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

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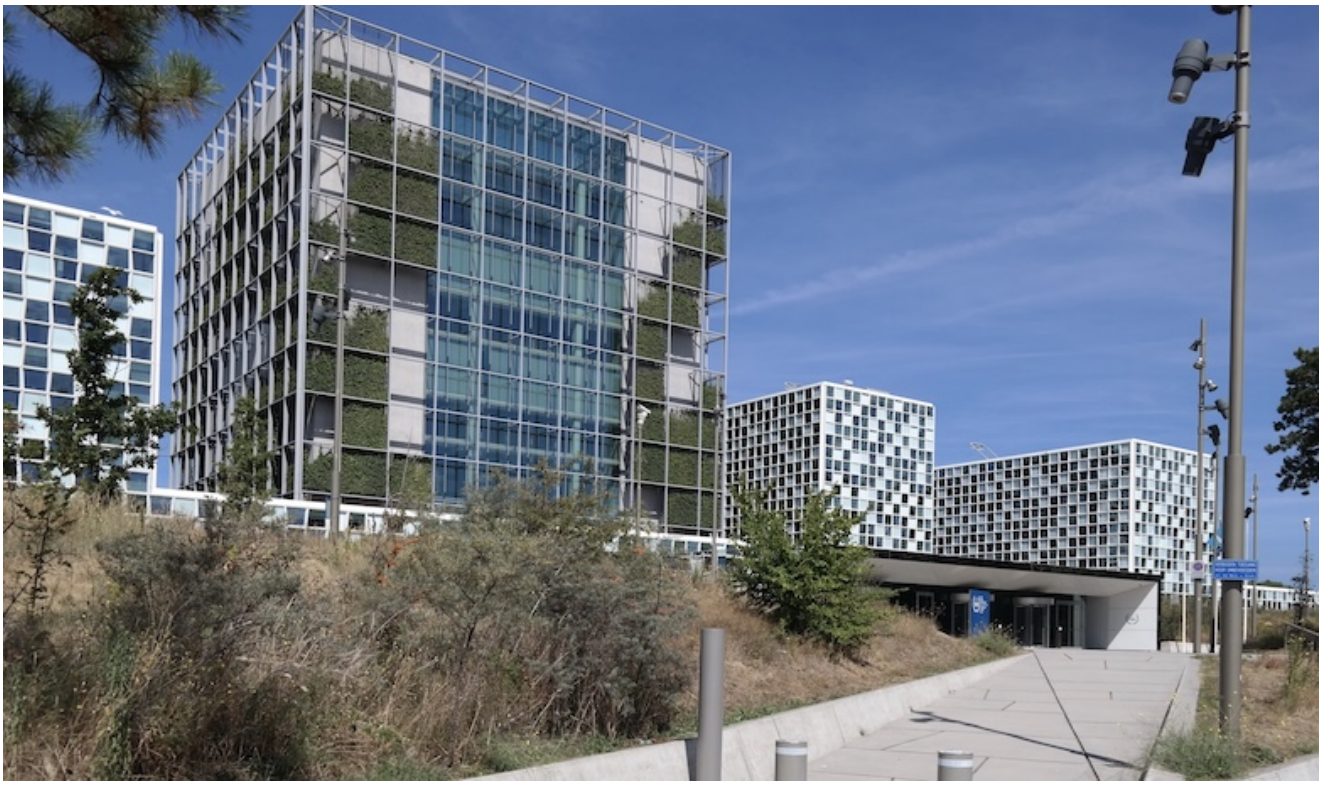

On November 21, 2024, the Pre-trial Chamber of the International Criminal Court (ICC) issued four decisions dealing with various legal matters arising out of the Prosecutor's May 20 request to issue arrest warrants in connection with the war in Gaza. In Part One of this post, we discussed the first two decisions in which the Court dealt with procedural issues: it rejected as premature Israel's jurisdictional objection to the request to issues arrest warrants; and rejected as legally unfounded Israel's claim that before requesting the arrest warrants the Prosecutor should have allowed it the possibility to conduct its own investigation under Article 18 of the Rome Statute. After the publication of the first part of the post, Israel filed two notices of appeal to the ICC Appeals Chamber on the issue of jurisdiction and admissibility (in the context of its complementarity claim) (see here and here) and two parallel requests from the Pre-trial Chamber for a leave to appeal the same two questions (see here and here). The Prosecutor has already asked the Appeals Chamber to reject, on procedural grounds, the two notices of appeal (see here and here).

In the second part of the post, we discuss the two decisions of the Court regarding the issuance of the arrest warrants themselves which it approved against Israeli Prime Minister Benjamin Netanyahu, former Israeli Minister of Defense Yoav Gallant, and senior Hamas leader, Mohammed Deif.

Whereas the two arrest warrants decisions remain confidential—to protect witnesses and "to safeguard the conduct of the investigations"—the Court published a short summary of the two decisions. It justified publication by way of reference to the possibility that similar conduct is still ongoing and the interests of victims and families (the Court used essentially the same language with respect to Putin's arrest warrant from 2023). Still, the summary seems to potentially serve other communicative purposes as well. It accommodates the interests of the suspects to know why their arrest is sought, affords relevant States information that could assist them in asserting complementarity, and explains the action undertaken by the Court to relevant audiences.

We discuss below the two decisions on the basis of the limited information made available by the Court. Given the sparse nature of the information, we must, at times, speculate about the actual contents and reasons underlying the Chamber's decisions. We are assisted in this last endeavor by the Prosecutor's announcement made upon submitting the requests for arrest warrants, and on the panel of expert's report supporting his decision to request arrests.

The Arrest Warrants against Netanyahu and Gallant

Jurisdiction

As noted in Part One of this post, the Court must satisfy itself according to Article 19(1) of the Rome Statute that it has jurisdiction over a case before issuing arrest warrants. Indeed, the summary contains a short discussion of the question of jurisdiction.

At the outset, the Chamber considered that the alleged conduct of Mr. Netanyahu and Mr. Gallant falls within the jurisdiction of the Court. The Chamber recalled that, in a previous composition, it already decided that the Court's jurisdiction in the situation extended to Gaza and the West Bank, including East Jerusalem. Furthermore, the Chamber declined to use its discretionary *proprio motu* powers to determine the admissibility of the two cases at this stage. This is without prejudice to any determination as to the jurisdiction and admissibility of the cases at a later stage.

This paragraph seems to allude to paragraph 15 of the decision rejecting Israel's challenge to the Court's jurisdiction. In that paragraph, the Pre-trial Chamber considered its 2021 decision on jurisdiction to be *res judicata*. Still, as we explained in Part One of this post, the 2021 decision focused on the implication of the 2015 accession of the State of Palestine to the Rome Statute on the Court's territorial jurisdiction. It explicitly refrained from deciding the impact of the Oslo Accords on the Court's jurisdiction.

From the summary, it appears that the Pre-trial Chamber decided only the question of territorial jurisdiction, confirming that the territory of the State of Palestine extends for jurisdictional purposes to the Gaza Strip and West Bank, including East Jerusalem. There is no indication that the impact of the Oslo Accords on the Court's jurisdiction was considered and determined. The Court's "no prejudice" formulation, alluding to subsequent determinations of jurisdiction and admissibility at a later stage of the proceedings, confirms this. As we explained in Part One, we have serious doubts whether the Chamber complied with its duty under Article 19(1) to "satisfy itself that it has jurisdiction" in the case before issuing arrest warrants. This is so especially because the matter of jurisdiction was extensively argued in the many *amicus* briefs submitted to the ICC in 2020 and 2024, and in Israel's jurisdictional challenge from September 20. In its notice of appeal to jurisdiction, Israel also stressed the connection between its jurisdictional challenge and the Court's duties under Article 19(1) of the Statute (see e.g., para. 3).

By contrast, while we have reservations about the discretion it exercised, the Court clearly acted within its right in refusing to engage *proprio motu* with admissibility issues at this stage of the process. These include the issues discussed in Part One of this post pertaining to the manner by which the Prosecutor fulfilled his Article 18 duty to provide a clear and specific notification regarding the parameters of the investigation that would allow Israel and other relevant States to exercise the right to invoke complementarity. These issues have now been raised again before the Appeals and Pre-trial Chambers in the contexts of the Israeli appeal of the decision on the Article 18(1) notice.

Legal Definition of the Conflict

The Prosecutor claimed, and the Pre-trial Chamber agreed, that the classification of the armed conflict which broke in Gaza after October 7 is a hybrid one, comprising of a non-international armed conflict (NIAC) between Israel and Hamas, as well as an international armed conflict (IAC) between Israel and Palestine. In a previous post, we discussed at length the Prosecutor's claim that two armed conflicts were at play and his legal conclusion concerning the parallel application of the law regarding NIAC and IAC. We will not reiterate the full discussion here.

Suffice it to say, that it appears from the summary that the Court accepted all three legal theories mentioned in the panel of experts' report in relation to the parallel existence of an IAC: (a) that an IAC occurs when there exists a NIAC on the territory of a member State between a foreign State and a non-State actor; (b) that Israel and Palestine are both parties to the Geneva Conventions and that common Article 2 applies in their bilateral relations; and that (c) Israel is the occupying power in the Gaza strip. On that basis, the Court was able to find reasonable grounds to attach responsibility to Netanyahu and Gallant for the war crime of starvation as a method of warfare, a crime which only applies as far as Palestine is concerned in situations of IAC.

As we explained in the earlier post, all three legal conclusions of the experts, now endorsed by the Court, could and, most likely, would be contested, as would the designation of starvation as a method of warfare falling under the IAC and not the NIAC aspect of the conflict. In fact, it is difficult to see what IAC war crimes would *not* be applicable under this legal construction in cases involving Israeli defendants (whereas Hamas defendants would only be responsible for NIAC war crimes as the summary of the arrest warrant against Deif shows). By contrast, crimes against humanity are applicable to both parties in both IAC and NIAC.

We believe that a sound application of the theory of parallel application should distinguish between practices directly related to the conduct of hostilities between Israel and Hamas and other practices relating to obligations directly owed by Israel to the civilian population. Whereas Israel's legal obligations to facilitate or provide the civilian population with humanitarian assistance are directly related to the latter, criminal prohibitions on certain means and methods of warfare, including starvation of civilians *as a method of warfare* (that is, on certain forms of siege), appear to us to be more related to the former.

Similarly, applying fully the law of belligerent occupation to the Gaza Strip as a basis for applying IAC, including with respect to areas and periods of time in which large scale hostilities between a State and a non-State actor were taking place, puts in question an important distinction between the laws pertaining to the conduct of hostilities and the laws of belligerent occupation, which assume a degree of effective control over the area in question (and, by implication, an end to, or significant reduction in, the intensity of active fighting). Arguably, even if the entire Gaza strip has been an occupied territory throughout the duration of the current armed conflict (a legal conclusion we do not fully share), the rules on conduct of hostilities should operate as the dominant set of rules for the purpose of calibrating the precise legal obligations, including under international criminal law, of the parties to the armed conflict.

In any event, it is unfortunate that the reasons underlying the decision of the Court regarding the classification of the armed conflict remain confidential. And it is hard to see what justification there could be for secrecy around this largely doctrinal point. Declassification of this part would have allowed outside observers to scrutinize the legal approach taken by the Court and might have even allowed interested parties to try to appeal this part of the decision.

The Crimes

The decision of the Pre-trial Chamber that the war in Gaza qualifies as an IAC is especially important. As we explained in a previous post, the starvation as a method of warfare charge is the centerpiece of the entire case against Netanyahu and Gallant. That war crime,

anchored in Article 8(2)(b)(xxv) of the Rome Statute, has no parallel in NIAC (note that the amendment to Article 8(2)(e) which introduces the same crime to NIAC, has been ratified up until now only by 18 member States, not including Palestine).

It also appears that the Pre-trial Chamber's position that the Gaza strip is occupied territory played a role in its holding that the suspects impeded humanitarian aid "in violation of international humanitarian law," given the heightened obligations of occupying powers to facilitate and provide aid to protected persons (see e.g., here). The Court explains neither which date Israel re-occupied the territory nor when the full application of the laws of belligerent occupation restarted (cf. ICJ *Advisory Opinion on the Occupied Palestinian Territory*, para. 94). This is, however, a matter that could be highly relevant for evaluating the legality or illegality of specific measures relating to humanitarian aid that Netanyahu and Gallant decided at different points in time throughout the war. We note that the experts opined in their report—somewhat imprecisely in our view—that "Israel certainly became the occupying power in all of or at least in substantial parts of Gaza after its ground operations in the territory began." It is likely that the Court adopted the same approach in its decision on the issuance of arrest warrants.

According to the summary, there are reasonable grounds to believe that Netanyahu and Gallant "intentionally and knowingly deprived the civilian population in Gaza of objects indispensable to their survival, including food, water, medicine and medical supplies, as well as fuel and electricity, from at least 8 October 2023 to 20 May 2024," committing thereby the crime of starvation as a method of warfare. The starvation claim appears to be based on the allegation, found in the Prosecutor's statement accompanying the request for arrest warrants, that Netanyahu and Gallant instituted a "total siege" over the Gaza strip. As we explained in a previous post there are serious doubts whether a total siege of the entire Gaza Strip (as opposed to Gaza City) was ever planned. Moreover, Israel never implemented in effect a policy of total siege in the Gaza Strip.

In this last regard, the position of the Court regarding the suspects' *mens rea* is noteworthy. The Chamber conceded that Israel allowed humanitarian aid into the Gaza Strip and that, at times, its quantity increased. However, it noted that decisions to allow or increase aid were often conditional, and that they "were not made to fulfil Israel's obligations under international humanitarian law or to ensure that the civilian population in Gaza would be adequately supplied with goods in need. In fact, they were a response to the pressure of the international community or requests by the United States of America."

This holding appears to anticipate an Israeli counter-argument, according to which decisions to facilitate more aid rule out the existence of the special intent required in order to prove the crime of starvation as a method of warfare (cf. ICC Elements of Crime). The Court seems to take the view that partial compliance with a legal obligation does not prove lack of intent to violate it. Still, this appears to us to be a strained legal construction. A person who has been persuaded or pressured by another person to change an unlawful course of conduct he or

she once intended to pursue no longer *intends* in a legal sense to violate the law, and may also no longer fulfil the required *actus reus* conditions for establishing criminal conduct. It seems that the Court is mixing here legal intent to starve—implying purposeful deprivation of sustenance in order to cause starvation or knowledge with virtual certainty that the deprivation will result in starvation—with the inner motives of the suspects, which is not something that criminal law normally covers (see e.g., *Prosecutor v. Tadić*, para. 268).

The summary stipulates, however, that "the increases in humanitarian assistance were not sufficient to improve the population's access to essential goods" (probably intending to say that the increases did not sufficiently improve the situation), and that there are reasonable grounds to believe that "the lack of food, water, electricity and fuel, and specific medical supplies, created conditions of life calculated to bring about the destruction of part of the civilian population in Gaza, which resulted in the death of civilians." This latter language seems to refer to the elements of the crime of extermination found in Article 7(2)(b) of the Rome Statute. Still, the Court decided that it could not determine that all elements of the crime of extermination were met.

Note that the ICC Elements of Crimes lists four elements for establishing the crime of extermination. Elements 3 and 4 are simply part of the general requirements for all crimes against humanity, which the Court decided were provisionally met for other charges. Element 1 requires that "one or more persons were killed," an element which the Court found to have been met for the purposes of issuing an arrest warrant for the crime against humanity of murder. By way of elimination, it must then be Element 2 that is missing in the case, namely, that "the conduct constitute, or took place as part of, a mass killing of members of a civilian population." This implies that the Prosecution was not able to prove, at this stage of the proceedings, that reasonable grounds exist to find that the alleged policy of starvation caused death on a massive scale. Given the linkage between the crime of humanity of extermination and the crime of genocide (which includes extermination acted upon with a special intent to destroy), this preliminary finding by the Chamber does not bode well for those who claim that it can be shown that Israel's campaign in Gaza is genocidal in nature (with the necessary caveat that the Chamber looked at one putative method of destruction by extermination—through starvation—and only during the first months of the war).

It is also interesting to note, in this context, that the experts' report quotes the *Lukic* case, where the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber held that the death of 60 people could satisfy the "mass killing" element for the crime against humanity of extermination (ICTY, Appeals Chamber Judgment, para. 537). Perhaps the Pre-trial Chamber hesitated to accept the ICTY's position on the applicable threshold, and perhaps even the death of 60 persons due to starvation has not been established by the Prosecutor. We note in this regard that in June 2024, the World Health Organization claimed that 32 deaths in Gaza were attributed to malnutrition, and that Integrated Food Security Phase Classification (IPC) reports relating to the dire situation of food insecurity in Gaza for the relevant period reviewed by the Chamber (see here and here)

have been partly rejected by the Famine Review Committee (which serves as an IPC review board) and further challenged by Israel (who claimed methodological errors in the work of the IPC, resulting in inaccurate situation analysis and predictions).

In any event, the Pre-trial Chamber did consider that there were reasonable grounds to hold that the deliberate failure to allow sufficient quantities of humanitarian aid into Gaza implicates the suspects in other crimes against humanity—murder and other inhumane acts—as well as in the crime against humanity of persecution (deprivation of fundamental rights on the basis of political and or national grounds). Should the Prosecutor find more proof of deaths due to starvation, he may try to seek to reopen the Court's decision regarding the crime against humanity of extermination.

The Pre-trial Chamber also assessed that there were reasonable grounds to believe that Netanyahu and Gallant had responsibility as civilian superiors for intentionally directing attacks against the civilian population in two instances (the summary suggested that Prosecutor unsuccessfully sought to include additional instances in the arrest warrant). The summary does not provide further information about these instances, but if it is based on paragraph 28 of the experts' report, it seems likely that these were instances in which attacks were directed against food and water production facilities, people seeking humanitarian aid or humanitarian convoys.

Given the lack of detail, it is difficult to evaluate whether these instances fall under the purview of the Israeli investigation mechanisms which would raise complementarity issues as well as questions relating to the Prosecution ability to show that Netanyahu and Gallant knowingly refrained from repressing the violations. According to the IDF, 74 incidents relating to the war in Gaza have been referred to criminal investigation and more than a thousand incidents have been referred to the General Staff fact-finding and assessment mechanism. Some of these investigations relate to attacks against people seeking humanitarian aid and humanitarian convoys.

As Professor Tom Dannenbaum noted, a number of war crimes alleged by the Prosecutor—willfully killing and inflicting great suffering or serious injury to body or health (articles 8(2)(a)(1) or 8(2)(c)(1) and 8(2)(a)(3) or 8(2)(c)(1) of the ICC Statute)—were omitted from the summary altogether. It is not clear whether they are included in the secret arrest warrants issued, but we share Professor Dannenbaum's assessment that the omission is most probably caused by a technical failure in the preparation of the summary and not due to legal inability to press such charges. Those charges are, generally speaking, easier to establish than the parallel crimes against humanity of murder and inhumane acts which were mentioned in the summary.

The Arrest Warrant against Mohammed Al-Masri (Deif)

On the same day the Chamber issued the arrest warrants against Netanyahu and Gallant, it also decided to issue arrest warrants against Mohammed Deif, the senior leader of Hamas's military wing. Deif, it should be noted, is one of three Hamas leaders who were the target of investigation by the Prosecutor. And his original request from the Court was for issuing arrest warrants against all three. Two of the three—Ismail Haniya and Yahya Sinwar—were killed by Israel during the war and the Prosecutor requested to end the proceedings against them.

Deif too was probably killed, but Prosecutor claimed that he "is not in a position to determine whether Mr. Deif has been killed or remains alive." This raises the suspicion that the Prosecutor and the Court proceeded with the case against Deif despite the strong indications regarding his death to avoid the uneasy impression of issuing arrest warrants only against Israeli nationals while refraining from taking measures against the serious crimes committed by the Hamas leadership (but see Professor Dannenbaum for a more forgiving analysis of the Court's approach to the issue). The Prosecutor may, in the future, identify additional leaders of Hamas who were involved in the events on and after October 7 and who are still alive, and seek arrest warrants against them as well.

At any rate, the arrest warrants issued against Deif focus on two sets of issues: the attacks of October 7, 2023; and the crime of hostage taking (101 hostages kidnapped from Israel on October 7 are still held in the Gaza strip, about half of them are presumed dead). The Pre-trial Chamber found that it had reasonable grounds to assume that the crime against humanity and war crime of murder were committed (articles 7(1)(a) and 8(2)(c)(1)), as were the war crime of intentionally directing attacks against civilians (article 8(2)(e)(1)) and the crime against humanity of extermination (article 7(1)(b)). With regards to the Israeli hostages, the chamber held that it had grounds to believe the following crimes were committed by Deif: torture, both as a crime against humanity and war crime (articles 7(1)(f) and 8(2)(c)(1)); rape and other forms of sexual violence, both as crimes against humanity and war crimes (articles 7(1)(g) and 8(2)(e)(6)); and the war crimes of cruel treatment and outrages upon personal dignity (articles 8(2)(c)(1)-(2)).

It is interesting to note that the Prosecutor did not ask the Court to include any crimes related to the well-recorded practices of diverting humanitarian aid for Hamas's own use in the arrest warrants against Hamas leaders. Such practices are bound to be raised, however, as a defence claim in connection with allegations involving Israel's leaders' humanitarian aid policies. And the Prosecution might be invited to reconsider, if the evidence supports it, whether assigning criminal responsibility to Hamas leaders responsible for such illegal practices is appropriate.

Appeal

In our part-one post we briefly discussed the possibility of appeals. And indeed, Israel chose to appeal the Court's decisions on jurisdiction and admissibility. By contrast, Israel did not have a right of appeal against the very decision to issue the arrest warrant and chose not to

request leave to appeal specific aspects of the arrest warrant decision, such as the decision not to publish the reasons for the classification of the armed conflict pursuant to Article 82(1)(d) of the ICC Statute. Note, however, that in its request for leave to appeal the jurisdictional decision, Israel does mention (para. 2) that there was no reason that the Court's Article 19(1) jurisdictional assessment remains classified. This is an issue that Israel might wish to further discuss in the appeal proceedings.

Implications of the Arrest Warrants

Israel's Deepening Legal Troubles

One immediate implication of the issuance of arrest warrants is that it is far more difficult for Netanyahu and Gallant to travel abroad. All 124 State parties to the ICC are obligated, according to the Court's case law, to execute the arrest warrants notwithstanding any immunity available under international law. While the position of the Court in this regard is not free from controversy, we can safely assume that Netanyahu, and certainly Gallant (who no longer holds ministerial immunity) will not travel to those countries in the near future with the possible exception of a few countries who announced they will ignore the Court's order (see here).

However, the consequences of the decision extend far beyond interfering with Netanyahu and Gallant's travel plans. The arrest warrants might well accelerate the transformation of Israel into a "pariah State," with whom any high-level diplomatic contact becomes a public relations liability. Furthermore, there is no reason to assume that the current arrest warrants are the final word from the Court. The Prosecutor may submit further requests for arrest warrants against additional senior Israeli officials. In fact, the Prosecutor has already declared following the recent decisions by the Court that his investigation into events taking place in the Gaza Strip, as well as in the West Bank, continues. It cannot even be excluded that some requests already have been submitted and are being kept confidential.

There are other legal risks that exist for Israel beyond the ICC process which the arrest warrants exacerbate. These include legal and political pressures on foreign governments to halt weapon sales to Israel. Some cases are already pending before the domestic courts of Israel's arms-trading partners. And efforts by various activist groups to launch universal jurisdiction and other transnational criminal proceedings against IDF soldiers are also ongoing (especially those who recorded themselves in social media videos from Gaza). In a number of countries, such criminal complaints have already been filed, sometimes against Israeli soldiers with dual citizenship.

The ICC's Own Troubles

The ICC issued the arrest warrants at a most dramatic point in time in the history of the institution. The election of Donald Trump as President, and the assumption of control by the Republican Party of both houses of Congress, almost certainly guarantee harsh retaliatory

measures against the Court. There is long-standing hostility by prominent U.S. politicians against the Court's approach to jurisdiction over nationals of States not parties to the ICC and over its actual or potential targeting of the United States and its close allies (first, and foremost, Israel). Such sanctions could greatly complicate the Court's ability to function regularly and might erode its basis of support, potentially causing a political split among its member States. The French decision to reexamine its position on heads of State immunity in cases involving States not party to the ICC might suggest that the process of political distancing of member States from the ICC has begun.

What's more, the showdown with the new U.S. administration is occurring when the Court is also facing an unprecedented scandal concerning the Prosecutor's own compliance with relevant ethical standards. It is against this background that the concerns we raised in Part One of our post about the duty to properly establish jurisdiction over the case and the reasonable affordance of an opportunity to invoke complementarity should be evaluated. These concerns, as well as the concerns raised here regarding the transparency of the arrest warrant decisions and the legal reasons underlying them, may have more significant implications for the Court's legitimacy and effectiveness than they would have had in ordinary circumstances.

Israel's Current Options

In light of these considerations, it looks as if Israel may take one or more of three different routes open to it. First, it can go on an all-out campaign to undermine the Court's legitimacy and the political support it currently enjoys. We do not recommend this approach. The ICC is an important international institution and rule of law safeguard, and trying to cripple or dismantle is an excessive response to some specific shortcomings. But one cannot preclude that this avenue would be selected by Israel. The perception in Washington D.C. that the Court has bitten off more than it could reasonably chew, especially in the area of jurisdiction and complementarity, might help such an Israeli campaign. Clearly, Israel is the main "loser" from the ICC proceedings, but the ICC itself might also suffer considerable collateral harm.

The second route available to Israel is to work to derail the proceedings from within the ICC, using the Rome Statute's procedures to challenge the Prosecution at each turn in the road. As noted earlier, Israel already appealed the decisions handed down last week by the Chamber. And Israel, its allies, and Netanyahu and Gallant may opt in the future for other legal maneuvers that could delay and complicate the case and provide Israel more time and ways to apply pressure on the court.

The third, and in our mind, the preferable alternative, is for Israel to take all measures that would allow it to successfully invoke the principle of complementarity. If Israel genuinely investigates the allegations against Netanyahu and Gallant, something that it has not done so far for reasons that mostly have to do with the broader political controversy inside Israel surrounding the methods for investigating the events leading to and from October 7, it can

request that the proceedings be suspended. The fact that Israel requested the Court to order the Prosecutor to issue Israel with a request to investigate under Article 18(1), and Israel's appeal of the decision of the Court not to order so, serve as a signal that Israel might be interested in investigating these allegations.

But even if Israel's new appeals are denied, it still has the possibility of invoking complementarity by opening its own investigation. However, the procedural bar that Israel would have to clear now has become considerably higher than it was before. To convince the Court to suspend proceedings in which arrest warrants were already issued, Israel would need to show that an independent and effective criminal investigation is actually being conducted. Such an investigation must specifically address Netanyahu and Gallant's actions, and the concrete allegations raised against them by the Prosecutor. The Court will rightly reject an investigation whose sole purpose is to shield the accused from ICC prosecution.

As we explained in an earlier post, Israeli law allows for several methods of inquiry that could possibly satisfy the conditions of complementarity under the ICC Statute. At the time, we were of the view that a state commission of inquiry, authorized to make recommendations to the Attorney General to examine whether to open a criminal investigation, could satisfy the Court when exploring complementarity under Article 18 of the Rome Statute. Under Article 19, however, a criminal investigation supervised by State Prosecutors appears to be a more befitting measure. In any event, a bi-partisan inquiry committee—as was recently proposed by the government—most likely lacks the kind of independence required for claiming complementarity under the ICC Statute.

We also note that certain States have negotiated in the past with the ICC prosecutor a comprehensive agreement for complementarity arrangements (see e.g. the agreement between the Prosecutor and Columbia and the MOU concluded between the Prosecutor and Venezuela). Granted, these agreements were finalized at a relatively early stage of the proceedings, during the preliminary examination or start of investigation phase. Still, we see no principled reason why such an agreement with the Prosecutor could not be concluded even at this later stage, resulting in a common request to the Court to suspend the arrest warrants.

Concluding Thoughts

In the two parts of this post, we offered several criticisms directed at the four decisions issued by the Pre-trial Chamber on November 21, 2024. We questioned the legal validity of the chamber's jurisdictional decision, as well as the propriety of the procedure on complementarity. We also criticized the decision not to publish a longer redacted version of the decision to issue the arrest warrants against Netanyahu and Gallant. At least some of these issues, we believe, might adversely affect the Court's legitimacy in the eyes of certain states.

This state of affairs is unfortunate for the Court and its many supporters. We are of the view that in issuing these decisions, which might be among the most consequential in the history of the ICC, the Court should have taken all reasonable steps to avoid concerns about the legitimacy of its decisions. Yet, ignoring the challenge to jurisdiction found in many *amicus* briefs and adopting a highly formalistic view on complementarity do not contribute to maintaining the Court's legitimacy.

At the end of the day, the role of the Court is not only to punish perpetrators of serious international crime, but also to impact the future behavior of States and individuals. It seems to us that the decisions on the arrest warrants might not achieve either of these goals. Netanyahu and Gallant are unlikely to be arrested and the Court's own legitimacy and power of deterrence, and even its ability to continue to function, might suffer.

In our view, the only reasonable way out of this predicament is for Israel to initiate a genuine, independent and effective criminal investigation, preferably based on modalities acceptable to the Office of the Prosecutor. This might offer Israel a way to invoke complementarity and explore the serious allegations made against its leaders by the Prosecutor; it may also offer the Court a way to avoid a devastating clash with the new U.S. administration.

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