

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/18**
Date: **2 December 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

Prosecution Response to Israel’s “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: **Office of the Prosecutor**

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I. INTRODUCTION

1. On 21 November 2024, Pre-Trial Chamber I dismissed “Israel’s challenge to the jurisdiction of the Court” (“Decision”)¹ on the basis that States are not entitled to challenge jurisdiction under article 19 prior to the issuance of a warrant of arrest or summons to appear.² It also held that Israel could make such a challenge once that condition was satisfied.³ On the same day, the Chamber issued three arrest warrants in the *Situation in the State of Palestine*, two of them against Israeli nationals. On 27 November 2024, Israel filed a direct appeal before the Appeals Chamber under article 82(1)(a) of the Statute against the Decision (“Appeal”).⁴ Simultaneously, “out of an abundance of caution, and in order to preserve all of its procedural rights”,⁵ Israel also filed an application for leave to appeal before Pre-Trial Chamber I under article 82(1)(d) of the Statute against the same Decision (“Application for Leave”).⁶ On 29 November 2024, the Prosecution requested the Appeals Chamber to dismiss the Appeal *in limine* because it is inadmissible under article 82(1)(a) of the Statute.⁷

2. The Prosecution respectfully submits that Israel’s Application for Leave should be dismissed because it fails to meet the threshold conditions for granting leave to appeal set forth in article 82(1)(d) of the Statute. None of the three purported issues identified in the Application affects the fair and expeditious conduct of the proceedings nor would the Appeals Chamber’s intervention, at this juncture, materially advance the proceedings. Far from materially advancing the proceedings, granting leave to appeal the proposed issues would significantly delay the proceedings since, in the view of the Pre-Trial Chamber, Israel can *now* challenge the Court’s jurisdiction, and so can the suspects against whom arrest warrants have been issued. In such circumstances, the criteria of article 82(1)(d) are not met.

II. SUBMISSIONS

3. Article 82(1)(d) “requires (i) that the decision involves an issue that would significantly affect *both* the ‘fair’ and ‘expeditious’ conduct of the proceedings; *or* the outcome of the trial; and (ii) that, in the view of the Chamber, an immediate resolution by the Appeals Chamber is

¹ [ICC-01/18-374](#) (“Decision”); [ICC-01/18-354-AnxII-Corr](#) (“Challenge”).

² [Decision](#), para. 17.

³ [Decision](#), paras. 17-18.

⁴ [ICC-01/18-386](#) (“Appeal”). In its Appeal, Israel requests that the Appeals Chamber suspend the Pre-Trial Chamber’s arrest warrants against Benjamin Netanyahu and Yoav Gallant pursuant to article 82(3) pending the resolution of the Appeal: [Appeal](#), paras. 29-37.

⁵ [ICC-01/18-388](#) (“Application for Leave”), para. 7.

⁶ [Application for Leave](#).

⁷ [ICC-01/18-392 OA2](#).

warranted as it may materially advance the proceedings”.⁸ “These requirements are cumulative and, therefore, failure to demonstrate one makes it unnecessary for the Chamber to address the others”.⁹

4. Chambers have emphasised the “limited nature of the remedy foreseen by article 82(1)(d) of the Statute”, and highlighted that “[i]n the system of the Statute, interlocutory appeals are meant to be admissible only under limited and very specific circumstances”.¹⁰

5. Furthermore, the Appeals Chamber has held that an “issue” is a “an identifiable subject or topic requiring a decision for its resolution”, and the resolution of that issue must be “essential for the determination of matters arising in the judicial cause under examination”.¹¹ The issue must “aris[e] from the decision”, and not be constituted by “a question over which there is a mere disagreement or conflicting opinion”.¹² In addition, “[l]eave to appeal cannot be granted if the party seeking to appeal, instead of identifying appealable issues, seeks leave to litigate *ex novo* before the Appeals Chamber the entire decision”.¹³ Moreover, the mere fact that a party disagrees with the interpretation of the law is not, by itself, sufficient to warrant an appeal under article 82(1)(d).¹⁴ Likewise, “[m]aterially advancing the proceedings does not simply entail having the Appeals Chamber provide its interpretation of the relevant legal provision. If that were the case, all issues would automatically trigger an interlocutory appeal”.¹⁵

6. In its Application, Israel identifies three purported issues,¹⁶ and argues that these are “appealable issues”¹⁷ which “affect the fair and expeditious conduct of the proceedings, and immediate resolution thereof by the Appeals Chamber may materially advance the proceedings”.¹⁸ Israel does not argue that the issues impact “the outcome of the trial”.¹⁹

⁸ [ICC-01/22-111](#), para. 23 (“[Mongolia Decision](#)”); [ICC-01/04-168](#) (“[DRC Extraordinary Review AJ](#)”), paras. 7-19; [ICC-01/05-01/08-75](#), paras. 5-20.

⁹ [Mongolia Decision](#), para. 23; [ICC-01/14-10/18-560](#), para. 55.

¹⁰ [Mongolia Decision](#), para. 23; [ICC-01/12-01/18-342-Red-t-ENG](#), para. 25.

¹¹ See e.g. [DRC Extraordinary Review AJ](#), para. 9.

¹² See e.g. [ICC-01/04-01/10-487](#) (“[Mbarushimana Decision](#)”), para. 4.

¹³ [ICC-02/11-01/11-307](#), para. 70; [ICC-01/04-02/06-604](#), para. 17 (“the Second Issue appears to merely challenge the entirety of the reasoning in the Impugned Decision and to seek a de novo review of the matter by the Appeals Chamber”).

¹⁴ [ICC-01/14-01/18-2665](#), para. 7.

¹⁵ [ICC-02/05-01/20-254](#), para. 7.

¹⁶ [Application for Leave](#), paras. 26-38: “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’”. “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*”. “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”.

¹⁷ [Application for Leave](#), paras. 26-38.

¹⁸ [Application for Leave](#), paras. 39-44.

¹⁹ Statute, art. 82(1)(d).

7. The three purported issues only reflect Israel’s disagreement with the Chamber’s interpretation of the Court’s legal framework and its processes. Yet only the third issue (whether States can challenge jurisdiction under article 19(2) prior the issuance of an article 58 decision) was dispositive in the Decision. Accordingly, the First and Second Issues are not in the circumstances essential matters for judicial determination and are therefore not “issues” for the purposes of article 82(1)(d). In any event, even if assuming *arguendo* that the Third Issue arises from the Decision, for the reasons developed below, none of them (including the Third Issue) significantly affects the fair and expeditious conduct of the proceedings, nor would their resolution by the Appeals Chamber at this juncture materially advance the proceedings. The Application should therefore be dismissed.

A. Israel does not discharge its burden under article 82(1)(d)

8. At the outset, the Prosecution notes that Israel has failed to discharge its burden to demonstrate that *each* of the purported issues affects *each* of the article 82(1)(d) conditions that it has chosen to address.²⁰ Israel generally argues that leave to appeal should be granted because “there has been no substantive public adjudication of the serious jurisdictional objections raised by Israel”²¹ at “[t]he earliest possible resolution”.²² Yet, this sole and general argument is insufficient to satisfy each of the conditions of article 82(1)(d) that Israel has chosen to address. On this basis alone, Israel’s Application should be dismissed.

9. In addition, this argument does not address the second aspect of the first applicable criterion, which is that the proposed issue must also significantly affect the *expeditious* conduct of the proceedings. For failing to address this criterion, the Application should also be dismissed, on this basis alone.

B. None of the purported issues significantly affects the fair and expeditious conduct of the proceedings

10. As noted, Israel generally asserts that the purported issues affect the fairness and expeditiousness of the proceedings because “there has been no substantive public adjudication of the serious jurisdictional objections raised by Israel in this case”.²³ Yet this general argument does not demonstrate how the fair and expeditious conduct of the proceedings would be affected at all, let alone *significantly* so. To the contrary, they are not, and could not, be

²⁰ [ICC-01/05-01/08-3396](#), para. 10.

²¹ [Application for Leave](#), paras. 40.

²² [Application for Leave](#), paras. 44.

²³ [Application for Leave](#), paras. 40.

affected—not least since, as explained further below, the Chamber held that there *is* an avenue for adjudication of such jurisdictional objections.

11. Article 82(1)(d) refers to the fair conduct of the proceedings as a whole, and not fairness as perceived by a particular individual or entity. Contrary to Israel’s suggestion, there is no unfairness to Israel, nor to the suspects, as a result of the current proceedings. Neither Israel, nor any other State, nor any other party or participant, can expect Chambers of this Court to disregard its legal framework to allow the ventilation of arguments whenever and however they are raised. This would not only be *ultra vires* and contrary to the expeditious conduct of the proceedings, but would also be unfair to parties, participants and other interested actors which abide by the Court’s provisions and its processes.

12. The Prosecution recalls that Israel had opportunities to raise its jurisdictional and complementarity concerns but declined to avail itself of them. On 28 January 2020, this Chamber, in another composition, expressly invited Israel to provide submissions on jurisdiction in the context of the rule 103 proceedings that preceded the Chamber’s Article 19(3) Decision confirming the Court’s jurisdiction in this Situation.²⁴ However, Israel chose not to participate.²⁵ Then, in March 2021, when the Prosecution opened its investigation in this Situation, Israel, like any other State with jurisdiction, had the opportunity to request the deferral of the investigation under article 18(2) of the Statute. Again, it chose not to do it. The Prosecution even sought Israel’s clarification of its stance on a deferral, to which Israel responded by simply repeating its rejection of the Court’s jurisdiction.²⁶

13. Further, on 21 November 2024, in the Decision, this Chamber held that *now*, in its view, the legal framework allows Israel to challenge the Court’s jurisdiction and therefore it offered Israel another, and *extant*, procedural avenue to challenge the Court’s jurisdiction. In addition, article 19(2)(a) allows “a person for whom a warrant of arrest [...] has been issued under article 58” to challenge the Court’s jurisdiction.²⁷ It follows that Israel had, and in the Chamber’s view has, avenues to raise its jurisdictional concerns.

²⁴ [ICC-01/18-14](#) para. 16 (“The Chamber notes that Israel has an interest in the adjudication of the Prosecutor’s Request and, accordingly, invites Israel to submit written observations of no more than 30 pages by no later than 16 March 2020.”). The Prosecutor made a similar observation: [ICC-01/18-12](#), para. 6.

²⁵ Although Israel chose not to provide observations, numerous legal representatives of victims, States Parties, intergovernmental organisations, and amici curiae responded to the Chamber’s call. In total, the Chamber received submissions from some 11 groups of one or more victims, 31 States Parties (from 8 States Parties directly, and from 2 international organisations which include 23 States Parties, alongside more than 30 other non-States Parties), and 33 academics or non-governmental organisations (individually or in groups). Such a wide variety of perspectives ensured that the Chamber had the benefit of a diverse range of arguments, which contributed to the reasoning in the Court’s Article 19(3) Decision.

²⁶ [ICC-01/18-375](#), para. 12.

²⁷ Statute, art. 19(2)(a).

14. Accordingly, none of the three purported issues significantly affects the fair and expeditious conduct of the proceedings.

C. Resolution of the purported issues by the Appeals Chamber would not materially advance the proceedings

15. Finally, Israel’s general argument does not demonstrate how resolution of any of the purported issues by the Appeals Chamber would materially advance the proceedings.²⁸ On the contrary, granting leave to appeal to litigate whether Israel *could have challenged* the Court’s jurisdiction would not move the proceedings forward; instead, it would unnecessarily delay them since the Chamber has indicated its view that Israel can *now* challenge it.²⁹

16. As noted, in the Decision, the Chamber held that “Israel clearly would have standing to bring a challenge as the State of nationality under article 19(2)(b) *juncto* article 12(2)(b) of the Statute if the Chamber decides to issue any warrants of arrest for Israeli nationals”.³⁰ In addition, the Chamber “reassure[d] Israel that it will not be estopped on the basis of article 19(5) of the Statute [...] [and that] Israel will have the full opportunity to challenge the Court’s jurisdiction and/or admissibility of any particular case if and when the Chamber issues any arrest warrants or summonses against its nationals”.³¹

17. Given that on 21 November 2024 the Chamber issued arrest warrants against Benjamin Netanyahu and Yoav Gallant, in the view of the Chamber, Israel could *now* challenge the Court’s jurisdiction. Likewise, the two persons against whom arrest warrants have been issued can challenge the jurisdiction of the Court under article 19(2)(a) of the Statute.

18. Accordingly, an immediate resolution by the Appeals Chamber of the purported issues, at this stage, would not materially advance the proceedings.

III. RELIEF REQUESTED

19. For these reasons, Israel’s Application for Leave should be dismissed.



Karim A.A. Khan KC, Prosecutor

Dated this 2nd day of December 2024
At The Hague, The Netherlands

²⁸ *Contra* [Application for Leave](#), para. 44.

²⁹ *See similarly* [DRC Extraordinary Review AJ](#), paras. 14-15, 18.

³⁰ [Decision](#), para. 16.

³¹ [Decision](#), para. 18.