# The ICC Palestine Case in the Aftermath of the Arrest Warrants Decisions – Part One

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On November 21, 2024, the Pre-Trial Chamber of the International Criminal Court (ICC) issued four decisions. These deal with various legal matters arising out of the Prosecutor's May 20 request to issue arrest warrants as part of his ongoing investigation of the Situation in Palestine, in the context of the War in Gaza.

– The Court rejected as premature Israel's jurisdictional objection to the request to issue arrest warrants to Israeli Prime Minister Benjamin Netanyahu and former Minister of Defense Yoav Gallant.

– The Court rejected as legally unfounded Israel's claim that, before requesting the arrest warrants, the Prosecutor should have notified it of the possibility to conduct its own investigation pursuant to Article 18 to the Rome Statute of the ICC.

– The Court approved the Prosecutor's request to issue arrest warrants against Netanyahu and Galant.

– The Court approved the Prosecutor's request and issued an arrest warrant against senior Hamas leader Muhamad Deif (despite Israel's claims that he has been killed in the war).

Read together, these four decisions represent a major development in the ICC's involvement in the war in Gaza. They also give rise to interesting, at times troubling, questions regarding the conduct of ICC proceedings leading up to the issuance of arrest warrants.

In this two-part post we discuss the four decisions of the Court, and their implications for the next stages of the proceedings. We also offer preliminary thoughts as to the possible repercussions that might emanate from these decisions.

In the first part, we deal with the two procedural decisions issued by the Court. In the second part we deal with the arrest warrants and their implications. We note that according to Article 82(1)(a) of the Rome Statute, and Rule 154(1) of the ICC's Rules of Procedure and Evidence, Israel has a right to appeal the two procedural decisions within five days of the date it was notified of them. Still, at the time of writing this post, it is unclear whether Israel will choose to do so.

**The Decision on Jurisdiction**

Given the unique jurisdictional features of the Palestine case—that is, the reliance on the accession to the ICC Statute of the State of Palestine, whose exact status under international law and scope and geographical reach of legal powers remain heavily contested—it was always clear that any legal proceedings in the case would involve difficult jurisdictional issues. Such issues must be resolved by the Court at an early stage of the proceedings in view of the language of Article 19(1) of the ICC Statute which states, "The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17."

Anticipating difficulties in this regard, the previous Prosecutor, Fatou Bensouda, who opened the first preliminary examination and investigation in the Palestine case requested the Court in 2020, pursuant to Article 19(3) of the Statute, to confirm its territorial jurisdiction over the case. In a 2021 decision, the Pre-Trial Chamber held that Palestine's membership in the Rome Statute implies that crimes committed on the territories occupied by Israel in 1967 (West Bank, including East Jerusalem, and the Gaza Strip) were committed on the territory of a member State and fall, in principle, under the Court's jurisdiction.

Still, two of the three chamber judges deferred judgment on the question whether the Oslo Accords, which limited the criminal jurisdiction of the Palestinian Authority, impact the Court's jurisdiction. They held that:

[129] the arguments regarding the Oslo Agreements 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. The Chamber considers 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 will not address these arguments.

…

[131] When the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time.

A third judge was of the view that because the Oslo Accords did not confer jurisdiction on the Palestinian Authority over Israeli nationals, the Court too had no jurisdiction over such cases (unless Israel accepted the Court's jurisdiction) by virtue of the principle that one cannot transfer to others legal powers that it did not have (*Nemo dat quod non habet* or *nemo plus iuris transferre potest quam ipse habet*).

Following the Prosecutor's May 20 request for arrest warrants, which named two Israeli nationals (Netanyahu and Gallant), the question of the *ratione personae* jurisdiction of the Court re-emerged. On June 10, the United Kingdom filed a request for leave to submit written observations on the matter of the Court's jurisdiction, pursuant to Rule 103 of the Rules of Procedure and Evidence. The request put forward the position that the Court should decide the jurisdictional questions left unresolved in the 2021 decision, before it proceeds to decide on whether or not to issue arrest warrants in the case.

On June 27 the Court approved the UK request and decided that any other interested party may also submit requests to file *amicus* briefs (without clearly limiting the issues which the briefs should address). Indeed, more than seventy interested parties, including States, organizations, and individuals, were granted permission to submit *amicus* briefs to the court (this post's two authors were among those who received permission to submit an *amicus* brief). Many of these briefs referred to the impact of the Oslo Accords on the Court's jurisdiction (see e.g., here, here, here, and here). These and other briefs also raised additional issues concerning jurisdiction and admissibility (see e.g., here and here). The Prosecutor submitted a response to the different briefs on August 23.

On September 20, Israel submitted an independent challenge to the Court's jurisdiction, invoking its status as a "State from which acceptance of jurisdiction is required under article 12" pursuant to Article 19(2)(c) of the Statute. In its challenge, Israel raised two separate objections to the Court's jurisdiction.

First, Israel reiterated its opposition to the fact that Palestine is considered a State for the purpose of ICC jurisdiction. Second, and more importantly, Israel claimed that even if Palestine is a State for ICC purposes, it lacks jurisdiction over Israelis, by virtue of the Oslo

Accords, and could not therefore delegate such jurisdiction to the ICC. As we noted above, the same claim was left undecided in the 2021 decision, in which the Court decided that this issue should be raised at a later point in time, in the context of future arrest warrant proceedings.

The Prosecutor submitted a short reply on September 27, claiming that the challenge is premature (that is, it cannot be raised before arrest warrants are issued), and that Israel lacks standing to bring it under Article 19(2)(c), because once Palestine joined the Statute, Israel's acceptance of jurisdiction is no longer "required."

In its short decision of November 21, the Pre-Trial Chamber rejected Israel's challenge, effectively accepting the Prosecutor's position. On the question of standing, the Court held that,

In the matter under consideration, the acceptance by Israel of the Court's jurisdiction is not required, as the Court can exercise its jurisdiction on the basis of the territorial jurisdiction of Palestine. As soon as there is one jurisdictional basis pursuant to article 12(2)(a) or (b) of the Statute, there is no need for an additional one (para. 13).

The chamber cited in support of its position a 2019 Pre-Trial Chamber decision on jurisdiction in the Afghanistan case. Still, the 2019 decision did not discuss at all the question of *standing* under article 19(2). Rather, it noted, correctly, that the territorial State's acceptance of jurisdiction renders it unnecessary to also obtain acceptance of jurisdiction by the State of nationality. This was not, however, the issue of standing raised by Israel.

The approach taken in the decision—that Article 19(2)(c) does not afford standing to any State besides the one on which the Prosecutor relied in order to base jurisdiction under Article 12—ignores what seems to us to be the overriding aim of Article 19. The article's purpose is to allow challenges to the jurisdiction and admissibility of the case by specially affected individuals and States. This includes States investigating the crimes and, arguably, all States referred to in Article 12 as States whose acceptance of the Court's jurisdiction is *potentially* required by virtue of their strong connection to the case. Professor William Schabas's observations in this regard appear to support this position.

Paragraph (c) contemplates a challenge by a State 'from which acceptance of jurisdiction is required under article 12', obviously referring to article 12(3). This necessarily involves a non-party State, or at least a State that was not a party at the relevant time. It seems implausible that a non-party State should be able to challenge jurisdiction as well as admissibility, yet this is what a literal reading of article 19(2) seems to suggest.

Also relevant is the language in Article 34 of the ILC Draft Statute, which afforded a right to challenge jurisdiction to "any interested state." Such a right should arguably be afforded to all Article 12 States in order to allow them to protect their sovereign interests, which might be adversely affected by a Court decision to proceed with a case affecting their nationals,

events occurring in their territory, or pending investigations or proceedings. This appears, in fact, to have been the position the Appeals Chamber implicitly took in paragraph 44 of its authorization of investigation decision in the Afghanistan case with respect to the Article 19 right of standing of relevant States to raise, at the appropriate stage, jurisdictional issues relating to Article 98 agreements.

In any case, in the particular circumstances of the case, Palestine's jurisdiction over Israeli nationals was fiercely contested. This is illustrated by the fact that *amicus* briefs on this point were allowed by the Court in June 2024 and that the only ICC judge that has so far written a decision on the matter opined that Israel's acceptance of jurisdiction is required. As such, the Pre-Trial Chamber decision not to review the Israeli challenge is unsatisfactory. Concluding that Article 19(2)(c) only allows the State that accepted jurisdiction to challenge it seems to us to be an odd construction, because States that accepted jurisdiction are less likely to challenge jurisdiction than States that did not accept jurisdiction.

But even if one embraces that approach, it is hard to accept the Court's rejection of a direct challenge from the a State that clearly has capacity to accept jurisdiction (the State of nationality) that calls into the question the capacity of the other State—the territorial State—to do so in the specific situation at hand. The Court's response to this argument, which Israel raised in its challenge, is brisk and unclear.

[T]he Chamber rejects Israel's argument that merely because it claims that Palestine could not have delegated jurisdiction to the Court, the Chamber would have to ignore its previous decision (rendered in a different composition) which has become *res judicata*. Indeed, there is a fundamental difference between granting a State standing on the presumptive validity of its claim to have jurisdiction over a situation or a case and granting it standing on the basis of an argument – which was already ruled upon – that a particular State Party does not have jurisdiction (para. 15).

In other words, the Court took the view that the 2021 decision settled the issue of acceptance of jurisdiction for the purposes of standing under Article 19(2)(c). The Court does not explain how this approach can be reconciled with the language of that decision, which contemplates a further jurisdictional challenge "[w]hen the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute." To recall, neither the majority on the 2021 Pre-Trial Chamber, as it was composed then, nor the present Pre-Trial Chamber has engaged with the substance of the Oslo Accord claim. Their holding on jurisdiction was wholly based on Palestine's membership in the ICC Statute, which was indeed confirmed in 2021.

What's more, if jurisdiction is already settled, it is not clear why the Court concludes its decision that "Israel will have the full opportunity to challenge the Court's jurisdiction and/or admissibility of any particular case if and when the Chamber issues any arrest warrants or

summonses against its nationals" (para. 19).

The Court further held that Israel cannot challenge the court's jurisdiction under Article 19 because its challenge is premature. A State can challenge the jurisdiction of the Court under Article 19 only after there a "case" in which to challenge it, and a "case" exists only after the Court issues an arrest warrant. While highly formalistic and not inevitable (as the word "case" is not clearly defined in the Statute), this approach appears to be supported in the case law (see e.g., *Venezuela I* decision, para. 35). Still, the implication of this decision is that now, after arrest warrants were issued, Israel can renew its jurisdictional challenge.

Although, as we mention above, the Court assured Israel that it maintains its right of challenge, the decision is less than clear on what would be the legal basis for *standing* for bringing this challenge. In paragraph 16 of the decision the Court explains that "Israel clearly would have standing to bring a challenge as the State of nationality under article 19(2)(b) *juncto* article 12(2)(b) of the Statute if the Chamber decides to issue any warrants of arrest for Israeli nationals." However, standing under Article 19(2)(b) is available to any investigating or prosecuting State with jurisdiction over the case, and not just to those whose acceptance is required under Article 12 (see Nsereko and Ventura, para. 36). The language of Article 19(2)(b) also appears to focus on complementarity challenges, and not on broader jurisdiction challenges, which appear more suitable under Article 19(1) or 19(2)(c) (see Nsereko and Ventura para. 37; but see Schabas, at p. 493-94, claiming that limiting Article 19(2)(b) challenges to complementarity challenges is illogical).

We find this aspect of the Pre-Trial Chamber decision to be peculiar for another reason. According to Article 19(1) of the Rome Statute, "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it." As Nsereko and Ventura write, based on many previous decisions of the Court, "'an initial determination on whether the case against [the accused] fall[s] within the jurisdiction of the Court […] is a *prerequisite* for the issuance of a warrant of arrest' or a summons to appear" (para. 7, emphasis added)

In 2021, the Court made an informed and explicit decision not to discuss the effects of the Oslo Accords on the Prosecutor's jurisdiction to investigate the situation. This decision arguably made sense from a judicial economy viewpoint. The Prosecutor merely asked to open an investigation into a *situation,* and thus there was no imperative need to discuss the Oslo Accords question before a specific suspect having Israeli nationality was identified. Currently, however, this logic no longer holds.

The Court has before it two Israeli suspects and must establish its jurisdiction over them. The Court is clearly aware of this specific challenge to its jurisdiction because Israel included this in its submission as did many of the *amicus* briefs submitted to it pursuant to Rule 103. Ignoring this issue seems to us to be incompatible with the Court's duties under Article 19(1) of the Statute, and with the expectations articulated in the 2021 decision that the Oslo Accords issue would be discussed at this stage of the proceedings.

Granted, the summary of the arrest warrants issued by the Court mentions that the issue of jurisdiction had been provisionally established by the 2021 decision. However, from this short summary (the full decision issuing the arrest warrants remains confidential) it does not seem as if the issue of the effect of the Oslo Accords on the Court's jurisdiction was actually considered and determined. Indeed, it would also make very little sense to reject the Israeli challenge to jurisdiction relating to the Oslo Accords, without even hinting that the substantive issue raised there has been discussed in another decision issued by the same Pre-Trial Chamber on the very same day.

Finally, it is also hard to reconcile the Pre-Trial Chamber's decision with its previous decision on the UK request and its approval of requests for submission of dozens of other *amicus* briefs. It is not clear to us what was the exact purpose of this entire exercise which delayed the decision in the case by many months (for a criticism of the Court's timeline, see here). Did the Court have a change of heart (coinciding, perhaps, with a change in composition) and simply chose to ignore all the claims raised in the *amicus* briefs, notwithstanding its duty to satisfy itself that it has jurisdiction under Article 19(1)? Does the Court plan to discuss these issues at a later stage of the proceedings? Unfortunately, the Court leaves very few clues about the answers to these questions and the entire rationale underlying the *amicus* proceedings remains opaque.

Regardless of the decision's lack of clarity, it is quite clear that the Court did not, in fact, close the door on Israel's jurisdictional claims. Of course, Netanyahu and Gallant themselves could also raise parallel arguments on jurisdiction. What the Court did was to effectively kick, once again, the jurisdictional can down the road. This is, to our mind, a rather unsatisfactory outcome: The Court has just issued arrest warrants in a very high profile case, directly affecting the core sovereign interests of a non-member State, without fully addressing the jurisdictional issues that put in doubt its very authority to do it. This is despite the previous Prosecutor's Article 19(3) request to the chamber to settle the matter (see para. 20 of the 2020 request), and despite the same chamber's decision—albeit in a different composition—to permit dozens of *amicus* briefs on this very question. In fact, the Court ignores in its decision the voluminous briefs submitted to it, missing an opportunity to decide now the point of law and fact that was comprehensively argued before it.

**The Decision on Article 18**

According to Article 18 of the Rome Statute, when the Prosecutor decides to open a new investigation, he or she should notify the relevant States, which may then inform the Court that they are investigating the same situation (involving the "same groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality, within a situation" (see the Philippines case, para. 106)). The domestic investigation is then periodically reviewed by the ICC.

On September 20 Israel submitted a separate request to the Court, asking it to order the Prosecutor to notify it according to Article 18 about his investigation into events related to the war in Gaza. This effectively asked the court to delay the issuance of arrest warrants until Israel has had a chance to claim that it is investigating the same alleged violations of the ICC Statute. At the heart of this request is the claim that the ICC investigation of possible crimes committed in the Gaza war after 2023 cannot be covered by the notification provided to Israel in 2021 by the previous Prosecutor with regard to other possible crimes (including, the construction of West Bank settlements and incidents relating to previous rounds of violence in Gaza). We should note that both of us have made a similar claim in a post we published shortly after the request for arrest warrants.

The Court rejected Israel's second challenge based on the fact that Israel failed to adequately respond to the 2021 notification, and on its position that the investigation of the new Gaza war is part of the same investigation.

The Chamber notes that the Notification indicated that the investigation concerned alleged crimes in the context of an international armed conflict, Israel's alleged conduct in the context of an occupation, and a non-international armed conflict between Hamas and Israel. In the applications for warrants of arrest, as also explained by the Prosecutor in his public statement at the time of filing the applications, the Prosecution alleges conduct committed in the context of the same type of armed conflicts, concerning the same territories, with the same alleged parties to these conflicts. Therefore, no substantial change has occurred to the parameters of the investigation into the situation. The Chamber notes that Israel's position would effectively mean that the Prosecution's investigation in every situation would be limited to the incidents and crimes addressed during the preliminary examination and described in the article 18 notification. Such interpretation has already been rejected by the Appeals Chamber. There was, and is, therefore, no obligation for the Prosecution to provide a new notification to the relevant States pursuant to article 18(1) of the Statute, and as such to provide a new one-month timeline for requests for deferral.

The Court relied for its decision on two previous ICC decisions in the Afghanistan and Venezuela cases. But here again the Court seems to be mixing different issues. The Afghanistan decision dealt with the question whether or not there is a need for a new *authorization* for the Prosecutor to investigate new incidents, and not with the question of complementarity notification, which raises different practical issues (i.e., even if the new aspects of the investigation are authorized, notification may be needed in order to facilitate a "mirroring" domestic investigation). While the Venezuela decision did deal directly with Article 18 notification, it reviewed the Prosecutor's notification and found that it defined the parameters of the investigation with sufficient clarity and specificity (see e.g., paras. 220, 256). The Court did not engage in the present case in the same level of analysis regarding the 2021 notification. And while the citation to para. 230 of the Venezuela case restates correctly that the "the obligation to provide sufficiently specific information in an article 18 notification does not limit in any way the Prosecutor's future investigations," this does not

dispose of the separate question whether expansion of an existing investigation into incidents that exceed the parameters notified in the past (but not the authorization to investigate) requires a separate notification or some other form of clear and specific communication that could facilitate a mirroring investigation.

We find the position of the Court on Article 18 to be unconvincing (although we are aware of academic support for the position taken by the Court). The principle of complementarity was adopted to incentivize States to take it upon themselves to investigate allegations of international crimes. But without clear and specific notification, it would be extremely difficult for domestic authorities to launch an investigation that mirrors that of the Prosecutor. The 30-day delay in the ICC brought about by the issuance of a new notification which the Court avoided, appears to us to be clearly outweighed by the much longer delays brought about by potential procedural challenges to the failure to notify (note that Israel or other parties may appeal the chamber's decision), and future article 19(2)(b) proceedings. Moreover, the perception that the Court did not try hard enough to ensure Israel's interest in invoking complementarity is found at the heart of third States' challenges to the legitimacy of the ICC proceedings (see e.g., here), putting in question whether the interpretation of Article 18 (even if doctrinally plausible) can be justified on policy grounds.

**Concluding Thoughts**

In sum, we believe that two procedural decisions issued by the court are less than satisfactory and leave much to be discussed in later stages of the proceedings. It seems that if the Court wishes to gain trust in the soundness and integrity of its decisions, a fuller discussion of the jurisdictional issues and a fuller evaluation of the manner in which complementarity was facilitated in the concrete circumstances of the case should have taken place at this stage and not deferred to later stages of the process.

*In Part Two of this post, we will review the two decisions on arrest warrants, and discuss more broadly the legal and other implications of the Court's decisions*.

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