



## **LPHR Q&A: Current progress of the International Criminal Court's preliminary examination into the situation in Palestine and potential next steps**

This week marks the fifth anniversary of the 2014 hostilities in Gaza that the Israeli military code-named 'Operation Protective Edge'. Five years on from the commission of alleged serious international crimes during the 2014 military offensive on Gaza, there is a gaping absence of criminal prosecutions at the domestic level in Israel and Palestine in relation to these alleged serious violations of international criminal, humanitarian and human rights law.

It is therefore timely to provide an update on the current progress of the preliminary examination into the situation in Palestine that has been carried out by the Office of the Prosecutor of the International Criminal Court (**Office of the Prosecutor**) since January 2015.

In this Q&A we set out the substance of the progress made by the Office of the Prosecutor. We then explain the investigation and prosecution processes that may be activated following the conclusion of the preliminary examination process. This Q&A also assesses the potential impact of the unprecedented decision on 12 April 2019 by the Pre-Trial Chamber II of the International Criminal Court in relation to the Afghanistan situation.

### **When was the last update by the Office of the Prosecutor on its preliminary examination into the situation in Palestine and did it say if it is near to completion?**

The latest update from the Office of the Prosecutor came on 5 December 2018. This is when the Office of the Prosecutor published its [annual report](#) on all its preliminary examination activities, including into the situation in Palestine. The Office of the Prosecutor conducts a preliminary examination for the purpose of determining whether there is a reasonable basis to initiate a full criminal investigation into a specific situation.

The December 2018 annual report strongly indicates that the preliminary examination on the situation in Palestine, which has been open since 16 January 2015, is very close to completion:

*“During 2018, the Office has advanced and significantly progressed its analysis on all of the factors listed in article 53(1)(a)-(c) [Rome Statute of the International Criminal Court] in line with its holistic approach. Given the detailed focus that the Office has given to this situation since 2015, the Prosecutor intends to complete the preliminary examination as early as possible.”<sup>1</sup>*

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<sup>1</sup> Paragraph 284, [Report on Preliminary Examination Activities 2018](#)



## What alleged serious crimes are being examined by the Office of the Prosecutor?

The December 2018 report provides a summary of its review of alleged war crimes and crimes against humanity committed in the occupied Palestinian territory that fall within the jurisdiction of the International Criminal Court.

### West Bank, including East Jerusalem:

The December 2018 reports that the Office of the Prosecutor has “*focused its analysis*” on alleged war crimes committed by Israeli authorities in the West Bank, including East Jerusalem, in relation to settlement activities. The alleged crimes are namely:

- “*the settlement of civilians onto the territory of the West Bank, including East Jerusalem*”;
- “*the forced removal of Palestinians from their homes in the West Bank and East Jerusalem*”;
- “*the confiscation and appropriation of land*”;
- “*the planning and authorisation of settlement expansions*”;
- “*constructions of residential units and related infrastructures in the settlements*”;
- “*the regularisation of constructions built without the required authorisation from Israeli authorities (so-called outposts)*”; and
- “*public subsidies, incentives and funding specifically allocated to settlers and settlements’ local authorities to encourage migration to the settlements and boost their economic development.*”<sup>2</sup>

The report further states that Israeli authorities are “*also alleged to have been involved in*”:

- “*the demolition of Palestinian property and eviction of Palestinian residents from homes in the West Bank and East Jerusalem*”; and
- “*reportedly continued to advance plans to relocate Bedouin and other herder communities present in and around the so-called E1 area, including through the seizure and demolition of residential properties and related infrastructure.*”<sup>3</sup>

<sup>2</sup> Paragraph 269, [Report on Preliminary Examination Activities 2018](#)

<sup>3</sup> Paragraph 270, [Report on Preliminary Examination Activities 2018](#)



On the latter issue, the report notably states that, “on 17 October 2018, the Prosecutor issued a statement expressing concern in relation to the planned eviction of the Bedouin community of Khan al-Ahmar in the West Bank.”<sup>4</sup> LPHR's briefing on this specific issue can be read [here](#).

The report further states that the Office of the Prosecutor has “also received information regarding other crimes allegedly committed” which may amount to crimes against humanity committed by officials of the Israeli authorities in the West Bank, including East Jerusalem. These allegations relate to:

- “the crime of persecution”;
- “transfer and deportation of civilians”;
- “the crime of apartheid.”<sup>5</sup>

The report concludes its summary of alleged crimes in the West Bank, including East Jerusalem, that are being reviewed by the Office of the Prosecutor by stating:

*“The Office has also received allegations that Palestinian security and intelligence services in the West Bank have committed the crime against humanity of torture against civilians held in detention centres under their control.”<sup>6</sup>*

#### **Gaza:**

The December 2018 annual report states that during the course of the year, the Office of the Prosecutor “continued to analyse allegations of crimes committed by both members of the Israeli Defence Forces and Palestinian Armed Groups, respectively, during the hostilities in Gaza in 2014.”<sup>7</sup> The [2017 annual report](#) provides a summary of the specific alleged crimes that the Office of the Prosecutor is reviewing in the context of the 2014 hostilities:

*“All parties are alleged to have committed crimes during the 51-day conflict. It has been alleged that the Israel Defense Forces directed attacks affecting civilians and civilian objects, such as attacks on or affecting: residential areas and buildings; medical facilities, ambulances, and medical personnel; UN Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) schools serving as designated emergency shelters; and various other civilian objects and infrastructure. In addition, it has been alleged that members of Palestinian armed groups committed crimes in relation to, inter alia, rocket and mortar attacks launched against Israel,*

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4 Paragraph 283, [Report on Preliminary Examination Activities 2018](#)

5 Paragraph 271, [Report on Preliminary Examination Activities 2018](#)

6 Paragraph 272, [Report on Preliminary Examination Activities 2018](#)

7 Paragraph 274, [Report on Preliminary Examination Activities 2018](#)



*the alleged use of protected persons as shields, and the alleged ill-treatment and execution of persons accused of collaborating with Israel.”<sup>8</sup>*

The 2018 Annual Report goes on to say that it has “*focused on a sample of illustrative incidents, out of the thousands of previously documented by the Office*”, with the aim to:

*“i) select incidents which appear to be the most grave in terms of alleged harm to civilians and damage to civilian objects and/or are representative of the main types of alleged conduct, and; ii) prioritise incidents for which there is a range of sources and sufficient information available to enable an objective and thorough analysis.”<sup>9</sup>*

The Office of the Prosecutor importantly adds that it is examining alleged crimes committed in the context of the Gaza protests that began on 30 March 2018: “The Office has *gathered information regarding other crimes allegedly committed by both sides in relation to the violence that has occurred in the context of the protests held along the Israel-Gaza border since 30 March 2018. These and any other alleged crimes that may occur require further assessment.*”<sup>10</sup> LPHR's legal submission to the UN Commission of Inquiry on the Gaza protests can be read [here](#).

It is notable that the Office of the Prosecutor reiterates a key issue previously raised in its [2017 annual report](#): namely that the Gaza hostilities between 7 July 2014 and 26 August 2014 “*may be classified as either an international or non-international armed conflict.*” The specific classification to be accorded to the 2014 hostilities in Gaza is crucial because certain war crimes under the Rome Statute of the International Criminal Court are criminalised only in relation to international armed conflicts, and *not* for non-international armed conflicts. The Office of the Prosecutor summarises the significance of this in its 2018 Annual report, stating, “*Consequently, the Office’s conclusions on the commission of alleged crimes [in Gaza] in some instances depend on the qualification of the conflict as either international or non-international in character.*”<sup>11</sup>

Significant relevant examples of war crimes that are only criminalised in relation to international armed conflicts include the [prohibited use of civilian human shields](#), and war crimes that must adhere to the principle of proportionality, such as a [military attack against an object that is expected to cause incidental civilian loss of life, civilian injury, and/or damage to civilian objects](#).

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<sup>8</sup> Paragraph 66, [Report on Preliminary Examination Activities 2017](#)

<sup>9</sup> Paragraph 274, [Report on Preliminary Examination Activities 2018](#)

<sup>10</sup> Paragraph 275, [Report on Preliminary Examination Activities 2018](#)

<sup>11</sup> Paragraph 273, [Report on Preliminary Examination Activities 2018](#)



## What else does the Office of the Prosecutor have to assess before deciding whether or not to open a full investigation?

In addition to the ongoing jurisdictional assessment outlined above, the 2018 annual report of the Office of the Prosecutor stated that the preliminary examination has progressed to the final phase: an assessment of whether specific cases are admissible to be brought before by the International Criminal Court.

The assessment by the Office of the Prosecutor of the admissibility of a particular case is two-fold. First, it needs to assess whether the relevant state has not already conducted, or is conducting, *genuine national proceedings* in the same matter (**complementarity**). Second, it needs to assess whether the alleged criminal conduct is *sufficiently grave* to warrant the intervention of the International Criminal Court (**gravity**).

If these two tests are satisfied, the Office of the Prosecutor must then determine whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the **interests of justice**.

### Complementarity

Complementarity refers to a governing principle at the heart of the International Criminal Court that national courts should first and foremost deal with alleged serious crimes. The International Criminal Court shall therefore only deal with cases as a 'court of last resort', when it has been determined that the state in question is either unable or unwilling to carry out genuine proceedings.

The complementarity assessment therefore involves an examination of: i) the existence of relevant national proceedings in relation to the potential cases under consideration for investigation by the Office of the Prosecutor, and ii) where relevant domestic investigations or prosecutions exist, an assessment whether or not they are genuine.

The 2018 annual report states that in relation to alleged crimes committed in the West Bank, including East Jerusalem, the information that the Office of the Prosecutor has, "*does not seem to indicate the existence of any relevant investigations or prosecutions being or having been conducted against the persons or groups of persons which are likely to be the focus of an investigation into crimes allegedly committed in the West Bank, including East Jerusalem.*"<sup>12</sup>

The Office of the Prosecutor notes that the absence of relevant national proceedings is attributed to two decisive factors: on the one hand to the fact that Palestinian authorities are

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<sup>12</sup> Paragraph 277, [Report on Preliminary Examination Activities 2018](#)



unable to exercise jurisdiction over the alleged Israeli perpetrators, and, on the other hand, to the fact that the Israeli government maintains the position that settlement-related activities are not unlawful and that Israel's High Court of Justice *“has held that the Government's settlement policy was non-justiciable.”*<sup>13</sup> Non-justiciability is a concept applied by a Court when it declines to adjudicate an issue on the basis that it is alleged to be unsuitable for judicial resolution.

In relation to alleged crimes committed in Gaza, the 2018 annual report notes that the Office of the Prosecutor has no information regarding investigations against Palestinian armed groups. By contrast, it notes that in relation to alleged crimes by Israeli forces in Gaza, *“the information available indicates that all of the relevant incidents are or have been the subject of some form of investigative activities at the national level within the IDF military justice system.”*<sup>14</sup>

This is significant, as it implies the the Office of the Prosecutor will have to make an assessment of the genuineness of the investigative activities carried out by Israeli authorities. For a relevant analysis in this regard, please see [LPHR's recently published complementarity assessment](#) on investigations carried out by Israeli authorities in relation to the grave issue of widespread and targeted airstrikes against family homes in Gaza during the 2014 hostilities.

### **Gravity**

Gravity refers to an assessment of the scale, nature, manner of commission of the crimes, and their impact. [Article 17 of the Rome Statute of the International Criminal Court](#) makes clear that a case shall be inadmissible if it *“is not of sufficient gravity to justify further action by the Court.”*

The Office of the Prosecutor has expressly stated in its case selection policy guidance that *“Gravity is the predominant case selection criteria adopted by the Office and is embedded also into considerations of both the degree of responsibility of alleged perpetrators and charging.”*<sup>15</sup>

In relation to the West Bank, including East Jerusalem, the 2018 annual report gives no indication what conclusions have been made by the Office of the Prosecutor on the question of gravity. It states only that the Office of the Prosecutor *“has considered whether, based on the information available, the crimes allegedly committed [...] are sufficiently grave [...] to justify the opening of an investigation, in particular considering their scale, nature, manner of commission, and their impact on victims and affected communities.”*<sup>16</sup>

<sup>13</sup> Paragraph 277, [Report on Preliminary Examination Activities 2018](#)

<sup>14</sup> Paragraph 279, [Report on Preliminary Examination Activities 2018](#)

<sup>15</sup> Paragraph 6 of the Office of the Prosecutor Policy Paper on Case Selection and Prioritisation, 15 September 2016 [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)

<sup>16</sup> Paragraph 278, [Report on Preliminary Examination Activities 2018](#)



Similarly, in relation to Gaza, the 2018 annual report gives no indication what conclusions have been made by the Office of the Prosecutor on the question of gravity. There is, however, a separate paragraph stating that its gravity assessment will involve deciding whether to include *“those who appear to be most responsible for the most serious crimes, including persons with levels of responsibility in directing, ordering, facilitating or otherwise contributing to the commission of the alleged crimes.”*<sup>17</sup> This indicates that the Office of the Prosecutor is cognisant of considering the potential individual criminal responsibility of military and political leaders.

Finally in the context of the gravity assessment, the 2018 annual report expressly states that consideration is being given by the Office of the Prosecutor as to *“whether the alleged crimes were committed on a large scale or as part of a plan or policy.”*<sup>18</sup> This importantly signifies that the Office of the Prosecutor is including within its gravity assessment whether or not crimes against humanity, in addition to war crimes, were committed during the 2014 hostilities in Gaza.

### **Interests of Justice**

The 2018 annual report is silent on this issue. This is suitable given that the Office of the Prosecutor has apparently not reached a conclusion on whether the complementarity and gravity tests have been satisfied.

It must however be noted that the interests of justice test has gained acute prominence following the unprecedented [12 April 2019 decision of Pre-Trial Chamber II of the International Criminal Court relating to the situation in Afghanistan](#). In its decision, the Pre-Trial Chamber refused to provide authorisation for the Office of the Prosecutor to pursue a fully investigation into the situation in Afghanistan, on the sole basis that it determined it would not be in the interests of justice to do so.

Neither the Office of the Prosecutor nor the Pre-Trial Chamber has ever previously determined that an investigation by the International Criminal Court might be contrary to the interests of justice.<sup>19</sup> The Pre-Trial Chamber reached its decision even after taking into account 680 written representations on behalf of a very large number of victims welcoming the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth.<sup>20</sup>

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<sup>17</sup> Paragraph 280, [Report on Preliminary Examination Activities 2018](#)

<sup>18</sup> Paragraph 281, [Report on Preliminary Examination Activities 2018](#)

<sup>19</sup> Paragraphs 1 and 22 of the [Office of the Prosecutor 's Request for Leave to Appeal](#) the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan

<sup>20</sup> Paragraph 87 of [Pre-Trial Chamber II Decision](#) Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan



The Office of the Prosecutor immediately responded to the decision by saying that they will “*consider all available legal remedies.*” It subsequently submitted a [Request for Leave to Appeal](#) to the Pre-Trial Chamber on 7 June 2019, in which it emphasises that the issues in the 12 April 2019 decision are of “*constitutional importance... not just for this situation but for all situations under consideration at the preliminary examination stage.*”<sup>21</sup>

The decision by the Pre-Trial Chamber on the Afghanistan investigation has been strongly criticised by international legal experts and human rights groups. For example, the director of international justice at the International Federation for Human Rights (FIDH) condemned the decision as “*politically charged.*” This refers to the fact that the decision was made against the overarching context of [recent extraordinary threats made against the ICC by the United States government](#), which followed the [Office of the Prosecutor's decision of 20 November 2017](#) to open a full investigation into Afghanistan that included within its scope alleged criminal offences committed by US armed forces during their interrogation of detainees.

### **What relevance does the ICC's April 2019 decision on Afghanistan have in relation to the preliminary examination into the situation in Palestine?**

At the outset it is important to highlight that the Office of the Prosecutor will not be required to gain judicial authorisation from the Pre-Trial Chamber of the International Criminal Court should it decide to open a full investigation into the situation in Palestine. This is because an automatic judicial check against the powers of the Office of the Prosecutor to initiate a preliminary examination, and then open a full investigation, only arises in the absence of a referral by the UN Security Council or a referral by a State Party to the Rome Statute of the International Criminal Court. The State of Palestine, who is a State Party to the Rome Statute, [referred the situation](#) to the Office of the Prosecutor in May 2018, whereas no State Party to the Rome Statute, nor the UN Security Council, ever made a referral of the situation in Afghanistan.

Although a judicial authorisation will not be required to commence with a possible full investigation into the situation in Palestine, the Pre-Trial Chamber's analysis of the interests of justice test may nonetheless have a potential impact. This is because the Office of the Prosecutor may decide that, pending the outcome of its appeal against the decision by the Pre-Trial Chamber in the Afghanistan situation, it will be prudent to take account of the reasoning of the Pre-Trial Chamber when making its own determination on the interests of justice requirement in relation to its preliminary examination on Palestine.

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<sup>21</sup> Paragraphs 5 of the [Office of the Prosecutor's Request for Leave to Appeal](#) the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan



That being said, the Office of the Prosecutor may also decide that relatively little weight should be given to the reasoning given by the Pre-Trial Chamber in its decision, if it takes the position that the reasoning is fundamentally flawed and/or inconsistent with the overarching purposes of the Rome Statute of the International Criminal Court: *“the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities.”*<sup>22</sup>

We can briefly summarise here that the Pre-Trial Chamber reached their negative decision by first determining that *“an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.”*<sup>23</sup>

The Pre-Trial Chamber then ascertained the following factors were particularly relevant when concluding that there would not be an effective investigation and subsequent prosecution within a reasonable time in the context of Afghanistan: *“(i) the significant time elapsed between the alleged crimes and the [Prosecutor’s] Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time, even for the limited purposes of a preliminary examination, as such based on information rather than evidence; (iii) the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution’s investigative efforts and activities at this stage.”*<sup>24</sup>

The Pre-Trial Chamber concluded that these factors should override the wishes of the victims to proceed with an investigation. It did so based on the following rationale: *“[V]ictims’ expectations will not go beyond little more than aspirations. This, far from honouring the victims’ wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.”*<sup>25</sup>

Against this context, it may be useful to outline a few initial observations that we have on the potential application of each of the three specific factors to the situation of Palestine, and how the differing material facts could lead to a distinctly different *interests of justice* determination.

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22 See preamble to [Rome Statute of the International Criminal Court](#). Also see paragraph 89 of [Pre-Trial Chamber II Decision](#) Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan

23 Paragraph 89 of [Pre-Trial Chamber II Decision](#) Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan

24 Paragraph 91 of [Pre-Trial Chamber II Decision](#) Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan

25 Paragraph 96 of [Pre-Trial Chamber II Decision](#) Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan



In relation to the *time lapse factor*, the preliminary examination into the situation in Afghanistan lasted for 11 years in relation to alleged crimes committed since 1 May 2003, and mainly for alleged crimes committed in the early half of the decade between 2005 and 2015<sup>26</sup>. In comparison, the preliminary examination into the situation in Palestine has currently lasted a distinctly shorter period of 4.5 years in relation to alleged crimes committed since 13 June 2014, and some of the alleged crimes being considered within the context of the preliminary examination are ongoing, e.g. alleged crimes related to settlement activities.

In relation to the *scarce cooperation factor*, the preliminary examination did not receive a state referral from any State party to the Rome Statute, including Afghanistan, whilst, in contrast, the State of Palestine has expressed its support for the International Criminal Court's intervention through its referral made to the Court in 2018.

In relation to the *access to evidence and potential suspects factor*, the combination of the factual circumstances relevant to the first two factors appear to be materially relevant to enabling a positive assessment in relation to this third and final factor.

The Office of the Prosecutor could accordingly, on an initial view, be potentially able to reach a positive assessment on the *interests of justice* criterion, even should it decide to fully apply the factors outlined by the Pre-Trial Chamber in its Afghanistan decision on 12 April 2019.

## What happens next?

To answer this question, it is necessary to briefly outline the process that the Office of the Prosecutor must adhere to when concluding a preliminary examination, followed by the investigation and prosecution processes that may follow.

Opening a preliminary examination allows the Office of the Prosecutor to conduct an analysis of information in order to determine whether the threshold for initiating an investigation under the Rome Statute for the International Criminal Court has been met: there must be a *reasonable basis to proceed* after having taken into account jurisdiction and admissibility factors.

There is no timeline provided in the Rome Statute for bringing a preliminary examination to a close. Depending on the facts and circumstances of each situation, the Office of the Prosecutor may decide to: (i) decline to initiate an investigation; (ii) continue to collect information on crimes and relevant national proceedings in order to make a determination; or (iii) initiate the investigation, subject to judicial authorisation as appropriate.

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<sup>26</sup> Paragraph 93 of [Pre-Trial Chamber II Decision](#) Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan



If it is established that there is a reasonable basis to proceed, the Office of the Prosecutor can initiate an investigation based upon either: (i) a referral by the UN Security Council; (ii) a referral by a State Party; or (iii) *proprio motu* (at its own initiative/on its own authority). Where an investigation is undertaken by the Office of the Prosecutor of its own accord, it must first seek the authorisation of the judges of the Pre-Trial Chamber of the Court.

As noted above, in light of the [referral lodged by the State of Palestine in May 2018](#), the Office of the Prosecutor will not be required to seek the authorisation of the Pre-Trial Chamber in order to proceed with an investigation. This appears significant in light of the aforementioned Pre-Trial Chamber decision of 12 April 2019 to overturn the Office of the Prosecutor's decision to open an investigation into the Afghanistan situation, in circumstances where there had been neither a referral by the UN Security Council nor a referral by a State Party to the Rome Statute.

### **Investigation Process**

If an investigation is initiated, the Office of the Prosecutor will assemble an investigative team comprising investigators, co-operation advisers and, if necessary, prosecutors. They will then seek access to the relevant area in an effort to collect and examine different forms of evidence, and question a range of persons, from those being investigated to victims and witnesses.

The International Criminal Court [notes](#) that the investigative process “*relies heavily on the assistance and cooperation of States parties, international and regional organisations, as well as civil society.*” Palestine is a State Party to the Rome Statute and its decision to lodge a referral to the Court on 15 May 2018 suggests a will to fully cooperate in any future investigation. On the other hand, Israel is a non-State Party to the Rome Statute and has no obligation to cooperate with the Court. It seems unlikely that it will do so voluntarily given its opposition to the Court. It is unclear what potential impact these factors might have on the effectiveness of a potential full investigation by the Office of the Prosecutor.

The investigative process allows the Office of the Prosecutor to identify the “*gravest incidents and those most responsible for [the] crimes.*” It is incumbent on the Office of the Prosecutor to collect both incriminating and exonerating evidence in order to establish the truth about any given situation. The exonerating evidence is disclosed to the Defence teams as part of potential later proceedings.

Once the Office of the Prosecutor considers it has gathered sufficient evidence to prove before the International Criminal Court judges that an individual is responsible for a crime in the Court's jurisdiction, it will request the judges to issue either: i) a warrant of arrest, or, ii) a summons to appear.



If the judges determine that there are reasonable grounds to believe that the individual has committed a crime within the Court's jurisdiction, they will only issue an arrest warrant if considered necessary to ensure a person's presence at trial, to prevent the person from obstructing or endangering the investigation or Court proceedings, or to ensure the prevention of further criminal activity.

The powers to execute arrest warrants are vested in States. States Parties to the Rome Statute have an obligation to cooperate fully with the International Criminal Court (Article 86 of the Rome Statute) and to ensure that there are procedures available under their national law to execute all cooperation requests from the Court made under Part 9 of the Statute (Article 88 of the Rome Statute). An arrest warrant is valid for life once it is issued.

Once arrested, suspects are placed in custody at the Court's detention centre, where they will remain through the course of the Court proceedings unless the chamber decides otherwise. Pre-Trial and Trial Chambers dealing with a case must periodically review whether the conditions requiring the person to be detained continue to be met.

In the alternative to issuing an arrest warrant, judges can issue a summons to appear where there are reasonable grounds to believe that this is sufficient to ensure the individual's appearance in Court. An individual subject to a summons to appear will attend the Court voluntarily and is not held in the custody of the Court.

It should be noted that once an investigation is opened by the Office of the Prosecutor, [Article 18 and Article 19 of the Rome Statute](#) provides for challenges regarding to admissibility or to the jurisdiction of the Court.

Article 18 provides that where the Prosecutor initiates an investigation, it shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes under the Rome Statute and which relate to the information provided in the notification to States.

At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorise the investigation. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.



Article 19 provides for challenges to the jurisdiction of the Court or the admissibility of a case from either: i) the accused, ii) a person subject to an arrest warrant or summons, or iii) a State which has jurisdiction over a case. A State which has jurisdiction over a case may only make a challenge on the basis that it is either investigating or prosecuting the case, or has completed its investigation or prosecution of the case. A challenge can only be made once by a relevant party. It should also be made at the earliest possible opportunity. If a challenge is made, the Prosecutor must suspend the investigation until the Court has made a ruling on the challenge.

An Article 18 or 19 challenge to admissibility is therefore potentially open for activation by the State of Israel if the Office of the Prosecutor opens an investigation into the situation in Palestine. However, it can only do so by arguing that it has already investigated, or is investigating, Rome Statute crimes or specific cases that are within the scope of the Office's investigation (up to now there are no relevant prosecutions that Israel could refer to).

In addition, an Article 19 challenge on jurisdiction or admissibility grounds could be brought by an accused, or by a person for whom a warrant of arrest or a summons to appear has been issued, in the potential scenario of cases against specific individuals being opened following an investigation into the situation in Palestine.

### **Prosecution Process**

Once the person for whom an arrest warrant or a summons to appear has been issued is in the Court's custody or decides to come voluntarily to the Court, the Office of the Prosecutor will first have to convince the judges, at the Pre-Trial phase, that it has sufficient evidence to commit the case to trial. At this stage, the judges will have to decide whether to confirm, decline, or review the charges presented by the Office of the Prosecutor against the defendant.

If the judges confirm the charges, the case goes to trial. Once at trial, the Office of the Prosecutor is first to present its case, and bears the burden of proof that the accused person is guilty beyond reasonable doubt. The Office of the Prosecutor can present evidence in the form of documents, other tangible objects, or witness statements. It should be noted that the Office of the Prosecutor has also been developing capacity regarding use of digital evidence, as used in the request for the [arrest warrant against Mahmoud el-Werfelli](#) for alleged war crimes in Libya.

The Office of the Prosecutor's witnesses are questioned by the Defence, and vice versa. Once the Office of the Prosecutor has presented all its evidence, it is the turn of the accused, with the assistance of his or her counsel, to present his or her Defence.

It is important to add that victims can come forward and apply to be recognised as participants, and be represented by a lawyer.



## Conclusion

This Q&A has outlined the current progress of the International Criminal Court's ongoing preliminary examination into the situation in Palestine, and potential next steps. The last update from the Office of the Prosecutor strongly indicated that it is very close to concluding its preliminary examination. LPHR will continue to closely monitor this very significant process which may lead to providing legal accountability and justice to victims, survivors and their families for alleged serious international crimes.

**Alamara Khwaja Bettum, Tareq Shrourou**

## Relevant further LPHR reading:

- [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](#)
- [Complaint 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](#) (jointly submitted with Al Mezan Centre for Human Rights)
- [Justice Denied: Gaza human shield survivors and the systemic failure of Israel's military investigation system to provide accountability](#) (joint report with Al Mezan Centre for Human Rights)
- [Complaint submitted 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](#) (jointly submitted with Al Mezan Centre for Human Rights and Medical Aid for Palestinians)
- [No More Impunity: Gaza's Health Sector Under Attack](#) (joint report with Al Mezan Centre for Human Rights and Medical Aid for Palestinians)
- [LPHR Commentary: Israel's Supreme Court judgment on the legality of Israel's rules of engagement in the context of use of force against Gaza protesters](#) (submitted to the UN independent Commission of Inquiry on the 2018 Protests in the Occupied Palestinian Territory)
- [LPHR Briefing: The impending demolition of the Palestinian community of Khan al-Ahmar in the occupied West Bank and the forcible transfer of its residents](#)