Israel-Hamas 2024 Symposium – Pro-Israel Lawfare, Symbolism, or Genuine Legal Concern?

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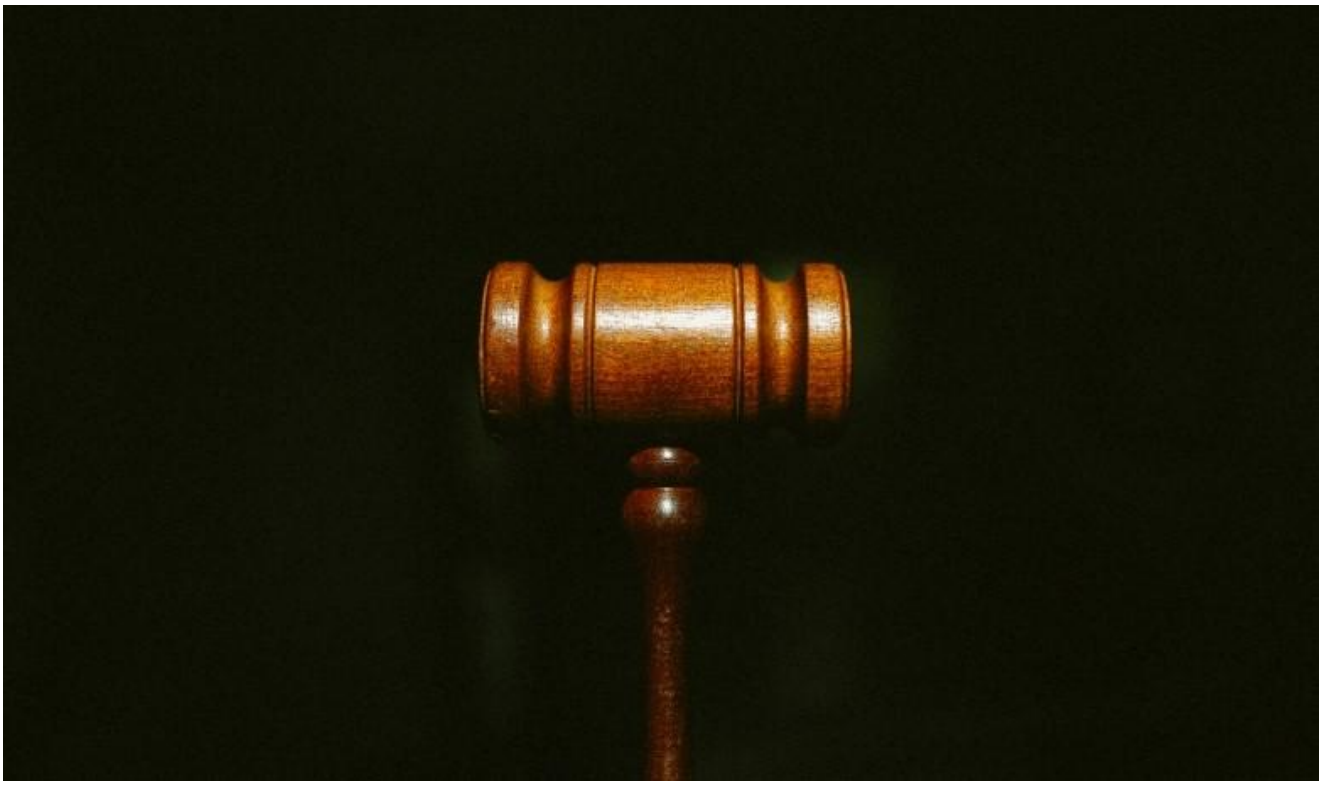

Israel often perceives itself at the receiving end of what today is termed “lawfare”: warfare by legal means or the use of strategic litigation to achieve in the courtroom what cannot be achieved on the battlefield. South Africa’s case against Israel or Nicaragua’s case against Germany at the International Court of Justice (ICJ) with regard Israel’s military operation in the Gaza Strip, Palestine’s inter-State communication against Israel before the Committee on the Elimination of Racial Discrimination with regard to Israel’s conduct in the Occupied Palestinian Territory (OPT), and the General Assembly’s request for an advisory opinion by the ICJ on the legal consequences arising from the policies and practices of Israel in the OPT, including East Jerusalem, are usually mentioned in this context.

But lawfare also seems to be employed in the other direction. On 20 May 2024, the Prosecutor of the International Criminal Court (ICC) announced that he had filed applications for warrants of arrest before the ICC’s Pre-Trial Chamber I in the Situation in the State of Palestine not just for three Hamas leaders but also for Israel’s Prime Minister Benjamin Netanyahu and Defence Minister Yoav Gallant. The latter were accused of war crimes and crimes against humanity committed on the territory of the State of Palestine (in the Gaza

strip) from at least 8 October 2023, including starvation of civilians as a method of warfare, extermination in the context of deaths caused by starvation, and intentionally directing attacks against a civilian population. The application for arrest warrants for the two State officials caused outrage in Israel. The Government of Israel called on "the nations of the civilised, free world . . . to stand by Israel" and to "oppose the prosecutor's decision." Israel's allies, especially the United States, the United Kingdom and Germany, expressed consternation about the step and criticised the simultaneous applications for arrest warrants for the Hamas leadership on the one hand and the two Israeli officials on the other claiming that this resulted in an incorrect implication of equivalence.

The UK's Request to Provide *Amicus Curiae* Observations

On 10 June 2024, for the first time in the history of the ICC, a State filed a request with a Pre-Trial Chamber of the ICC to provide written *amicus curiae* observations at the arrest warrant stage of the proceedings in order to prevent the issuance of an arrest warrant. The United Kingdom requested to provide observations on whether "the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords." The United Kingdom submitted that the Chamber, pursuant to Article 19(1) of the Rome Statute, was "required to make an initial determination of jurisdiction in resolving the application for arrest warrants."

While in February 2021 a Pre-Trial Chamber of the ICC had found that the Court may exercise its jurisdiction over international crimes committed on the territory of Palestine, the Chamber at the time "did not determine the jurisdictional issues relating to the Oslo Accords." The United Kingdom argued, in effect, that the Pre-Trial Chamber could not issue warrants of arrest for Israel's Prime Minister and Minister of Defence because under Article XVII(2)(c) of the Oslo II Accord, Palestine or, more precisely, the Palestinian Council, did not have jurisdiction over Israeli nationals and that, in accordance with the general principle of *nemo plus iuris transferre potest quam ipse habet*, Palestine could not transfer a jurisdiction to the ICC which it did not possess.

Under rule 103(1) of the ICC Rules of Procedure and Evidence, a Chamber of the Court, if it considers it desirable for the proper determination of the case, may grant leave to a State to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate. Given the potential relevance of the issue the United Kingdom wished to address, Pre-Trial Chamber I decided on 27 June 2024 to authorise the United Kingdom to file by 12 July 2024 written *amicus curiae* observations pursuant to rule 103 of the Rules, which may not exceed 10 pages. On 2 July 2024, the United Kingdom requested an extension of two weeks for the filing of its observations in light of the approaching general election in the United Kingdom on 4 July. Considering that good cause had been shown, Pre-Trial Chamber I authorised the United Kingdom to file the observations by 26 July 2024. It is understood that the new Labour Government in the United Kingdom will maintain its request and file observations by the deadline.

Anticipating that its decision to grant the United Kingdom leave to file observations, may result in other States making similar requests, on 27 June 2024 Pre-Trial Chamber I also decided that any such request must be received by 12 July 2024 in order to limit the impact of this procedure on the expeditiousness of the present stage of the proceedings.

Germany's Request to Provide *Amicus Curiae* Observations

On 16 July 2024, it was reported that Germany had also filed a request with Pre-Trial Chamber I to provide written *amicus curiae* observations with regard to the applications for arrest warrants for Prime Minister Netanyahu and Defence Minister Gallant. It was said that Germany intervened "in Israel's interest." The Federal Foreign Office stated that incidents such as attacks on schools or hospitals "must be fully investigated by the Israeli judiciary and, where necessary, punished . . . . We have repeatedly called on Israel to do this, and the Israeli judiciary has also repeatedly initiated this." Berlin intended to focus in its observations on the principle of complementarity and the question of whether the ICC could already act during the ongoing war.

According to the principle of complementarity, the ICC can only take action if the country's judiciary is unwilling or unable to investigate the crimes in question. The Federal Foreign Office argued that, in view of the seriousness of the allegations and the ongoing conflict, the investigations by the Israeli judiciary required "time and care." While nothing more was said in the report, it seems that Germany intends to argue that it is too early to decide the question of complementarity because the Israeli judiciary must be given time to investigate and that therefore, at the present moment no arrest warrant against the Israeli officials should be issued.

While the request for leave to file an *amicus curiae* observation was deliberately revealed to the press by the German Federal Foreign Office, any enquiry about the content of these observations was blocked. The German Embassy in the Netherlands, which handles legal briefs at the international courts in The Hague, even declined to confirm that a request had been made, stating that,

> the relevant chamber could order that all documents relating to observations in proceedings under rule 103 (1) of the Rules of Procedure and Evidence be classified as confidential. If the chamber were to do so, then not even the fact that an observation had been made, let alone the content, could be made public. In such a case, the chamber would first have to change the classification before any statement of any kind regarding any observation made could be made public.

This conduct may be explained by that fact that a basic tenet of German foreign policy is to "stand by Israel's side" and, perhaps even more importantly, to be seen standing by Israel's side. It is also a good example of the Federal Foreign Office's general policy of secrecy and extreme cautiousness in matters of international law.

On the day the ICC Prosecutor made public the applications for arrest warrants, the Federal Foreign Office had declared that the "Court will have a host of difficult questions to answer here, including in particular the question as to its jurisdiction and the complementarity of investigations carried out by affected states governed by the rule of law, which include Israel." It seems that the United Kingdom and Germany agreed on a division of labour: while the United Kingdom was to challenge the ICC's jurisdiction, Germany was to question the admissibility of the case on the ground of investigations by the Israeli judiciary. The aim of both *amicus curiae* observations, however, was the same – to get the two Israeli officials off the ICC's hook.

Germany's Complementarity Argument

The United Kingdom's jurisdictional argument has been examined in detail elsewhere. While not much is known about the substance of the German *amicus curiae* observations at this stage, an admissibility challenge on grounds of complementarity seems even more tenuous than the United Kingdom's Oslo II Accord argument. As the ICC Appeals Chamber in the case concerning the Situation in the Democratic Republic of Congo held in 2006: "An initial determination by the Pre-Trial Chamber that the case is admissible is not a prerequisite for the issuance of a warrant of arrest pursuant to article 58(1) of the Rome Statute." On the contrary, while the Pre-Trial Chamber has discretion pursuant to article 19(1), second sentence, of the Rome Statute to address the admissibility of a case on an application for the issuance of a warrant of arrest, in most cases such a determination will be to the detriment of the interests of the suspect. None of the exceptional circumstances identified by the Appeals Chamber that would call for a determination of admissibility at the arrest warrant stage of proceedings are present in the case of the Israeli officials.

In any case, any complementarity objection would require that the Israeli judiciary actually investigates the crimes for which the Prosecutor has sought arrest warrants. As the Prosecutor noted in his statement of 20 May 2024:

> [T]he principle of complementarity . . . will continue to be assessed by my Office as we take action in relation to the above-listed alleged crimes and alleged perpetrators and move forward with other lines of inquiry. Complementarity, however, requires a deferral to national authorities only when they engage in independent and impartial judicial processes that do not shield suspects and are not a sham. It requires thorough investigations at all levels addressing the policies and actions underlying these applications.

There is no indication, let alone information, in the public domain that the Israeli judiciary has been investigating Prime Minister Netanyahu and Defence Minister Gallant for the war crime of starvation as a method of warfare or any of the other war crimes and crimes against humanity underlying the applications for arrest warrants. One wonders what classified information Germany has got about such investigations, which it could reasonably bring to

the attention of the ICC. If such investigations were in fact being conducted, it would be open to both the Israeli suspects and Israel itself to challenge the admissibility of the case at any time. It was therefore not necessary for Germany to "come to the aid" of the Israeli officials by raising the question of complementarity before a warrant of arrest has even been issued.

Germany also seems intent to argue that it is too early for the ICC to decide on the question of complementarity during an ongoing war because allegations of such seriousness require "time and care." However, investigations into, for example, the war crime of starvation of civilians as a method of warfare seem rather straightforward, which is probably why the Prosecutor focused on this war crime. If the Prosecutor was able to investigate this crime and prepare a casefile, so should the Israeli judiciary. If no investigations have been conducted nine months into the conflict, this suggests that the Israeli judiciary is either unable or unwilling to do so.

An "it is too early to tell" argument with regard to complementarity would also raise the question of how long the ICC should give the Israeli judiciary to act. The fact that the war in Gaza is ongoing may generally make investigations more difficult, but the fact that a conflict is ongoing has never prevented the ICC from issuing an arrest warrant. This is not least because the person for whom a warrant of arrest has been issued under article 58 of the Rome Statute can challenge the admissibility of the case on grounds of complementarity at any time in the proceedings. If the question of complementarity was really a question of timing, a similar argument could be made with regard to the arrest warrants for the Hamas leaders – namely, that investigations by the Palestinian judiciary required time and care.

The Impact of the Requests

One may wonder whether Germany's request for leave to file *amicus curiae* observations was really about complementarity and the admissibility of the case or whether it was just another way to show its steadfast solidarity with Israel. In any case, both the United Kingdom's and Germany's interventions have the consequence of prolonging the arrest warrant proceedings. Pre-Trial Chamber I will have to decide next on whether to authorise Germany to file written observations. Considering that it allowed the United Kingdom to do so and, at the time made arrangements for requests by other States, it is expected that in the next few days the Chamber will authorise Germany to do so. In the case of the United Kingdom, the Chamber initially decided that these observations must be submitted within 14 days. It can thus be assumed that Germany will have to file its observations with the Registrar in the second or third week of August 2024. The Registrar will then provide a copy of Germany's written observations to the Prosecutor who, in turn, will be given an opportunity to respond to these and to any other observations authorised by the Chamber. This, again, will take some time.

Once all the relevant documents are before it, the Pre-Trial Chamber will deliberate and finally decide on the applications for the warrants of arrest. This procedure shows that, contrary to what has been claimed in some parts of the media, arrest warrants will not be issued “within the next two weeks.” On the contrary, Germany’s intervention will make sure that no decision will be taken before September.

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