

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/18**

Date: **27 November 2024**

**PRE-TRIAL CHAMBER I**

**Before:**

**Judge Nicolas Guillou, Presiding Judge  
Judge Reine Adélaïde Sophie Alapini-Gansou  
Judge Beti Hohler**

**SITUATION IN THE STATE OF PALESTINE**

*Public*

**Request for leave to appeal "Decision on Israel's challenge to the jurisdiction of the  
Court pursuant to article 19(2) of the Rome Statute"**

**Source: The State of Israel**

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

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**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

Office of the Attorney General of Israel

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Public Information and Outreach  
Section**

## I. INTRODUCTION

1. In its Decision rejecting Israel’s Article 19(2) Jurisdictional Challenge on the basis of procedural grounds,<sup>1</sup> the Pre-Trial Chamber chose not to examine substantively Israel’s detailed and fully pleaded objections as to the Court’s lack of jurisdiction with respect to the “*Situation in the State of Palestine*”.<sup>2</sup> Rather, the Pre-Trial Chamber stated: (i) that Israel does not have standing to file a jurisdictional challenge pursuant to article 19(2)(c) of the ICC Statute at all; and (ii) that States do not have standing to file a jurisdictional challenge pursuant to article 19 prior to the issuance of arrest warrants. As a consequence, Israel has been and, on the Pre-Trial Chamber’s interpretation of article 19(2)(c) of the Statute, will continue to be denied judicial consideration of its grave doubts as to the Court’s jurisdiction with respect to the *Palestine Situation* pursuant to article 19(2)(c) of the Statute.

2. To compound this position, Israel does not have access even to a redacted version of the Court’s confidential decision on the arrest warrants, which is understood to make findings as to their jurisdictional basis in compliance with the Court’s articles 19(1) and 58(1) duties to do so,<sup>3</sup> and has also been denied access to the Prosecutor’s confidential article 58 application which contains submissions as to the Prosecution case on jurisdiction.<sup>4</sup> The absence of a public adjudication on such a critical aspect of the arrest warrants, is perplexing in circumstances where the Court initiated a public *amicus curiae* procedure specifically to address the Oslo Accords issue which it deemed to have “potential relevance” to its article 19(1) jurisdiction assessment.<sup>5</sup> The Court’s article 19(1) jurisdiction assessment is a pure question of public international law and does not require reference to any confidential evidence or witnesses. Declining to substantively grapple with Israel’s jurisdiction challenge while simultaneously

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<sup>1</sup> Decision on Israel’s challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute, ICC-01/18-374, 21 November 2024 (“[Impugned Decision](#)”).

<sup>2</sup> This filing is without prejudice to Israel’s position regarding the Court’s lack of jurisdiction in respect of the above-captioned Situation, or to Israel’s status as a State not Party to the Rome Statute.

<sup>3</sup> ICC Press Release, “[Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant](#)”, 21 November 2024: “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”.

<sup>4</sup> Decision on Israel’s request for access to the Prosecution’s application for warrants of arrest, ICC-01/18-350-SECRET-Exp, 6 September 2024.

<sup>5</sup> Public redacted version of ‘Order deciding on the UK’s request to provide observations pursuant to rule 103(1) of the Rules of Procedure & Evidence and setting deadlines for any other requests for leave to file *amicus curiae* observations’, [ICC-01/18-173-Red](#), 27 June 2024, para 4.

making findings on jurisdiction which Israel is not privy to is a matter which significantly affects the fair conduct of the proceedings.

3. This situation has egregiously infringed upon Israel's rights as a sovereign State which is not party to the ICC Statute. Israel possesses serious concerns that a fundamental precondition to the exercise of jurisdiction enshrined in the ICC Statute has not been the subject of proper judicial consideration. However, the Court has now issued arrest warrants against Israel's Prime Minister, and former Defence Minister.

4. The Impugned Decision's significance cannot be over-stated. Ensuring that arrest warrants are well founded jurisdictionally is not a mere formality. Jurisdiction plays a critical role in defining judicial competence in order to prevent abuse of the judicial process and guarantee that courts do not exceed the carefully defined mandates entrusted to them, including when issuing arrest warrants. The Court's legitimacy depends in equal measure both on the effective discharge of its mandate, and on adherence to its jurisdictional limitations. The latter is further safeguarded by sovereign States, including those that are not party to the ICC Statute, being permitted to exercise their rights to challenge the Court's jurisdiction.

5. The fundamental errors committed by the Pre-Trial Chamber led to its imposition of a test for standing that, in effect, eliminates any opportunity for (a) a State to challenge the jurisdiction of the Court prior to arrest warrants being issued; (b) a State of nationality to challenge the jurisdiction of the Court on the basis that article 12(2)(a)'s territorial precondition to the exercise of jurisdiction is not satisfied; and (c) a Pre-Trial Chamber's article 19(3) decision on jurisdiction that reserves an aspect of its decision for further consideration operates as *res judicata* with respect to the decision that it reserved. The Chamber's test for standing seriously curtails the rights of States, and undermines the foundational jurisdictional safeguards contained in the ICC Statute.

6. Israel further submits that the Pre-Trial Chamber's decision to decline to address the substance of its jurisdictional challenge on the basis, *inter alia*, that the Pre-Trial Chamber's article 19(3) decision is *res judicata* constitutes a "decision with respect to jurisdiction" for the purposes of Article 82(1)(a) of the Rome Statute, and is therefore a decision that can be appealed as of right without requiring leave from the Pre-Trial Chamber. This is why a notice of appeal is being filed concurrently to the present request.

7. However, out of an abundance of caution, and in order to preserve all of its procedural rights, Israel hereby requests leave to appeal the Impugned Decision on the basis of a number of errors of law and fact. The Impugned Decision involves issues that significantly affect the fair and expeditious conduct of proceedings, or their outcome, and for which immediate resolution by the Appeals Chamber may materially advance the proceedings.

## II. PROCEDURAL HISTORY AND RELEVANT EVENTS

8. On 1 January 2015, the Registrar received a purported declaration under Article 12(3) of the Statute,<sup>6</sup> claiming to be signed by the “President of the State of Palestine”, and which stated that “the Government of the State of Palestine” accepted the jurisdiction of the Court with respect to crimes “committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”.<sup>7</sup>

9. On 2 January 2015, the United Nations Secretary General received a purported instrument of accession to the Statute by the “State of Palestine” pursuant to Article 125(2) of the Statute.<sup>8</sup>

10. On 16 January 2015, the OTP announced that she had decided to open a preliminary examination into the “*Situation in Palestine*” (“the Situation”).<sup>9</sup>

11. On 22 May 2018, the Prosecution received a purported referral by the “Government of the State of Palestine” pursuant to Articles 13(a) and 14 of the Statute, requesting the investigation of crimes “committed in all parts of the territory of the State of Palestine”.<sup>10</sup>

12. On 22 January 2020, the OTP filed a request for a jurisdictional ruling pursuant to Article 19(3) of the Statute,<sup>11</sup> seeking a ruling from the Pre-Trial Chamber on “the scope of the Court’s territorial jurisdiction in the situation of Palestine”.<sup>12</sup>

13. On 5 February 2021, the Pre-Trial Chamber issued its Decision on the “Prosecution request pursuant to article 19(3)”. This Decision found, unanimously, that “Palestine is a State Party to the Statute”; and, by a majority, that due to its “State Party” status, “Palestine qualifies as ‘[t]he

<sup>6</sup> ICC Press Release, “[Palestine declares acceptance of ICC jurisdiction since 13 June 2014](#)”, 5 January 2015.

<sup>7</sup> Document dated 31 December 2014, “[Declaration Accepting the Jurisdiction of the International Criminal Court](#)”.

<sup>8</sup> Depository Notification, [C.N.13.2015.TREATIES-XVIII.10](#), 6 January 2015.

<sup>9</sup> ICC Press Release, “[The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine](#)”, 16 January 2015.

<sup>10</sup> ICC OTP, “[Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine](#)”, 22 May 2018.

<sup>11</sup> Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, [ICC-01/18-12](#), 22 January 2020.

<sup>12</sup> *Id.*, para. 220.

State on the territory of which the conduct in question occurred’ for the purposes of article 12(2)(a) of the Statute”, and that “the Court’s territorial jurisdiction [...] extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem”.<sup>13</sup> The Decision did not deal with the arguments regarding the Oslo Accords, as those were “not pertinent to the resolution of the issue under consideration, namely the scope of the Court’s territorial jurisdiction in Palestine” and “as a consequence, the Chamber will not address these arguments”.<sup>14</sup> The Pre-Trial Chamber deemed it “opportune to emphasise” that its conclusions pertained only to “the current stage of proceedings, namely the initiation of an investigation by the Prosecutor”.<sup>15</sup> The Pre-Trial Chamber expressly reserved further consideration of jurisdictional issues as and when the Prosecution might bring an Article 58 application, or a challenge were brought under Article 19(2): “[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, the Chamber will be in a position to *examine further* questions of jurisdiction which may arise at that point in time”.<sup>16</sup> Judge Peter Kovács appended a Partly Dissenting Opinion, in which he disagreed on the fact that Palestine qualifies as “[t]he State on the territory of which the conduct in question occurred” for the purposes of article 12(2)(a) of the Statute, and that the Court’s territorial jurisdiction in the Situation extends – in a quasi-automatic manner and without restrictions – to the territories of Gaza, the West Bank and East Jerusalem. Instead, he found that in the absence of Israel’s acceptance of the Court’s jurisdiction, such jurisdiction could not exceed the restricted competences *ratione personae* and/or *ratione loci* transferred to the Palestinian Authority pursuant to the Oslo Accords that created it.<sup>17</sup>

14. On 3 March 2021, the OTP announced the initiation of an investigation into crimes within the jurisdiction of the Court that are alleged to have been committed in the Situation since 13 June 2014.<sup>18</sup>

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<sup>13</sup> Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, ICC-01/18-143, 5 February 2021 (“[Article 19\(3\) Decision](#)”), p. 60.

<sup>14</sup> *Id.*, para. 129.

<sup>15</sup> *Id.*, para. 131.

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> Judge Kovács’ Partly Dissenting Opinion, [ICC-01/18-143-Anx 1](#), paras. 370-371 *et seq.*

<sup>18</sup> ICC OTP, “[Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine](#)”, 3 March 2021.

15. On 20 May 2024, the Prosecutor announced to the media that he had filed an application seeking warrants of arrest in respect of, *inter alia*, Israel’s Prime Minister, Mr. Benjamin Netanyahu, and Israel’s Minister of Defence, Mr. Yoav Gallant.<sup>19</sup>

16. On 10 June 2024, the United Kingdom submitted a request to file *amicus curiae* observations on ‘[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords.’<sup>20</sup> On 27 June 2024, the Pre-Trial Chamber issued a decision granting the UK’s request, and setting the deadline for any additional requests to submit *amicus curiae* observations.<sup>21</sup> The large majority of the requests was subsequently granted.<sup>22</sup> The Pre-Trial Chamber issued additional Orders with respect to the participation of victims,<sup>23</sup> and the OPCD.<sup>24</sup> By 16 August 2024, the Pre-Trial Chamber received over 70 observations submitted by, *inter alia*, States, organisations, individuals and victims’ representatives. On 23 August 2024, the OTP filed a consolidated response to observations by interveners.<sup>25</sup>

17. On 23 September 2024, Israel filed its Challenge to the Jurisdiction of the Court pursuant to article 19(2) of the Rome Statute.<sup>26</sup> On the same day, Israel filed its Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice.<sup>27</sup>

18. On 27 September 2024, the Prosecution submitted its Responses to Israel’s Jurisdiction Challenge<sup>28</sup> and to Israel’s Abridged Request for an Article 18(1) Notice.<sup>29</sup> The Prosecution

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<sup>19</sup> ICC OTP, “[Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine](#)”, 20 May 2024.

<sup>20</sup> Request by the United Kingdom for leave to submit written observations pursuant to Rule 103, [ICC-01/18-171-Anx](#), 10 June 2024, para. 27.

<sup>21</sup> Public redacted version of ‘Order deciding on the United Kingdom’s request to provide observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, and setting deadlines for any other requests for leave to file *amicus curiae* observations’, [ICC-01/18-173-Red](#), 27 June 2024.

<sup>22</sup> Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, [ICC-01/18-249](#), 22 July 2024.

<sup>23</sup> Public redacted version of ‘Decision concerning the views, concerns and general interests of victims’, 30 July 2024, ICC-01/18-256-Conf, [ICC-01/18-256-Red](#), 7 August 2024.

<sup>24</sup> Order in relation to OPCD’s submissions on *amicus curiae* observations and the Prosecution’s request to provide a consolidated response, [ICC-01/18/325](#), 9 August 2024.

<sup>25</sup> Prosecution Consolidated Response to Observations by Intervenors pursuant to Article 68(3) of the Statute and Rule 103 of the Rules of Procedure and Evidence, [ICC-01/18-346](#), 23 August 2024.

<sup>26</sup> Public Redacted Version of “Israel’s challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute”, ICC-01/18-354-AnxII-Corr, 23 September 2024 (“[Jurisdictional Challenge](#)”).

<sup>27</sup> Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice, [ICC-01/18-355-AnxI-Corr](#), 23 September 2024.

<sup>28</sup> Prosecution’s 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, [ICC-01/18-357](#), 27 September 2024.

<sup>29</sup> Prosecution’s Response to Israel’s “Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice” – ICC-01/18-355-SECRET-Exp-AnxI-Corr, [ICC-01/18-360](#), 27 September 2024.

argued, *inter alia*, that Israel’s Jurisdiction Challenge should be dismissed for prematurity and lack of standing.<sup>30</sup>

19. On 4 October 2024 Israel submitted Requests for Leave to Reply to the Prosecution’s Responses to Israel’s Jurisdiction Challenge<sup>31</sup> and its Request for an Article 18(1) Notice.<sup>32</sup>

20. On 21 November 2024, Pre-Trial Chamber I issued the Impugned Decision, rejecting Israel’s Article 19(2) Jurisdictional Challenge, and also rejected Israel’s Article 18(1) Request. The Chamber also rejected Israel’s request for leave to reply to the Prosecutor’s response to its jurisdictional challenge and Israel’s request for leave to reply to the Prosecutor’s response to its Article 18(1) Request.

21. On the same day, Pre-Trial Chamber I announced by press release that it had filed an *ex parte* and confidential decision issuing warrants for the arrest of the Prime Minister of Israel, Mr. Benjamin Netanyahu, and the former Minister of Defence, Mr. Yoav Gallant.<sup>33</sup>

### III. APPLICABLE LAW

22. A decision is subject to appeal, pursuant to Article 82(1)(d), where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

23. The Appeals Chamber has defined an “issue” as:

an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.<sup>34</sup>

<sup>30</sup> Prosecution’s 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, [ICC-01/18-357](#), 27 September 2024, paras. 5-26.

<sup>31</sup> Request for leave to reply to 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, [ICC-01/18-361-Anx](#), 4 October 2024.

<sup>32</sup> Request for leave to reply to Prosecution’s Response to Israel’s “Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice” – ICC-01/18-355-SECRET-Exp-AnxI-Corr, [ICC-01/18-362-Anx](#), 4 October 2024.

<sup>33</sup> ICC Press Release, “[Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant](#)”, 21 November 2024.

<sup>34</sup> *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 (“[Leave to Appeal Judgment](#)”), para. 9.



24. “Essential” implies that the issue is necessary for determination of the impugned decision, “not merely a question over which there is disagreement or conflicting opinion”.<sup>35</sup> The issue must further be one for which:

immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.<sup>36</sup>

25. An appealable issue may be “legal or factual or mixed.”<sup>42</sup> Issues certified for appeal usually involve a mixture of law and fact in one degree or another. There is no set formula for articulating an appealable issue, and the form of such issues that have been approved in the past reflect the variety of situations from which they arise:

Whether the Chamber had already made the requisite findings under Article 87(7) of the Statute that the Kenyan Government failed to comply with the Prosecution's cooperation request, such that it ought to have referred the matter to the Assembly of States Parties (‘ASP’); or in the alternative, if the Chamber's findings are not considered ‘formal’ or ‘judicial’ findings under Article 87(7) of the Statute, whether it had any discretion not to enter the required finding under that provision and thus refer the matter to the ASP.<sup>37</sup>

...

[W]hether the Chamber erred in law when finding that, for the purpose of providing notice, as far as the legal characterisation of the facts is concerned, it is not necessary for the charges to set out the constituent legal elements of the alleged mode(s) of liability”.<sup>38</sup>

...

[W]hether the Chamber erred in finding that Mr Yekatom was sufficiently informed of the contours of the ‘common plan’ and his alleged ‘essential contribution’ although PTC II had not used this terminology established in the jurisprudence of the Court to characterise the relevant facts”.<sup>39</sup>

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<sup>35</sup> *Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, [ICC-01/04-01/06-1191](#), 26 February 2008, para. 8.

<sup>36</sup> [Leave to Appeal Judgment](#), para. 14.

<sup>37</sup> *Kenyatta*, Decision on the Prosecution’s request for leave to appeal, ICC-01/09-02/11-1004, 9 March 2015, (“[Kenyatta Leave Decision](#)”), para. 9.

<sup>38</sup> *Yekatom and Ngaißona*, Decision on the Yekatom Defence Request for Leave to Appeal the Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial, [ICC-01/14-01/18-730](#), 13 November 2020, p. 8.

<sup>39</sup> *Id.*

[W]hether the Chamber erred in permitting the trial to proceed in respect of charges for which the Chamber declined to consider the sufficiency of the Prosecution’s evidence.<sup>40</sup>

...

Whether declining to entertain a Defence motion for a judgement of partial acquittal is a discretionary matter”<sup>41</sup>

...

Whether the Chamber erred in law by finding that the Rule 68(2)(d)(i) requirement that the witness must have ‘failed to give evidence with respect to a material aspect’ may be fulfilled in situations where the witness does attend, but recants fundamental aspects of their prior recorded testimony”<sup>42</sup>

Whether the Chamber erred in law in its interpretation of the Rule 68(2)(d)(i) ‘interest of justice’ requirement by finding Rule 68(2)(d)’s purpose is the same as contempt proceedings namely to protect the integrity of the proceedings as a reactionary measure and not that the requirement is linked to the main purpose of Rule 68 of the Rules, which is to expedite trial proceedings”<sup>43</sup>

...

Whether the test for an excusal of the accused developed by the Majority is supported by the applicable law.<sup>44</sup>

#### IV. SUBMISSIONS AS TO APPEALABLE ISSUES

##### A. First Issue: Whether the Pre-Trial Chamber erred in law in finding that Israel does not have standing to file a jurisdictional challenge pursuant to article 19(2)(c) as it is not “a State from which acceptance of jurisdiction is required under article 12”

26. Israel submits that the Pre-Trial Chamber erred in concluding that Israel lacks standing to bring a jurisdictional challenge pursuant to article 19(2)(c) because Israel’s acceptance of the Court’s jurisdiction was no longer “required” as “the Court can exercise its jurisdiction on the basis of the territorial jurisdiction of Palestine”.<sup>45</sup> The Pre-Trial Chamber’s rationale for denying Israel standing to bring a jurisdictional challenge under article 19(2)(c) was premised on its observation that “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”.<sup>46</sup> To this end, the sole authority

<sup>40</sup> *Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on Defence request for leave to file a ‘no case to answer’ motion”, [ICC-01/04-02/06-2026](#), 5 September 2017, para. 7.

<sup>41</sup> *Id.*

<sup>42</sup> *Yekatom and Ngaïssona*, Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules, [ICC-01/14-01/18-2163](#), 25 October 2023, para. 2.

<sup>43</sup> *Id.*

<sup>44</sup> *Ruto et al.*, Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, [ICC-01/09-01/11-817](#), 18 July 2013, para. 2(ii).

<sup>45</sup> [Impugned Decision](#), para. 13.

<sup>46</sup> *Id.*

relied upon by the Pre-Trial Chamber was a 2019 Pre-Trial Chamber II Decision on the Authorisation of an Investigation with respect to the *Situation in Afghanistan*.<sup>47</sup> However, that decision, which arises out of Article 15, does not address the question of standing to file an article 19(2)(c) jurisdictional challenge. It simply addresses whether, in order for the Court to exercise jurisdiction, it is necessary under article 12(2) for both the territorial State and the State of nationality to be parties to the ICC Statute or have accepted the ICC's jurisdiction.<sup>48</sup>

27. Substantively, the Pre-Trial Chamber has conflated the preconditions to the exercise of jurisdiction by the Court under Article 12 with the standing requirements for a jurisdictional challenge by a State under Article 19(2)(c). The fact that the Court may exercise jurisdiction if only one precondition under Article 12(2) is satisfied does not mean that States whose acceptance of jurisdiction is required under Article 12 (i.e. States with an interest in the Situation pursuant to either precondition prescribed by Article 12(2)) should be denied standing to challenge an exercise of jurisdiction by the Court under Article 19(2)(c).

28. In reaching its erroneous conclusion as to Israel's lack of standing, the Pre-Trial Chamber failed to take into account the Court's previous jurisprudence as to standing under article 19(2) (which had been briefed in Israel's jurisdictional challenge).<sup>49</sup> The Impugned Decision also failed to consider the purpose of article 19(2) (or its precursor provision, article 34 of the International Law Commission's 1994 Draft Statute for an International Criminal Court) which is to allow challenges to be brought to the jurisdiction and admissibility of the case by specially affected individuals and States whose sovereign interests might otherwise be infringed.<sup>50</sup> Further, the Pre-Trial Chamber failed to conduct a textual analysis of article 19(2)(c)'s threshold criterion, namely conferring standing on "a State from which acceptance of

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<sup>47</sup> [Impugned Decision](#), footnote 15 referring to *Situation in the Islamic Republic of Afghanistan*, Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, [ICC-02/17-33](#), 12 April 2019, para. 58.

<sup>48</sup> *Situation in the Islamic Republic of Afghanistan*, Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, [ICC-02/17-33](#), 12 April 2019, para. 58.

<sup>49</sup> [Jurisdictional Challenge](#), paras. 40 and 42.

<sup>50</sup> United Nations, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), General Assembly (A/51/22), para. 248, available at: <https://www.legal-tools.org/doc/e75432/pdf/>: "it was noted that the term "interested State" was too vague and should be defined as those States entitled to exercise jurisdiction, including the State of nationality of the accused, the State where the crime had been committed, the State of nationality of the victims and the custodial State. According to one view, such interested States should also be parties to the Statute. According to another view, there was no logical reason to deprive a non-State party that had a direct and material interest in the case of the right to challenge the Court's jurisdiction. Thus, according to this view, any State that had a right to consent to the Court's jurisdiction under the Statute should be able to challenge that jurisdiction".

jurisdiction is required”, which plainly indicates that States not party to the Statute - whose acceptance of jurisdiction is required by article 12(3) of the Statute – are the States from whom article 19(2)(c) jurisdictional challenges are to be anticipated.<sup>51</sup>

29. The Pre-Trial Chamber’s erroneous finding that Israel does not have standing pursuant to article 19(2)(c) is an issue that arises directly from the Impugned Decision, and is decisive – i.e. “essential” – to its ultimate rejection of the Article 19(2) challenge. The issue is not merely one with which Israel disagrees, but is one that was necessary for, and integral to, the Pre-Trial Chamber’s determination of Israel’s challenge.

**B. Second Issue: Whether the Pre-Trial Chamber erred in fact and law in finding that its previous article 19(3) decision had become *res judicata***

30. Israel submits that the Pre-Trial Chamber erred in fact and law when rejecting Israel’s standing pursuant to article 19(2)(c), which was premised on the presumptive validity of the merits of its jurisdictional challenge, on the basis that this would require the Pre-Trial Chamber to revisit its previous decision on this issue which had become *res judicata*.<sup>52</sup>

31. At the outset, it should be recalled that neither the Rome Statute nor the Rules of Procedure and Evidence of the ICC provide for an explicit rule relating to *res judicata*, and the Pre-Trial Chamber provides no support for the use of such a concept in the current circumstances where there is no identity of the parties to the litigation, a traditional requirement of the principle. This absence of reasoning is prejudicial in the present proceedings, as the notion is being applied not to a final decision on a matter, but to a decision that was by definition and expressly stated to be preliminary in nature and to which Israel was not a party. Indeed, the previous decision of the Pre-Trial Chamber which was found to have become *res judicata* was an article 19(3) decision on the scope of the Court’s exercise of jurisdiction under Article 12. This decision cannot constitute a bar to future challenges to the jurisdiction of the Court under article 19(2), be it by a State or by individuals exercising their right to challenge the jurisdiction of the Court under article 19(2). If it were otherwise, this would mean that in any situation where an article 19(3) decision was issued, no challenges to jurisdiction under article 19(2) could subsequently be made in those proceedings. In essence, the result would be that the OTP could unilaterally seek to block any possibility of a challenge to the Court’s jurisdiction by requesting and successfully litigating an article 19(3) decision from a Pre-Trial Chamber.

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<sup>51</sup> See Schabas, W., *The ICC: A Commentary on the Rome Statute*, OUP, 2010, p. 368.

<sup>52</sup> [Impugned Decision](#), para. 15.

32. Further, the majority reasoning in the Pre-Trial Chamber’s 2021 decision expressly did not deal with the arguments regarding the Oslo Accords, as those were “not pertinent to the resolution of the issue under consideration, namely the scope of the Court’s territorial jurisdiction in Palestine” and “as a consequence, the Chamber will not address these arguments”.<sup>53</sup> In these circumstances, it is not understood how the principle of *res judicata* can properly bar consideration of Israel’s submissions to the effect that the Oslo Accords make it clear that the Palestinian authorities have no criminal jurisdiction either in law or in fact over Israeli nationals – and thus cannot validly delegate such jurisdiction to the Court.

33. Moreover, the Pre-Trial Chamber’s reliance on the principle of *res judicata* contradicts the majority judges’ express statement contained within the 2021 decision that issues relating to the Oslo Accords “may be raised by interested States based on article 19 of the Statute.”<sup>54</sup> In that decision, the Pre Trial Chamber explicitly limited its findings to the opening of an investigation and reserved further consideration of jurisdictional issues as and when the Prosecution might bring an Article 58 application, or a challenge was brought under Article 19(2): “It is further opportune to emphasise that the Chamber’s conclusions pertain to the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor pursuant to articles 13(a), 14 and 53(1) of the Statute. 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.”<sup>55</sup> This statement also supports Israel’s position that its Jurisdictional Challenge was timely because it envisioned that the Pre Trial Chamber could, “when the Prosecutor submits an application for the issuance of a warrant of arrest”, and therefore prior to issuing any decision on arrest warrants, address questions of jurisdiction”<sup>56</sup>

34. Finally, Israel notes that the Pre-Trial Chamber appears to have regarded the issues raised by Israel in its jurisdictional challenge regarding the effect of the Oslo Accords on the Court’s capacity to exercise jurisdiction as not being *res judicata* at an earlier stage in these proceedings. Indeed, the Pre-Trial Chamber granted the United Kingdom’s request to file *amicus* submissions specifically on this issue due to their “potential relevance” to the Court’s

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<sup>53</sup> [Article 19\(3\) Decision](#), para. 129.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, para. 131 (emphasis added).

<sup>56</sup> *Id.*, paras. 129 and 131.

article 19(1) jurisdiction assessment<sup>57</sup>, and invited interested participants to file *amicus* submissions prior to the Court issuing an article 58 decision. There is no explanation in the Impugned Decision for the Pre-Trial Chamber's apparent change of position on the matter.

35. This issue of whether or not the Court's article 19(3) constitutes *res judicata* as to the issue of Israel's standing under article 19(2)(c) is an issue that arises directly from the Impugned Decision and which was essential to the Pre-Trial Chamber's ultimate determination.

**C. Third Issue: Whether the Pre-Trial Chamber erred in law in finding that Israel's filing of a jurisdictional challenge pursuant to article 19(2) was premature as it was filed prior to the issuance of arrest warrants**

36. The Pre-Trial Chamber erred in finding that Israel's filing of a jurisdictional challenge pursuant to article 19(2) was premature as it was filed prior to the issuance of arrest warrants. According to the Pre-Trial Chamber, "the wording of article 19(2)(b) ... makes it clear that States may only challenge the Court's jurisdiction in relation to a particular case" which only comes into existence following the issuance of a warrant of arrest.<sup>58</sup> This erroneous conclusion was reached entirely summarily. Further, the Pre-Trial Chamber failed to consider the aim of article 19, as elucidated in article 19(5) – to enable States to make jurisdictional challenges at the earliest opportunity.<sup>59</sup> The Pre-Trial Chamber additionally failed to undertake a proper textual analysis of article 19(2) which permits jurisdictional challenges (as opposed to admissibility challenges) to be brought in relation to the Situation as a whole, and not only in relation to "a case".<sup>60</sup> Even if, *arguendo*, a "case" only arises after an arrest warrant is issued, the word "case" does not feature in the text of article 19(2)(c). This textual lacuna is not addressed by the Impugned Decision. Moreover, the Pre-Trial Chamber erred by failing to consider relevant ICC jurisprudence on the meaning of "case" as it has been applied with respect to other provisions of the ICC Statute.<sup>61</sup>

37. The court's final approach to this question is, on its face, inconsistent with its decision to allow leave to numerous actors – including states party to the Rome Statute – to submit *amici* briefs. The court's jurisprudence on the application of Rule 103 is clear: the court holds discretion in granting leave to submit observations that are desirable in the sense that they will

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<sup>57</sup> Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, [ICC-01/18-249](#), 22 July 2024.

<sup>58</sup> [Impugned Decision](#), para. 17.

<sup>59</sup> [Jurisdictional Challenge](#), paras. 49, 50 and 57.

<sup>60</sup> [Jurisdictional Challenge](#), paras. 51-54.

<sup>61</sup> [Jurisdictional Challenge](#), paras. 55-56.

assist the chamber in making the proper determination in the case.<sup>62</sup> It is unclear how the court could hold that the amici on the legal intricacies stemming from the Oslo Accords are necessary to the proper determination in the current stage, and at the same time ignore the issue in its current decision and deciding that the challenge was premature.

38. Despite the lack of reasoning substantiating this erroneous approach, the Pre-Trial Chamber's ultimate disposition of Article 19(2) jurisdictional challenge for prematurity was based upon it. This is, accordingly, an issue that arises directly from the Impugned Decision and which was "essential" to the Pre-Trial Chamber's ultimate determination.

**D. The appealable issues affect the fair and expeditious conduct of proceedings, and immediate resolution thereof by the Appeals Chamber may materially advance the proceedings**

39. The requirement of fair and expeditious proceedings extends to all phases and attributes of the Court's purported exercise of authority, including "any judicial proceedings arising out of the relevant investigations," including in the absence of charges pending against an accused.<sup>63</sup> The need for fair and expeditious proceedings applies with even greater force when arrest warrants have been issued and entail requests that they be enforced, and sanctions against States who may choose not to enforce them.

40. Despite the importance of ensuring a firm jurisdictional basis prior to the Court taking the drastic step of issuing arrest warrants containing grave allegations as to the commission of crimes against humanity and war crimes against the elected officials of a State which is not a party to the ICC Statute, there has been no substantive public adjudication of the serious jurisdictional objections raised by Israel in this case. Israel's fully pleaded submissions as to the lack of jurisdiction over Israeli nationals have not had the benefit of judicial consideration by the Pre-Trial Chamber and Israel does not have access to even a redacted version of either the Court's confidential decision on the arrest warrants (which contains its article 19(1) jurisdiction assessment) or of the Prosecutor's confidential article 58 application (which sets out the Prosecution's case on jurisdiction). The absence of public findings on this essential element underpinning the arrest warrants is particularly unjust given the Pre-Trial Chamber's

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<sup>62</sup> Decision on "Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence", [ICC-01/04-01/06-1289](#), 23 April 2008, para. 8.

<sup>63</sup> [Kenya Leave Decision](#), para. 26 ("Therefore, the Chamber considers that, notwithstanding the fact that the charges against Mr Kenyatta have been withdrawn, the 'fair and expeditious conduct of the proceedings' prong of the test, for the purposes of the Request, extends to any judicial proceedings arising out of the relevant investigations").

previous clear indication that the jurisdiction issues arising out of the Oslo Accords could be raised and further examined upon the submission of an article 58 application by the Prosecution and its initiation of a public amicus curiae procedure specifically to address the Oslo Accords issue.

41. Accordingly, the foregoing issues – which relate to ensuring that jurisdictional issues are publicly resolved and addressed by the Pre-Trial Chamber expeditiously – significantly affect the fairness and expeditiousness of proceedings.

42. Indeed, arrest warrants that later turn out to have been issued in excess of the Court’s jurisdiction will directly impact on the legitimacy of the Court, its standing in the international community, and its ability to encourage voluntary or legally required cooperation with the Court in these proceedings. This will impact not only the fairness and expeditiousness of these proceedings, but of other proceedings before the Court.

43. Immediate resolution of the issues may – indeed, will – materially advance the proceedings. The term “advance” has been described as relating to the attribute of “ensuring that the proceedings follow the right course” in circumstances where later discovery of error would be a setback:

Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings. A wrong decision in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back.<sup>64</sup>

44. The earliest possible resolution of the jurisdictional issues that Israel seeks to raise is vital to the protection of the integrity of these proceedings and the Court’s processes. Indeed, the need for immediate resolution is even greater given that the appealable issues arise in the context of a decision thwarting Israel’s attempt to fully litigate the question of the Court’s jurisdiction, at a stage of proceedings when, according to article 19(1) of the Statute, the Pre-Trial Chamber was required to “satisfy itself that it has jurisdiction.” Immediate resolution will materially advance, and is vital to the integrity, of the proceedings and the Court.

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<sup>64</sup> [Leave to Appeal Judgment](#), paras. 15-16.



**V. CONCLUSION AND RELIEF REQUESTED**

45. For the foregoing reasons, Israel respectfully requests that the Pre-Trial Chamber grant leave to appeal the Impugned Decision.

**Respectfully submitted:**



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Dr. Gilad Noam, Office of the Attorney-General of Israel

Dated 27 November 2024.

At Jerusalem, Israel.