court in which it controversially ruled that the 'interests of justice' statutory criterion had not been satisfied in relation to a decision of the Prosecutor to open an investigation into the situation in Afghanistan.

The Prosecutor's statement requests the Pre-Trial Chamber to “rule expeditiously” and “without undue delay so that my Office can take the appropriate next steps accordingly”. The last paragraph of the Prosecutor's Request requests a timeline of no longer than 120 days (18 April 2020) for a ruling, subject to accommodating requests by any participants.

LPHR similarly encourages an expeditious ruling by the Pre-Trial Chamber, and one which indeed confirms that the territory over which the Court may exercise its jurisdiction, and which the Prosecutor may subject to investigation, comprises the West Bank, including East Jerusalem, and Gaza.

It is an imperative for the due rights of victims, survivors and their families; for the upholding of the international rule of law; and for the prevention or deterrence of ongoing and future atrocities; that the long moral arc is not damagingly deviated or disproportionately delayed at a critical juncture as it bends towards justice.

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For more on LPHR's work in this area, please see the following:

- [LPHR Q&A](#): Current progress of the International Criminal Court's preliminary examination into the situation in Palestine and potential next steps (published July 2019)
- [LPHR Report](#): Eleven key points relevant to the complementarity assessment being undertaken by the Office of the Prosecutor of the International Criminal Court on the grave issue of targeted airstrikes against family homes in Gaza (published April 2019)
- [LPHR and Al Mezan Centre for Human Rights Complaint Submission](#) made to the United Nations Commission of Inquiry on the 2014 Gaza Conflict concerning large-scale destruction and damage to family houses in the Gaza Strip, with associated profound loss of life and injury to Palestinian residents, during Israel's military operation between 7 July 2014 and 26 August 2014 (published September 2014)



- [LPHR and Al Mezan Centre for Human Rights Joint Report: Justice Denied: Gaza human shield survivors and the systemic failure of Israel's military investigation system to provide accountability](#) (published September 2018)
- [LPHR, Al Mezan Centre for Human Rights and Medical Aid for Palestinians Complaint Submission](#) to the United Nations Commission of Inquiry on the 2014 Gaza Conflict concerning destruction and damage to medical infrastructure, and loss of life and injury to civilians and medical personnel, in Gaza, during Israel's military operation between 7 July 2014 and 26 August 2014 (published February 2015)
- [LPHR, Al Mezan Centre for Human Rights and Medical Aid for Palestinians Joint Report: No More Impunity: Gaza's Health Sector Under Attack](#) (June 2015)
- [LPHR Evidence Submission](#) to the UN independent Commission of Inquiry on the 2018 Protests in the Occupied Palestinian Territory: Israel's Supreme Court judgment on the legality of Israel's rules of engagement in the context of use of force against Gaza protesters (December 2018)