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**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/18**  
Date: **27 September 2024**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Iulia Motoc, Presiding Judge  
Judge Reine Adélaïde Sophie Alapini-Gansou  
Judge Nicolas Guillou

**SITUATION IN THE STATE OF PALESTINE**

**Secret and *EX PARTE*, only available to the Prosecution and the State of Israel**

**Prosecution Response to “Israel’s challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute” - ICC-01/18-354-SECRET-Exp-Anxi-Corr**

**Source:** Office of the Prosecutor

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**Document to be notified in accordance with regulation 31 of the *Regulations of the Court***

**to:**

**The Office of the Prosecutor**

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**Legal Representatives of the Applicants**

**Unrepresented Victims**

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**The Office of Public Counsel for Victims**

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**REGISTRY**

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**Detention Section**

**Victims Participation and Reparations Other  
Section**

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## I. INTRODUCTION

1. Israel's challenge (the "Challenge") to the jurisdiction of the Court pursuant to article 19(2)(c) of the Statute should be dismissed *in limine*.<sup>1</sup> First, the challenge is premature. In relation to each category identified in article 19(2), the entitlement to make a challenge arises only after the Chamber has issued an article 58 decision—when there is a "case". Second, even if it were not premature, Israel has no standing to file such a challenge under article 19(2)(c). Article 19(2)(c) only confers standing upon a "State from which acceptance of jurisdiction is *required* under article 12" of the Statute (emphasis added). Israel is not such a State, because Israel's acceptance of the Court's jurisdiction is not *required* for the exercise of the Court's jurisdiction in the *Situation in the State of Palestine*. To the contrary, as previously held by the Court in its Article 19(3) Decision, the preconditions to jurisdiction in article 12 of the Statute are satisfied by the State of Palestine's status as a State Party to the Statute.<sup>2</sup>

2. The Prosecution respectfully requests the Chamber to rule on this motion as a matter of urgency, and to reject the Challenge *in limine*.<sup>3</sup> The Prosecution stands ready to provide further submissions should the Chamber require it.

## II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this request is filed SECRET. The Prosecution respectfully observes that there seems to be no basis for this classification—and submits that these matters of law should be addressed in public. If the Challenge, the existence of which has been made public by Israel, is reclassified as public, this Response can follow the same classification.

## III. SUBMISSIONS

4. The Chamber should dismiss Israel's Challenge to the jurisdiction of the Court *in limine*. First, the Challenge is premature given that the Pre-Trial Chamber has not yet initiated the prosecution of a "case" before the Court, which is a threshold condition for a jurisdictional

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<sup>1</sup> ICC-01/18-354-SECRET-Exp-AnxI-Corr 26-09-2024.

<sup>2</sup> ICC-01/18-143 ("[Article 19\(3\) Decision](#)"), p. 60.

<sup>3</sup> The Prosecution takes note of Israel's assertion that the Prosecution should suspend its investigation pending resolution of the Challenge under article 19(7). Notwithstanding the Prosecution's view that article 19(7) has not been triggered due to the procedural invalidity of the Challenge, the Prosecution in any event understands article 19(7) to apply only to admissibility challenges, and not to jurisdictional challenges, as established by the reference to "article 17" in article 19(7). This interpretation is further confirmed by the focus of articles 19(10) and (11), also applying only to matters of admissibility. *See further* Nsereko and Ventura, 'Article 19' in Ambos, *Commentary*, p. 1080, mn 86: ("First, since Article 17 addresses only admissibility, not jurisdiction, it is clear that any State challenge limited to jurisdiction would not require the Prosecutor to suspend his or her investigation. Any other reading would lead to absurd results").

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challenge under article 19(2). Second, even if it were not premature, Israel is not entitled to challenge the Court's jurisdiction under article 19(2)(c), because its acceptance of the Court's jurisdiction under article 12 is not required.

#### A. The Challenge is Premature

5. Israel asserts that it “has an immediate right to challenge jurisdiction under article 19 given the current state of proceedings in the Situation.”<sup>4</sup> This is legally incorrect. Challenges under each of the three limbs of article 19(2) may be made only after a Pre-Trial Chamber has commenced the prosecution of a “case” by its decision under article 58, issuing a warrant of arrest or a summons to appear. Consequently, Israel's challenge should be dismissed *in limine* because it is premature.

6. This understanding of article 19(2) follows from the text itself and its context, and is established by the Court's case law.

7. First, the *chapeau* of article 19(2) explicitly provides that it applies to: “[c]hallenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court”.<sup>5</sup> The natural reading of this phrase is that *both* admissibility challenges and jurisdictional challenges are permissible only in relation to a “case”. In other words, implicitly, this phrase means: “Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court [*in relation to a case*].” This is also consistent with the necessary implication of the condition in article 19(2)(a),<sup>6</sup> and the express reference to a “case” in article 19(2)(b). By contrast, the only alternative potential construction of the *chapeau* of article 19(2)—that jurisdiction can be challenged “even where there is no such case”—is implausible in the context of the provision as a whole, including article 19(1), which expressly refers to a case.

8. Second, the broader context, particularly article 58, confirms the interpretation of article 19(2) that jurisdictional challenges may be made only once a “case” has arisen. The Court's consistent jurisprudence has emphasised the *ex parte* nature of article 58 proceedings.<sup>7</sup> To

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<sup>4</sup> Israel's Challenge, para. 48.

<sup>5</sup> Statute, art. 19(2) (emphasis added).

<sup>6</sup> Statute, art. 19(2)(a) (“An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58”).

<sup>7</sup> [ICC-01/09-35](#), para. 10 (“the proceedings triggered by the Prosecutor's application for a warrant of arrest or a summons to appear are to be conducted on an *ex parte* basis. The only communication envisaged at the article 58 this stage [sic] is conducted between the Pre-Trial Chamber and the Prosecutor”); [ICC-01/09-42](#), para. 16 (“[i]n qualifying the proceedings under article 58 of the Statute as *ex parte*, the Chamber indicates that the proceedings are to be conducted ‘without [...] argument by any person adversely interested’” and “the concrete factual

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allow an interested party to challenge the Court's jurisdiction at this stage—that is, alongside the Chamber's article 58 deliberations and before its decision—would be inconsistent with this *ex parte* character. It would wrongly turn article 58 proceedings into the functional equivalent of ordinary adversarial litigation.<sup>8</sup>

9. Third, the Court's case law has already established this interpretation of article 19(2). In its Article 19(3) Decision, the Chamber was faced with the question of whether there was a lawful basis for the Prosecutor's request for a ruling on jurisdiction under article 19(3) prior to the existence of a specific *case*. The Chamber confirmed that the Prosecutor *was* entitled to seek a ruling on jurisdiction in relation to a *situation*—that is, prior to the identification of a specific *case*<sup>9</sup>—based on the distinct purpose of article 19(3).<sup>10</sup> In this respect, the Chamber treated article 19(3) as an exception to the principle otherwise applying to article 19(2). The Chamber's reasoning *a contrario* is premised on the understanding that article 19(2) challenges of all kinds may be brought only once a *case* has arisen.<sup>11</sup> This position was confirmed by the Pre-Trial Chamber in *Venezuela*: “only ‘the third paragraph of article 19 of the Statute is not restricted to a case.’”<sup>12</sup>

10. In sum, article 19(2) establishes a unitary scheme which allows for certain challenges in relation to jurisdiction and admissibility of specific cases. The key question, therefore, is *when* a “case” has arisen for these purposes. On this question, the Court's jurisprudence is clear:

“Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.”<sup>13</sup>

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circumstances are not of relevance and cannot ground the modification of the *ex parte* nature of these proceedings”), see also paras. 18-20, 23 (“the proceedings under article 58 of the Statute are to be conducted with the exclusive participation of the Prosecutor”). See also ICC-01/04-169 OA (“[DRC Arrest Warrant Appeal Judgment](#)”), para. 45 (“article 58 [...] foresees that the Pre-Trial Chamber takes its decision on the application for a warrant of arrest on the basis of the information and evidence provided by the Prosecutor”).

<sup>8</sup> See also ICC-01/18-346 (“Prosecution's Consolidated Response to Interveners”), paras. 41-43 (explaining that the public acknowledgement of article 58 applications does not change the *ex parte* character of the proceedings.

<sup>9</sup> [Article 19\(3\) Decision](#), para. 68.

<sup>10</sup> [Article 19\(3\) Decision](#), para. 73.

<sup>11</sup> [Article 19\(3\) Decision](#), para. 73.

<sup>12</sup> ICC-02/18-45 (“[Venezuela Article 18\(2\) Decision](#)”), para. 35.

<sup>13</sup> [ICC-01/04-101-tEN-Corr](#), para. 65 (emphasis added). See also ICC-01/09-01/11-307 (“[Ruto et al. Admissibility AD](#)”), para. 40: (“In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61”). See also [ICC-01/04-93](#), p. 4; [DRC Arrest Warrant Appeal Judgment](#), para. 51.

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11. Israel's Challenge disregards this coherent and straightforward scheme, and relies instead on three primary arguments. None is convincing.

12. First, the Challenge draws on article 19(5) of the Statute, which provides: "A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity."<sup>14</sup> This argument does not advance Israel's position. A statutory obligation to act promptly does not ground an entitlement where none exists, or where none exists yet. Rather, it operates as to require a State to act with haste once the entitlement is actually triggered. Under the Statute, that is after the issuance of a warrant of arrest or summons.

13. Second, the Challenge points to the fact that article 19 explicitly permits jurisdictional challenges, with reference to its title and its *chapeau*.<sup>15</sup> This is unconvincing. It is not in dispute that article 19 expressly provides, subject to certain conditions, for jurisdictional challenges. The question is *when* any such entitlement arises. As set out above, it arises only once a specific case has arisen.<sup>16</sup>

14. Third, the Challenge argues that the absence of specific reference to "case" in article 19(2)(c) means that challenges thereunder may take place in relation to the "situation" as a whole and thus prior to the identification of a "case".<sup>17</sup> This argument is flawed. As above, the *chapeau* of article 19(2), correctly interpreted, requires the existence of a "case" across each of its three limbs. Moreover, this argument contradicts the reasoning and holding in the Article 19(3) Decision, and the Court's decision in *Venezuela*.<sup>18</sup> As noted above, the Chamber's conclusion in the Article 19(3) Decision that the Prosecutor is entitled to seek a jurisdictional ruling under article 19(3) prior to the identification of a specific case was premised on an *a contrario* understanding of article 19(3) *precisely in relation to Article 19(2)*.<sup>19</sup> It is clear in the Chamber's reasoning that it considers that this requirement applies across the three grounds set out in article 19(2).<sup>20</sup> As the Chamber concluded: "A Pre-Trial Chamber is mandated to address questions of jurisdiction *in the context of a case* pursuant to a number of legal bases, namely articles 19(1), 19(2) and 58(1)(a) of the Statute."<sup>21</sup>

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<sup>14</sup> Israel's Challenge, paras. 49-50.

<sup>15</sup> Israel's Challenge, paras. 51-52.

<sup>16</sup> See above paras. 6-10. and [Article 19\(3\) Decision](#), para. 73.

<sup>17</sup> Israel's Challenge, paras. 53-54.

<sup>18</sup> [Venezuela Article 18\(2\) Decision](#), para. 35.

<sup>19</sup> [Article 19\(3\) Decision](#), para. 73.

<sup>20</sup> See [Article 19\(3\) Decision](#), para. 73: ("These three mechanisms [Articles 19(1), 19(2) and 19(3)] regulate different situations and, therefore, have independent functions. This structure entails that the references to 'case' specifically *restrict the scope of application of the mechanisms set forth in article 19(1)-(2) of the Statute*. The absence of such references in article 19(3) of the Statute confirms, *a contrario*, that this mechanism extends beyond a case." (emphasis added).)

<sup>21</sup> [Article 19\(3\) Decision](#), para. 82 (emphasis added).

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15. For these reasons, any challenges under article 19(2), including article 19(2)(c), may be made only after the issuance under article 58 of a warrant of arrest or summons to appear, which commences the prosecution of a “case” before the Court.

16. Israel’s challenge should be dismissed on the basis that it is premature.

**B. Even if the Challenge were not Premature, Israel has no Standing under Article 19(2)(c)**

17. In addition, and even if Israel’s Challenge were not premature, it has no standing to make such a challenge under article 19(2)(c). The Challenge should also be dismissed *in limine* on this basis.

18. Article 19(2)(c) provides:

Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

[...]

(c) A State from which acceptance of jurisdiction is required under article 12.

19. Israel asserts that it has standing on what it calls “two independent grounds” under article 19(2)(c) of the Statute: “(i) as a “State of which the person accused of the crime is a national” under article 12(2)(b); and (ii) as “a State which is not Party to this Statute” in respect of which a declaration accepting the exercise of jurisdiction of the Court is required under article 12(3).<sup>22</sup> Both claims are incorrect.

Israel’s First Claim is Incorrect

20. It is evident on the face of article 19(2)(c) that Israel’s primary claim for standing is incorrect. Article 19(2)(c) grants a specific statutory right to “[a] State from which jurisdiction is *required* under article 12” of the Statute. Yet, in relation to the article 58 applications concerning Benjamin Netanyahu and Yoav Gallant, Israel is simply not such a State, either for the purpose of article 12(2)(a) or 12(2)(b). To the contrary, the preconditions to the exercise of the Court’s jurisdiction in the *Situation in the State of Palestine* are established on the basis of the State of Palestine’s status as a Party to the Statute. It follows from this that the basis of the Court’s jurisdiction in relation to the applications concerning Israeli nationals is Palestine’s territorial jurisdiction, as envisaged by article 12(2)(a) of the Statute. Where territorial jurisdiction is established under article 12(2)(a), as the Court has previously held, it is

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<sup>22</sup> Israel’s Challenge, para. 39.

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“unnecessary” to consider questions of personality under article 12(2)(b).<sup>23</sup> The same must hold for the purpose of standing under article 19(2)(c).

21. To put that another way, article 19(2)(c) does not grant standing to challenge the jurisdiction of the Court *both* to a territorial State *and* to the State or States of a suspect's nationality. This plain reading of article 19(2)(c)—which grants standing to whichever State or States' acceptance is *required* as a precondition to the exercise of the Court's jurisdiction in the particular case—ensures that the Court's jurisdiction is only challenged by those States whose consent is necessary for the Court's operation.

#### Israel's Second Claim is Incorrect

22. Israel's alternative claim for standing is likewise unconvincing. It is inconsistent with the Chamber's Article 19(3) Decision, and in essence amounts to a challenge to the accession procedures and functioning of a treaty to which Israel is not itself a party.

23. The Challenge argues that Israel has standing under article 19(2)(c) because “it is the sole State whose acceptance of jurisdiction is “required” pursuant to article 12(3).”<sup>24</sup> Israel's acceptance of jurisdiction is said to be required on the basis of Israel's assertion that Palestine “is not ‘the State on the territory of which the conduct in question occurred’ within the meaning of Article 12(2)(a) of the Rome Statute.”<sup>25</sup> Rather, to proceed in the case at hand, Israel's must accept the exercise of jurisdiction by the Court under article 12(3).

24. This argument is flawed and is inconsistent with the Chamber's Article 19(3) Decision. In that decision, the Chamber found that Palestine is a State Party to the Statute; that it is a “State” for the purposes of article 12(2)(a) of the Statute; that these matters were “settled by Palestine's accession to the Statute”,<sup>26</sup> and that the scope of Palestine's territorial jurisdiction extended to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.<sup>27</sup>

25. Moreover, the Chamber held:

By becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, all the provisions therein shall be applied to it in the same manner

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<sup>23</sup> [ICC-02/17-33](#), para. 58. *See also* para. 50: (“The first mechanism comes into play in this proceeding. The conducts that allegedly occurred in full or in part on the territory of Afghanistan or of other State Parties fall under the Court's jurisdiction, *irrespective of the nationality of the offender*. The Court has jurisdiction if the conduct was either completed in the territory of a State Party or if it was initiated in the territory of a State Party and continued in the territory of a non-State Party or vice versa.”) (emphasis added).

<sup>24</sup> Israel's Challenge, para. 44.

<sup>25</sup> Israel's Challenge, para. 44 (emphasis in the original).

<sup>26</sup> [Article 19\(3\) Decision](#), para. 112.

<sup>27</sup> [Article 19\(3\) Decision](#), para. 118.



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than to any other State Party. Based on the principle of the effectiveness, it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute's inherent effects over it.<sup>28</sup>

26. One of the inherent effects of Palestine's accession to the Statute is that the Court is endowed with jurisdiction in relation to crimes committed on Palestine's territory and by Palestinian nationals. Israel's Challenge is premised on denying this inherent effect, in order to construct an argument that *its own* acceptance of jurisdiction under article 12(3) is required. In so doing, in essence, Israel questions the validity and effects of the accession of Palestine to the Rome Statute, accepted by the Court's States Parties—and which the Chamber has already held to be effective, binding, and not reviewable even by the Chamber itself.<sup>29</sup> Consequently, in these circumstances, the Chamber should not accept that this is a valid basis for Israel's claim of standing.

#### IV. RELIEF REQUESTED

27. For these reasons, the Prosecution submits that Israel's Challenge should be dismissed *in limine*. The Prosecution stands ready to provide further submissions, if this would assist the Pre-Trial Chamber.



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**Karim A.A. Khan KC, Prosecutor**

Dated this 27<sup>th</sup> day of September 2024

At The Hague, The Netherlands

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<sup>28</sup> [Article 19\(3\) Decision](#), para. 102.

<sup>29</sup> [Article 19\(3\) Decision](#), para. 102.