Cour Pénale Internationale

International Criminal Court

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No.**: ICC-01/18**
Date: **13 January 2025**

THE APPEALS CHAMBER

Before: **Judge Tomoko Akane, Presiding Judge**
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE STATE OF PALESTINE

Public

Prosecution response to the "Appeal of 'Decision on Israel's Challenge to the Jurisdiction of the Court pursuant to article 19(2) of the Rome Statute' (ICC-01/18-374)"

Source: **Office of the Prosecutor**

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A. INTRODUCTION

1. The appeal should be dismissed not only because it is inadmissible[1] but also because it fails to show any error materially affecting the Pre-Trial Chamber's determination that Israel's jurisdictional challenge was premature.[2] In reaching this conclusion, the Chamber correctly interpreted the legal framework of the Court. This was because the challenge had been brought before the Chamber had made any decision under article 58 of the Statute, initiating the prosecution of a relevant case in this situation.

2. Significantly, nothing in the Decision deprives any person or entity with standing under article 19(2) of the Statute from challenging the Court's jurisdiction now that an article 58 decision has been issued.[3] As such, the Appeal primarily concerns technicalities under article 19(2)—in particular, the *correct timing* for such a challenge. The Pre-Trial Chamber said as much in its Decision.[4] Nothing in the Decision suggested that the Chamber would not proceed to satisfy itself of jurisdiction in accordance with article 19(1),[5] for the purpose of its decision under article 58.[6]

3. Now that cases in this situation have been initiated, jurisdictional challenges under article 19(2) may be brought by those with standing, if they choose to do so.[7] Consequently, even if this appeal were dismissed—as it should be—this would not restrict the exercise of any

[1] ICC-01/18-392 OA2 ("Request to Dismiss Article 19(2) Appeal *In Limine*") (arguing that the Decision was not a ruling on jurisdiction).
[2] *Contra* ICC-01/18-402 OA2 ("Appeal"), paras. 4-5, 70; *see also* ICC-01/18-374 ("Decision"). Since Israel considers the Decision to be a decision "with respect to jurisdiction" under article 82(1)(a), the page limit (60 pages) in regulation 38(2)(c) of the Regulations of the Court (concerning challenges to admissibility or jurisdiction, *mutatis mutandis* for the purpose of appeals against such decisions) would apply—and Israel indeed filed a brief of 26 pages (not including the title pages). The Appeals Chamber seems also to have accepted this understanding: *see e.g.* ICC-01/18-400 OA OA2 ("Prosecution Extension of Time Request"), para. 9 (anticipating that "Israel would consider itself entitled to file two briefs of up to 60 pages each", citing regulation 38(2)(c) of the Regulations of the Court); ICC-01/18-403 OA OA2 ("Extension of Time Decision"), paras. 6-7 (reducing the extension of time granted to the Prosecution to respond to the appeal, given the actual length of Israel's submissions, but not disagreeing with the Prosecution's understanding of the applicable framework). Accordingly, consistent with the chapeau of regulation 38(2), the Prosecution files a response of the present length.
[3] *Cf.* Appeal, para. 1 (referring to Israel as a "specially affected" State).
[4] Decision, para. 16 ("The issue before the Chamber is whether Israel is entitled—or indeed obliged—to bring such a challenge *before* the Court has ruled on the Prosecution's applications for warrants of arrest", emphasis supplied).
[5] *Contra* Appeal, para. 3
[6] While the Chamber did subsequently initiate prosecutions in this situation, it did so in in *ex parte* decisions under article 58 (currently still classified as secret), to which only the Prosecution is a party: *see* ICC, 'ICC Pre-Trial Chamber rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant,' 21 November 2024. The correct way to raise concerns about the exercise of the Court's jurisdiction in this respect is through a jurisdictional challenge within the framework of article 19(2) of the Statute. There has been no attempt to appeal the decisions under article 58.
[7] *See* Decision, para. 18.

statutory right, nor occasion any unfairness, for any person or entity. Indeed, for similar reasons, the Prosecution has already argued (and respectfully maintains the view) that the appeal is not admissible under article 82(1)(a), because the Decision did not encompass a ruling on jurisdiction at all.[8]

4. Israel expresses general concern about "undue infringement upon the sovereign rights and interests of States, including States not party to the Statute".[9] This is misplaced and immaterial to the proper disposition of this appeal. In particular, it is incorrect to assume that the Court's exercise of jurisdiction over one or more persons—based on their alleged conduct in the territory of a State Party—as such violates the sovereignty of their State of nationality.[10] This was contrary to the view of the "overwhelming majority of States" in drafting the Statute almost thirty years ago,[11] and such a position has since likewise been rejected by the Court.[12] Even among the small minority of States holding this view, some prominent proponents have not maintained it consistently.[13]

5. Nor could it be otherwise since this view would—incorrectly—permit States which are not party to the Statute to veto the sovereign prerogative of States Parties to accept the jurisdiction of the Court on their own territory. No State accepts such a foreign veto over their own exercise of their own national law, even over foreign nationals, unless benefiting from a specific immunity grounded in the mutual consent of the States concerned. *A fortiori*, there can

[8] *See* Request to Dismiss Article 19(2) Appeal *In Limine*, paras. 4-8.
[9] *Contra* Appeal, para. 1.
[10] *Cf.* Appeal, para. 1 (referring to "undue infringement upon the sovereign rights and interests of States, including States not party to the Statute, which may be violated by the Court's assertion of jurisdiction with respect to their nationals or territory").
[11] *See* E. Wilmshurst, 'Jurisdiction of the Court,' in R.S. Lee (ed.), *The International Criminal Court—the Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer: 1999) ("Wilmshurst"), p. 139 (during the negotiations of the Statute, recalling the rejection of proposed amendments requiring "the consent of the territorial State *and* the State of nationality of the accused before the Court had jurisdiction", emphasis added); P. Kirsch, 'The development of the Rome Statute,' in R.S. Lee (ed.), *The International Criminal Court—the Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer: 1999) ("Kirsch"), p. 460 (referring to "overwhelming majorities"); W.A. Schabas and G. Pecorella, 'Article 12: preconditions to the exercise of jurisdiction,' in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck, Hart, Nomos: 2022), p. 812 (mn. 10: "The indispensable requirement of the acceptance of the State of nationality of the accused was not acceptable to the overwhelming majority of States"). *See also* W. A. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd Ed. (OUP: 2016) ("Schabas"), pp. 349-350.
[12] *See e.g.* Decision, para. 13. *See also* ICC-02/17-33 ("*Afghanistan* Article 15(4) Decision"), paras. 58-59.
[13] *Compare e.g.* US Department of State, 'Ending sanctions and visa restrictions against personnel of the International Criminal Court,' 2 April 2021 ("We maintain our longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel") *with* US Department of State, 'Rescuing Ukrainian children and women from Russia's aggression,' 26 July 2023 ("the ICC issued two arrest warrants […] for war crimes committed against Ukraine's children. As President Biden noted, and as the available evidence attests, these arrest warrants are 'justified'"). *See also e.g.* T. Buchwald, 'The ICC arrest warrants: even a strong US reaction should not include sanctions,' *Just Security*, 22 May 2024; A. Keith, 'Do not destroy the Int'l Criminal Court for pursuing accountability for Gaza,' *Just Security*, 17 May 2024.

be no such veto with regard to the exercise in principle of jurisdiction under international law over the most serious crimes of international concern.[14]

B. SUBMISSIONS

6. Israel fails to show any error at all in the Decision, much less one materially affecting the Decision so that it must be reversed by the Appeals Chamber. To the contrary, the Pre-Trial Chamber correctly interpreted article 19(1) of the Statute to restrict jurisdictional challenges to a specific 'case'—which is commenced only by means of an article 58 decision. Where no such decision has yet been taken, a jurisdictional challenge is premature and procedurally barred.[15]

7. Furthermore, while strictly only *obiter dicta* (and therefore not determinative of the outcome of the Decision), the Pre-Trial Chamber also correctly concluded that its prior ruling on the Court's exercise of jurisdiction in this situation (in a different composition) was *res judicata* for the purpose at least of its proceedings under article 58.[16] Similarly, the Pre-Trial Chamber correctly observed that Israel lacks standing to challenge jurisdiction under article 19(2)(c).[17] Yet even if the Chamber erred in either of these conclusions, such errors did not materially affect the Decision.[18]

8. These submissions are further explained in the following paragraphs. To place the proper emphasis on the *ratio decidendi* of the Decision, and to address the relevant issues in a logical order, the Prosecution has amended the order of its response to the grounds of appeal raised by Israel—thus, it first addresses the Third Ground of Appeal (concerning the timing of Israel's jurisdictional challenge), and then proceeds to consider the First and Second Grounds of Appeal, respectively. In the Prosecution's view, this re-ordering will facilitate the correct understanding of the issues in the Appeal, and allow the Prosecution's submissions to be presented with greater economy and clarity.

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[14] *See also e.g.* D. Scheffer, 'The self-defeating executive order against the International Criminal Court,' *Just Security*, 12 June 2020 ("This view is especially precarious because the United States does not contest that those States' national courts could prosecute U.S. defendants for such atrocity crimes, only that they can't provide jurisdiction to an international court to handle such cases […] Today it holds very little credibility because of the character of the crimes at issue, the evolution of international criminal law, and the longstanding principle of criminal jurisdiction over one's own territory"). *See further* D. Scheffer, 'The United States should ratify the Rome Statute,' *Articles of War*, 17 July 2023; D. Scheffer, 'A renewed agenda to advance US interests with the International Criminal Court,' *Council on Foreign Relations*, 25 May 2021.
[15] *Contra* Appeal, paras. 4(C), 53-69.
[16] *Contra* Appeal, paras. 4(B), 40-52. *See also* ICC-01/18-143 ("Article 19(3) Decision").
[17] *Contra* Appeal, paras. 4(A), 23-39.
[18] *Contra* Appeal, para. 5.

9. Finally, the Prosecution submits that the Appeals Chamber should also dismiss Israel's request to suspend the warrants of arrest issued on the basis of the Chamber's article 58 decisions. Neither those decisions nor the warrants are subject to this appeal nor in any event has Israel demonstrated that the validity and enforceability of the warrants, pending resolution of the Appeal, would create an irreversible situation, lead to irreversible consequences, or defeat the purpose of the Appeal.

B.1. The Chamber correctly concluded that Israel's jurisdictional challenge, prior to the Chamber's initiation of a case, was premature (Third Ground of Appeal)

10. In the Decision, the Chamber concluded that "States are not entitled under the Statute to challenge jurisdiction of the Court on the basis of Article 19 prior to the issuance of a warrant of arrest or a summons." In particular, it noted that "[t]he wording of article 19(2)(b) of the Statute makes it clear that States may only challenge the Court's jurisdiction in relation to a particular *case*, i.e., after the relevant Pre-Trial Chamber ruled that there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court", and that such proceedings are conducted *ex parte*.[19] On this basis, the Chamber rejected "Israel's challenge to the jurisdiction of the Court […] as premature".[20]

11. Israel is incorrect now to assert that the Chamber "erred in law" in any of these respects, or failed to provide adequate reasons for rejecting Israel's argument concerning the significance in this regard of article 19(5) of the Statute.[21] To the contrary, the Chamber correctly interpreted article 19(2) according to the principles of the Vienna Convention on the Law of Treaties ("VCLT").[22] In its brief, Israel misinterprets key aspects of the Chamber's reasoning in the Decision, and in any event shows no error in its conclusion. Accordingly, this ground of appeal should be dismissed.

[19] Decision, para. 17 (emphasis supplied).
[20] Decision, Disposition.
[21] *Contra* Appeal, paras. 4(C), 53-69.
[22] *See e.g.* VCLT, arts. 31-32. On the established caselaw consistently requiring the application of these principles in interpreting the Statute, *see further e.g.* ICC-02/04-01/15-2022-Red A ("*Ongwen* Appeal Judgment"), para. 1061; ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 ("*Bemba et al.* Appeal Judgment"), para. 675; ICC-01/04-01/06-3121-Red A5 ("*Lubanga* Appeal Judgment"), para. 277; ICC-01/04-168 OA3 ("*DRC* Extraordinary Review Appeal Judgment"), para. 33. *See also* ICC-02/04-01/05-532 ("*Kony* Confirmation In Absentia Decision"), para. 34.

B.1.a. Article 19(2) restricts jurisdictional challenges to a 'case', commenced by a decision under article 58

12. Understood according to their ordinary meaning, and read together with the context of other provisions of the Statute and in light of its object and purpose, the plain terms of article 19 require that jurisdictional challenges under article 19(2) may only be brought with respect to a concrete "case"—which is commenced by a positive decision of the Pre-Trial Chamber under article 58.[23] The Chamber reached the correct conclusion.

13. First, the chapeau of article 19(2) expressly provides, in material part, that:

> 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 […].[24]

14. 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, 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 understanding of the express terms of article 19(2) is also consistent with the necessary implication of the condition in article 19(2)(a), which requires that a case has been initiated,[25] and the express reference to "jurisdiction over a case" in article 19(2)(b).[26] In its general reference to "jurisdiction", nothing in article 19(2)(c) is of assistance to this interpretive question one way or the other.[27]

15. Second, the context of article 19(2) confirms that jurisdictional challenges may only be made with regard to a concrete case. In particular, the first sentence of article 19(1) states that "[t]he Court shall satisfy itself that it has jurisdiction in any *case* brought before it" (emphasis added).[28] Article 19(4) and article 19(6) likewise imply that jurisdictional challenges must be

[23] *See e.g.* ICC-01/04-101-tEN-Corr ("*DRC* Victim Participation Decision"), para. 65 ("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*", emphasis added). *See also* ICC-01/09-01/11-307 OA ("*Ruto et al.* Admissibility Appeal Decision"), para. 40 ("[C]oncrete 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").
[24] Statute, art. 19(2) (emphasis added).
[25] Statute, art. 19(2)(a) (referring to "[a]n accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58").
[26] Statute, art. 19(2)(b) (referring to "[a] State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted").
[27] Statute, art. 19(2)(c) (referring to "[a] State from which acceptance of jurisdiction is required").
[28] *See also* ICC-RoC46(3)-01/18-37-Anx ("*Bangladesh/Myanmar* Regulation 46(3) Decision, Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut"), paras. 31-32 (cautioning against an expansive interpretation of article 19 pre-empting the obligation under article 19(1) applying to "any case" brought before the Court).

made with regard to concrete cases, by requiring that they "shall take place prior to or at the commencement of the trial" including "[p]rior to the confirmation of charges". Rule 58(2) further clarifies this, by expressly contemplating that a jurisdictional challenge may be joined to a pending "confirmation or […] trial proceeding" but making no reference to any prior proceedings (*i.e.*, before a case has been initiated).[29] Likewise, by providing for their entitlement to receive a copy of a jurisdictional challenge if they have already appeared before the Court, rule 58(3) contemplates that there will necessarily be an identified suspect—which occurs only once a case has been initiated.[30]

16. More broadly, the well established procedure for initiating cases under article 58—which is *ex parte* as a matter of principle,[31] irrespective of their confidentiality or otherwise[32]—also confirms that jurisdictional challenges must be limited to a concrete case. The possibility of bringing a jurisdictional challenge *before* a case was initiated would provide a 'backdoor' into ongoing proceedings under article 58, and wholly undermine their *ex parte* character, turning them into the functional equivalent of ordinary adversarial litigation.

17. Third, interpreting article 19(2) to limit jurisdictional challenges to a concrete case is consistent with the object and purpose of the Statute. The drafters of the Statute sought to balance the practical ability of the Court to ensure that "the most serious crimes of concern to

[29] ICC RPE, rule 58(2) ("[The Chamber] may join the challenge or question to a confirmation or trial proceeding as long as this does not cause undue delay").
[30] ICC RPE, rule 58(3) ("The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor *and to the person referred to in article 19, paragraph 2*, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations […]").
[31] *See* ICC, *Chambers Practice Manual*, 8th Ed. (2024), para. 3 ("The application of the Prosecutor under Article 58 of the Statute and the decision of the Pre-Trial Chamber are submitted and issued *ex parte*"). *See further* 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"); ICC-01/09-35 ("*Kenya* Amicus Curiae Decision"), 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 […] stage is conducted between the Pre-Trial Chamber and the Prosecutor"); ICC-01/09-42 ("*Kenya* Participation Decision"), paras. 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' […] [W]hen proceedings are shaped by the legal instruments of the Court as *ex parte*, […] they shall be conducted without any person adversely interested being given the opportunity to be heard"), 18-20 (interpreting article 58 as excluding the conduct of adversarial proceedings, and noting that the Chamber "does not have the authority to create new adversarial proceedings outside the given procedural framework"), 23 (excluding the participation of persons other than the Prosecutor in article 58 proceedings).
[32] *See e.g.* ICC, *Chambers Practice Manual*, 8th Ed. (2024), para. 3 ("Even if the proceedings are public (which is however not recommended), the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application"). *See also* ICC-01/18-346 ("Prosecution's Consolidated Response to Interveners"), paras. 41-43.

the international community as a whole must not go unpunished"[33] with an appropriate, but not excessive, attention to the potential concerns of States that the Court might inadvertently exceed its jurisdiction.[34] Thus, while article 19 makes specific—and carefully calibrated[35]—provision for jurisdictional challenges, the Court should take care not to alter the balance struck by the drafters through either an overly expansive or reductive interpretation of the procedures which were expressly adopted. Judges of the Court have also warned against the danger of opening the door to "hypothetical or abstract questions of jurisdiction that do not arise from a concrete case".[36]

18. Little is new or controversial in the preceding submissions.[37] To the contrary, the Court's caselaw has already repeatedly emphasised that article 19(2) limits jurisdictional challenges to a concrete case. For example, in one of the Court's earliest decisions, the Pre-Trial Chamber held that jurisdictional challenges under article 19(2)(a) cannot be made before a "warrant of arrest or summons to appear has been issued and thus [a] case has arisen".[38] In the context of admissibility challenges under this same provision, while the Appeals Chamber has been willing to contemplate the possibility of such a challenge before the suspect has appeared before the Court, it still conditioned this on the fact that "a warrant of arrest has been issued under article 58 of the Statute".[39] States litigating before the Court have also understood

[33] Statute, Preamble. *See further* *DRC* Extraordinary Review Appeal Judgment, para. 33 (acknowledging the significance of the "preamble and general tenor of the treaty").
[34] *See also e.g.* Schabas, pp. 40-57 (summarising significant themes in the Preamble, understood as "expressing the 'broader purposes' of the Rome Statute" (text accompanying fn. 51), and concluding that: "[c]riminal justice generally has historically been treated as an issue of national jurisdiction, apparently out of respect for State sovereignty. But there can be no ethical reason why crimes against human beings wherever they take place on the planet are to be punished only if the territorial State chooses to prosecute").
[35] *See e.g.* Kirsch pp. 458-461 ("The final version of Part 2 of the Statute reflects a delicate balance. For the most part, it reflects the broad trends of the Conference. […] Jurisdictional issues proved by far the most difficult to resolve […] Here again, most provisions of Part 2 reflect the broad and more progressive trends of the Conference. […] As constructed, therefore, the Statute […] deliberately represents a balance of different interests. At the time of adoption, the Chairman of the CW indeed presented it as a carefully balanced package that could be destroyed through attempts to make last-minute amendments. The general perception that this was indeed the case explained the defeat at the time by overwhelming majorities, through no-action motions, of two sets of amendments […] [T]he strong majority in support of the Statute adopted by the Rome Conference is in itself an indication that an acceptable balance of preferences and interests was actually achieved"). *See also* Wilmshurst, pp. 127 ("The group of Articles governing the exercise of the jurisdiction of the [ICC] gave rise to some of the most difficult negotiations […] This was only to be expected, since these Articles were complex in nature and touched political nerves, dealing as they did with matters affecting state sovereignty").
[36] *Bangladesh/Myanmar* Regulation 46(3) Decision, Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut, para. 13. *See also* paras. 35-37.
[37] *See also e.g.* Schabas, pp. 487-488 ("jurisdiction of the 'Court' […] can only be challenged once there is a 'case'. Thus, a State that considered the Court was without jurisdiction […] would need to wait until an arrest warrant had been issued before filing proceedings").
[38] ICC-01/04-93 ("*DRC* Jurisdiction Submission Decision"), p. 4.
[39] *DRC* Arrest Warrant Appeal Judgment, para. 51.

jurisdictional challenges under article 19(2) to be limited to a concrete case,[40] without demur by the Appeals Chamber.[41]

19. Likewise, in the Article 19(3) Decision, the Pre-Trial Chamber was faced with the question 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*[42]—but only based on the distinct purpose of article 19(3).[43] In this respect, the Chamber treated article 19(3) as an exception to the principle animating jurisdictional challenges under article 19(2). The Chamber's reasoning *a contrario* was premised on the understanding that such challenges may be brought only once a *case* has arisen.[44]

20. Most recently, this position was further restated and confirmed by the Pre-Trial Chamber in *Venezuela*, which held that "according to article 19(2) of the Statute, States may challenge the jurisdiction of the court 'over a *case*'"[45] and that "only 'the third paragraph of article 19 of the Statute is not restricted to a case.'"[46] At a time before the Chamber had issued any decision

[40] *See e.g.* ICC-01/21-77 OA ("*Philippines* Article 18 Appeal Judgment"), para. 44 (recalling the Philippines' submission that "this ground of appeal 'is not raised as a challenge to the jurisdiction of the Court in the context of article 19 proceedings, *which explicitly concern the jurisdiction of the Court in relation to a concrete case*'", emphasis added).
[41] In the *Philippines* appeal, while the Appeals Chamber considered the procedural posture to be rather "unclear", the Philippines purported to raise arguments concerning an alleged jurisdictional ruling in the first instance decision under article 18, which was *not* the product of an article 19(2) challenge: *see e.g.* *Philippines* Article 18 Appeal Judgment, paras. 44, 51-52. The Appeals Chamber referred to this loosely as a "challenge to the jurisdiction of the Court" but without stating that article 19(2) was engaged: para. 53. By majority, the Appeals Chamber considered that any question of jurisdiction was "neither properly raised and discussed before the Pre-Trial Chamber nor adequately raised on appeal" and declined to consider it any further: paras. 54-57. Dissenting, Judges Perrin de Brichambaut and Lordkipanidze would have considered the Philippines' ground of appeal concerning jurisdiction, and granted it, but on the basis that the Pre-Trial Chamber had ruled on jurisdiction in the context of its decision under article 18(2), rather than because an article 19(2) challenge was yet ripe: *see* ICC-01/21-77-OPI OA ("*Philippines* Article 18 Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze"), paras. 9-14 (concluding that "the Pre-Trial Chamber made a positive determination regarding the exercise of the Court's jurisdiction […] as part of its admissibility assessment under article 18(2)"). This understanding is further supported by Judge Perrin de Brichambaut's carefully expressed reasoning in a former case, taking the position that article 19 in its entirety "applies only once a *case* has been defined by a warrant of arrest or a summons to appear pursuant to article 58 of the Statute": *Bangladesh/Myanmar* Regulation 46(3) Decision, Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut, para. 10 (emphasis added).
[42] Article 19(3) Decision, para. 68.
[43] Article 19(3) Decision, para. 73.
[44] Article 19(3) Decision, para. 73.
[45] ICC-02/18-45 ("*Venezuela* Article 18(2) Decision"), para. 34 (emphasis added).
[46] *Venezuela* Article 18(2) Decision, para. 35.

under article 58, when "the Prosecution has not yet identified any suspects", it held that "a jurisdictional challenge […] pursuant to article 19(2)" was, at that juncture, "premature".[47]

B.1.b. Israel misinterprets the Chamber's reasoning in the Decision

21. Israel raises three main arguments in its attempt to show an error in the Decision.[48] As shown in the following paragraphs, these arguments should all be rejected—they not only fail in their own terms, but they also fail to present any proper alternative to the correct interpretation of article 19(2) set out above.

22. As a preliminary matter, one of Israel's arguments—its second sub-ground of this ground of appeal[49]—is based on a misinterpretation of the Chamber's reasoning in the Decision. Israel thus states that "[a] core rationale" for the Chamber's conclusion "was the Prosecution's 'typical' conduct of the 'entire application process under Article 58 of the Statute *ex parte*'", such that "States 'therefore only become aware of the existence of the proceedings after the Court has ruled on the application […]'".[50] Based on this misreading of the Decision, Israel asserts that the Chamber erred by taking into account an "irrelevant consideration[]", because "the Prosecution's usual practice of not making public" its applications under article 58 "cannot negate, suspend, or limit a State's prerogatives" under article 19(2).[51] Furthermore, Israel suggests that considerations of the Prosecution's typical practice was in any event "inapposite" because the material article 58 applications in this situation *had* been publicly acknowledged by the Prosecution.[52]

23. Yet confidentiality of the article 58 proceedings—or the partial absence thereof—was not the basis of the Chamber's conclusion that Israel's jurisdictional challenge was brought prematurely. Rather, the gravamen of its reasoning was that such challenges could be brought only once a "case" had been initiated, as stated in terms in the latter part of paragraph 17 of the Decision.[53] This was correct, as explained above.[54] In that context, the Chamber likewise correctly stated that a case has been initiated once the Chamber has "ruled that there are

[47] *Venezuela* Article 18(2) Decision, para. 36.
[48] *See e.g.* Appeal, para. 4(C).
[49] *See* Appeal, paras. 63-65.
[50] Appeal, para. 63 (quoting Decision, para. 17).
[51] Appeal, para. 64.
[52] Appeal, para. 65 (concluding: "The Pre-Trial Chamber's reliance on the typically *ex parte* and secretive nature of article 58 proceedings as a basis for rejecting Israel's jurisdiction challenge on the grounds of prematurity is difficult to comprehend in these circumstances").
[53] Decision, para. 17 ("States may only challenge the Court's jurisdiction in relation to a particular *case*", emphasis supplied).
[54] *See above* paras. 12-20.

reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court and issued a warrant of arrest or a summons".[55]

24. In support of this reasoning, in the first part of paragraph 17 of its Decision, the Chamber had also correctly observed that article 58 proceedings are *ex parte* in nature.[56] This means that there is no party to these proceedings other than the Prosecutor. However, this is not a mere preference or exercise of discretion (as the term "typically" may have implied) but rather has been repeatedly recognised to be implicit in the Statute.[57] It is also legally distinct from the question of the confidentiality or otherwise of the proceedings—which (unlike the *ex parte* nature of proceedings) is generally a matter of the Prosecutor's discretion, when initiated by him. While *ex parte* proceedings may often be confidential in practice, as the Chamber noted, this is not necessarily so—and the fact that they are public does not mean that they are not *ex parte*.[58]

25. For these reasons, Israel thus misapprehends the reasoning of the Chamber in this passage of the Decision—both with regard to its significance for the purpose of the Chamber's overall conclusion (that Israel's jurisdictional challenge was premature), and in its own terms (that article 58 proceedings are *ex parte* as a matter of principle, irrespective of their degree of confidentiality). Properly understood, it is clear that the Decision did not err either in law or fact in the manner claimed by Israel.

B.1.c. Israel shows no error in the Chamber's conclusion

26. Israel's remaining arguments with respect to this ground of appeal likewise show no error in the Decision.

27. As its first sub-ground,[59] Israel asserts that: (i) the Chamber "misconstrued" the *Venezuela* decision concerning the timing of jurisdictional challenges—which in its view requires only that a suspect has been "identified", and is satisfied by the filing of the Prosecutor's application under article 58, and;[60] (ii) in any event, the Chamber incorrectly interpreted article 19(2)(c), "which permits jurisdictional challenges to be brought in relation

[55] Decision, para. 17. *See also above* para. 12 (fn. 23).
[56] Decision, para. 17.
[57] *See above* para. 16 (fn. 31).
[58] *See above* para. 16 (fn. 32). This situation was not the first time that article 58 proceedings were publicly acknowledged. For example, in the last 15 years, the Prosecutor publicly announced the filing of article 58 applications with respect to at least thirteen persons in situations including *Darfur*, *Kenya*, *Libya*, and *Georgia*.
[59] *See* Appeal, paras. 54-62.
[60] Appeal, para. 54. *See also* paras. 60-61.

to the Situation as a whole, rather than only in relation to 'a case'".[61] Both these claims are untenable.

28. In the first respect, Israel does not accurately present the *Venezuela* decision.[62] It wrongly considers it in isolation both from the proper interpretation of the Statute (which must be considered "[i]n the first place"),[63] and from the broader context of the Court's jurisprudence in which the *Venezuela* decision plainly sought to situate itself.[64] As such, while the *Venezuela* decision did note that the Prosecution had not yet even identified any relevant suspects to the Chamber, this was within the context of its broader emphasis that a jurisdictional challenge was premature until a case had actually been initiated before the Chamber.

29. Israel is also unconvincing in its further suggestions that the necessary threshold might be met by the mere filing of an application under article 58,[65] or that the term "case" in article 19 should be interpreted in the manner appropriate for the purposes of articles 15(4) and 53(1)(b).[66] The significance and meaning of the multiple references to the term "case" in article 19—its ordinary meaning—is indeed different from its significance and meaning in articles 15(4) and 53(1)(b) due to the (correct) application of the interpretive principles of the VCLT.[67] While the word may be the same, the particular context in which it is used in articles 15(4) and 53(1)(b) establishes that for those purposes it must (exceptionally) be interpreted differently. However, this does not hold true for article 19, where the application of the interpretive principles of the VCLT—including the relevant context—leads only to the conclusion that its ordinary meaning is the correct meaning.[68]

30. Similarly, Israel's assertion that the mere filing of an application under article 58 could serve to initiate a case for the purpose of article 19 overlooks article 58 itself, which implies that any legal effect of the Prosecution's application (other than seising the Pre-Trial Chamber itself) only occurs if the "*Pre-Trial Chamber* […] is satisfied" that the necessary conditions have been met.[69] Article 19(1) does not alter this conclusion, insofar as it imposes no obligation upon the Chamber in the context of article 58 to issue any ruling *before* the article 58 decision

[61] Appeal, para. 55. *See also* paras. 56-59.
[62] *Contra* Appeal, para. 54.
[63] *See* Statute, art. 21.
[64] *See above* para. 20 (referring to *Venezuela* Article 18(2) Decision, paras. 34-36).
[65] *Contra* Appeal, paras. 54, 61.
[66] *Contra* Appeal, para. 60.
[67] *Contra* Appeal, para. 60. *See also above* para. 11 (fn. 22).
[68] *See above* paras. 12-20.
[69] Statute, art. 58(1) (emphasis added). *Contra* Appeal, para. 54.

is rendered.[70] Nothing in the authorities cited by Israel suggests otherwise; if anything, rather, they point to the significance of the article 58 decision.[71] Self-evidently, if the Pre-Trial Chamber is not satisfied that the conditions in article 58 are established, including the jurisdictional condition, then there is no case before the Court.

31. In the second respect, the fact that article 19(2)(c) does not itself expressly include reference to the term "case" is not dispositive of the correct interpretation of the threshold condition for a jurisdictional challenge (the existence of a case).[72] Certainly, this provision does not "*expressly* permit[] jurisdictional challenges to be brought in relation to a Situation as a whole"—it is entirely silent on the timing or scope of challenges brought under this head.[73] For this reason, article 19(2)(c) must be read together with its *chapeau*, which establishes a unitary scheme for all jurisdictional challenges under the various sub-provisions of article 19(2), including the temporal constraint that challenges may be made after a "case" has arisen.[74] Nothing in the brief summary provided by the Appeals Chamber in *Afghanistan* is inconsistent with this reading.[75] While Israel relies on a passage from the Prosecution's own previous submission in this situation—which (taken in isolation) argues for a narrower view of the significance of the "case" pre-condition—it overlooks that this argument was expressly situated in the context of litigation on the scope of article 19(3).[76] As subsequently recognised by the Court, due to the specific nature and purpose of this provision (which, unlike the rest of article 19, does not relate to jurisdictional 'challenges' as such), it is an exception to the general principles applying for example to article 19(2) such as the limitation to concrete cases.[77]

32. As its third sub-ground, Israel asserts that the Chamber "did not give reasons for its rejection of Israel's submission that, taking into account article 19(5), following the Prosecutor's application for arrest warrants it had an 'immediate right to challenge jurisdiction under article 19 given the current state of proceedings in the Situation'."[78] Yet the Chamber

[70] *Contra* Appeal, para. 61.
[71] *Contra* Appeal, para. 61 (fn. 83).
[72] *Contra* Appeal, paras. 56-57.
[73] *Contra* Appeal, para. 56 (emphasis added). *See also above* para. 14.
[74] *See above* paras. 13-14.
[75] *Contra* Appeal, para. 58 (quoting ICC-02/17-138 OA4 ("*Afghanistan* Article 15(4) Appeal Judgment"), para. 42, fn. 59).
[76] *Contra* Appeal, paras. 56, 59 (quoting ICC-01/18-12 ("Prosecution Article 19(3) Request"), para. 24). *See further e.g.* Prosecution Article 19(3) Request, paras. 23, 25 (making clear that the Prosecution was advancing an interpretation of article 19(3)).
[77] *See above* para. 19.
[78] Appeal, para. 66. *See also* paras. 67-69.

addressed Israel's argument that it had standing to challenge jurisdiction at the present time,[79] as well as its understanding that it was "under an *obligation* to do so now pursuant to article 19(5)".[80] Further, the Chamber even reassured Israel that "it will not be estopped on the basis of article 19(5) […] from bringing a jurisdictional challenge" in the event that the "the Chamber issues any arrest warrants or summonses against its nationals."[81] In these circumstances, the Chamber clearly did not fail to "indicate with sufficient clarity the grounds" on which the Decision was based.[82] Indeed, the Appeals Chamber has specifically noted that "[t]here is no prescribed formula for what is or is not sufficient, and the extent to which the duty to provide reasons applies may vary according to the nature of the decision."[83] For example, it "will not necessarily require reciting each and every factor",[84] and it has been recognised that "failure to address in the reasoning of a decision one of the arguments of a party" will not "automatically result[] in an error."[85]

33. Moreover, article 19(5) cannot be properly interpreted to establish a duty to bring jurisdictional challenges before they are ripe according to article 19(2).[86] It is true that article 19(5) exhorts States to act promptly: "A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity."[87] But a statutory obligation to act promptly does not ground an entitlement where none exists, or where none exists *yet*. Rather, it requires a State to act promptly and diligently once the entitlement is actually triggered. Under the Statute, that is after the issuance of a warrant of arrest or summons.[88] The Decision contained no error in this respect.

34. Because of the foregoing, Israel's Third Ground of Appeal should be dismissed.

B.2. The Chamber correctly concluded that Israel lacks standing under article 19(2)(c) (First Ground of Appeal)

35. In the Decision, the Chamber referred to Israel's claim of standing to bring a jurisdictional challenge under article 19(2)(c) of the Statute, based on: (i) its view that "it is a

[79] *See* Decision, paras. 14, 16-18.
[80] Decision, para. 14 (emphasis supplied).
[81] Decision, para. 18.
[82] *Contra* Appeal, para. 68 (fn. 92, quoting ICC-02/05-01/20-236 OA5 ("*Abd-Al-Rahman* Jurisdiction Appeal Judgment"), para. 14).
[83] *Abd-Al-Rahman* Jurisdiction Appeal Judgment, para. 14.
[84] ICC-01/04-01/06-773 OA5 ("*Lubanga* Redactions Appeal Judgment"), para. 20.
[85] ICC-01/05-01/13-560 OA4 ("*Bemba et al.* Interim Release Appeal Judgment"), para. 116.
[86] *Contra* Appeal, paras. 67, 69.
[87] Statute, art. 19(5).
[88] *See above* paras. 12-20.

State from which acceptance of jurisdiction is required under article 12 […] even if there is another State which has delegated jurisdiction to the Court for that same situation",[89] and; (ii) further or alternatively, "its *claim* that Palestine is not a State on the territory of which the alleged conduct occurred" making Israel "the sole State whose acceptance of jurisdiction is required".[90] The Decision doubted the correctness of either argument, recalling that:

> [T]he Court can exercise its jurisdiction on the basis of the territorial jurisdiction of Palestine. As soon as there is one jurisdictional basis pursuant to article 12(2)(a) or (b) of the Statute, there is no need for an additional one.[91]

36. The Chamber further considered that, in the circumstances, a mere claim that Palestine's status precluded the Court from concluding that it was endowed with the required jurisdiction was insufficient to establish Israel's own standing for the purpose of article 19(2)(c).[92] In this regard, it also noted the effect of the holding in the Article 19(3) Decision, as addressed further below.[93] In any event, however, the Chamber noted that its view of the deficiencies in Israel's claim under article 19(2)(c) "is not an issue" because it considered 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."[94]

37. Israel now claims, incorrectly, that the Chamber "erred in law" in doubting its claim of standing under article 19(2)(c), and in its view acting inconsistently with the object and purpose of this provision and failing to support its conclusion with adequate reasons.[95] Yet these arguments are based on a misinterpretation of article 19(2)(c), and fail to show any error in the Decision. Further, and in any event, even if the Chamber had erred in its view of standing under article 19(2)(c), this did not materially affect the Decision—which was determined on the basis of the Chamber's unrelated conclusion that a jurisdictional challenge under article 19(2) could

[89] Decision, para. 12.
[90] Decision, para. 14 (emphasis supplied).
[91] Decision, para. 13.
[92] Decision, para. 15 ("there is a fundamental difference between granting a State standing on the presumptive validity of its claim to have jurisdiction over a situation or a case and granting it standing on the basis of an argument—which was already ruled upon—that a particular State Party does not have jurisdiction").
[93] *See* Decision, para. 15 ("the Chamber would have to ignore its previous decision (rendered in a different composition)"). *See further below* paras. 49-58.
[94] Decision, para. 16.
[95] *Contra* Appeal, paras. 4(A), 23-39.

not be brought until a case was initiated by means of a decision under article 58. This ground of appeal should, therefore, be dismissed.

B.2.a. Israel is not a "State from which acceptance of jurisdiction is required under article 12" for the purpose of article 19(2)(c)

38. Article 19(2)(c) of the Statute provides (emphasis added):

> 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*.

39. Interpreting and applying this provision, the Decision correctly pointed out that "[i]n the matter under consideration, the acceptance by Israel of the Court's jurisdiction is not required, as the Court can exercise its jurisdiction on the basis of the territorial jurisdiction of Palestine."[96] This reflected the correct interpretation of article 19(2)(c), giving effect to the plain meaning of the term "required" and having regard to the two alternative pre-conditions to the exercise of jurisdiction in article 12 of the Statute, to which an express cross-reference is made.

40. As the Pre-Trial Chamber correctly held in the *Afghanistan* situation, the alternative framing of article 12(2) means that, once it is established that conduct occurred within the territory of a State Party, it is unnecessary to further address whether the alleged perpetrators are nationals of a State Party.[97] It explained:

> Under article 12(2) of the Statute, in the cases of referral by a State Party or of proprio motu investigations, the Court may exercise its jurisdiction if the conduct has occurred in the territory of a State that is party to the Statute or has otherwise accepted the Court's jurisdiction (i.e. principle of territoriality), or, alternatively, if the offender is a national of one of those States (i.e. principle of nationality).
>
> The first mechanism comes into play in this proceeding. The conduct[] that […] allegedly occurred in full or in part on the territory of Afghanistan or other States Parties fall[s] under the Court's jurisdiction, irrespective of the nationality of the offender. The

[96] Decision, para. 13.
[97] *Afghanistan* Article 15(4) Decision, para. 58.

> 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 completed in the territory of a non-State Party or vice versa.[98]

41. This approach is, moreover, consistent with the plain intention of the drafters at the Rome Conference, and the object and purpose of the Statute.[99]

42. In the present circumstances, where the situation was referred to the Court by a State Party, and where the Chamber only briefly ventured into the question of standing under article 19(2)(c) as an *obiter dictum* (because it had separately determined that Israel's jurisdictional challenge was premature in any event), the Chamber did not err in its statement of the law in this area.

B.2.b. Israel shows no error in the Chamber's conclusion

43. Israel fails to show any error in the Chamber's conclusion. In the first place, its argument that the Chamber erred by "conflat[ing] preconditions to the exercise of jurisdiction by the Court under article 12 with the standing requirement for a jurisdictional challenge by a State under article 19(2)(c)" is unconvincing.[100] While it is true that articles 12(2) and 19(2)(c) have "different functions",[101] this does not mean that it was erroneous for the Chamber to follow the approach of the *Afghanistan* Pre-Trial Chamber in relying upon article 12(2) as the basis for determining the State "from which acceptance of jurisdiction is *required*".[102] To the contrary, this was the only proper course of action based on the correct interpretation of the relevant provisions.[103]

44. Nor did the Decision state generally, as Israel suggests, that "*no more than one* State has standing to challenge the jurisdiction of the Court under article 19(2)(c)."[104] While this may in fact be true—insofar as article 19(2)(c) only grants standing to a State whose acceptance of the Court's jurisdiction is essential ("required") and this may not be established if the Court can maintain its jurisdiction on an alternative basis[105]—in any event the Chamber was correct in

[98] *Afghanistan* Article 15(4) Decision, paras. 49-50.
[99] *See above* paras. 4-5, 17.
[100] *Contra* Appeal, para. 25.
[101] Appeal, para. 26.
[102] Statute, art. 19(2)(c) (emphasis added).
[103] *See above* paras. 38-41.
[104] *Contra* Appeal, para. 26 (emphasis added). *See* Decision, para. 13.
[105] *Cf.* Appeal, para. 29.

law to conclude that Israel's acceptance of jurisdiction is not required if the Court could act on the basis of the territorial jurisdiction of Palestine, a State Party.[106]

45. Israel is not assisted in this regard by its general references to the possibility of "interested" States approaching the Court with regard to concerns about jurisdiction or admissibility—nothing in the cited authorities evinces or suggests any invitation or standing beyond the scope of the relevant provisions in the Statute, or an expansive interpretation of those provisions.[107] Nor was the reasoning of the Chamber legally inadequate;[108] the basis for its conclusion was clear and it was not required to refer to every argument made by Israel[109]—especially as its comment was no more than an *obiter dictum* in the broader context of the Decision.

46. Israel also incorrectly claims that the Chamber erred by "adopting an unduly restrictive approach to a State's standing" to bring a jurisdictional challenge "in contravention of the object and purpose of article 19(2)".[110] This misapprehends the correct approach to treaty interpretation. Article 31(1) of the VCLT provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of *the treaty* in their context and in the light of *its* object and purpose."[111] It is plain from the emphasised words in this provision (in the singular) that the relevant object and purpose to be considered does not relate to the particular terms or provision at issue but rather to the treaty as a whole. While the drafters' understanding of the purpose of a particular provision as expressed in the preparatory work may be relevant as a *supplementary* means of interpretation under article 32 of the VCLT, this is not mandatory but rather is only merited in appropriate circumstances as illustrated by the phrase "[r]ecourse *may* be had".[112]

47. Given the circumstances of the Decision, and in particular the character of the Chamber's observations on article 19(2)(c) as an *obiter dictum*, there was no requirement for it to enter into the drafting history of article 19(2). Moreover, not only was the correct interpretation of article 19(2)(c) clear,[113] but in any event Israel's account of the drafting history tends to

[106] Decision, para. 13. The Chamber's view that the Court could act on the basis of Palestine's territorial jurisdiction followed from its application of the principle of *res judicata* to the Article 19(3) Decision: *see below* paras. 49-58.
[107] *Contra* Appeal, paras. 27-28.
[108] *Contra* Appeal, paras. 30-33.
[109] *See above* para. 32 (fns. 82-85).
[110] *Contra* Appeal, para. 34.
[111] VCLT, art. 31(1) (emphasis added).
[112] VCLT, art. 32 (emphasis added).
[113] *See above* paras. 38-41.

oversimplify one of the most sensitive aspects of the negotiation of the Rome Statute.[114] The scope of jurisdictional challenges under article 19(2) cannot be divorced form the sensitivities associated with the negotiation of the pre-conditions for the exercise of the Court's jurisdiction in the first place.[115]

B.2.c. The Decision was not, in any event, materially affected by any error in this regard

48. In any event, even if the Chamber had erred in its assessment of Israel's claim of standing under article 19(2)(c), this error did not materially affect the Decision since this finding was no more than an *obiter dictum*. As the Chamber expressly stated, "[i]n any event, Israel's standing is not an issue in this instance".[116] Rather, the *ratio decidendi* of the Decision, as the Chamber noted, was whether Israel could bring a jurisdictional challenge "before the Chamber has ruled on the Prosecution's applications for warrants of arrest".[117] The Chamber correctly determined that it could not, as addressed above.[118] For this reason, even if the Chamber had erred in its interpretation of article 19(2)(c), this did not materially affect the Decision and consequently this ground of appeal must in any event be dismissed.

B.3. The Chamber correctly concluded that the Article 19(3) Decision was *res judicata* (Second Ground of Appeal)

49. In the Decision, the Chamber considered Israel's argument that it must have standing to bring a jurisdictional challenge under article 19(2)(c), because it was "*prima facie* tenable" that Israel was a "State from which acceptance of jurisdiction is required under article 12".[119] In the Chamber's view, such a claim depended on the Chamber accepting that it should "ignore its previous decision" (the Article 19(3) Decision) "which has become *res judicata*".[120]

50. Israel now argues that the Chamber erred in "fact and law" in concluding that the Article 19(3) Decision was *res judicata*.[121] These arguments must fail, and this ground of appeal should be dismissed. The Chamber rightly applied the doctrine of *res judicata* for the purpose of the article 58 proceedings. Likewise, the Chamber did not err in its view that the holding in the Article 19(3) Decision encompassed the point which Israel sought to raise in order to establish its claim of standing to bring a jurisdictional challenge under article 19(2)(c). In any event,

[114] *Cf.* Appeal, paras. 35-39.
[115] *See above e.g.* paras. 4, 17.
[116] Decision, para. 16.
[117] Decision, para. 16.
[118] *See above* paras. 10-34.
[119] Decision, paras. 12, 14.
[120] Decision, para. 15.
[121] *Contra* Appeal, paras. 4(B), 40-52.

even if the Chamber had erred in its application of the *res judicata* doctrine, such an error did not materially affect the Decision—which was determined on the basis of the Chamber's unrelated conclusion that a jurisdictional challenge under article 19(2) could not be brought until a case was initiated by means of a decision under article 58.

B.3.a. The res judicata doctrine applied at least for the purpose of the Chamber's ex parte determination under article 58, including for ancillary matters such as the Decision

51. The Chamber correctly concluded that the Article 19(3) Decision was *res judicata* for the purpose of the article 58 proceedings which, like the article 19(3) proceedings, were *ex parte* and in which the Prosecutor was the only party.[122] The Appeals Chamber has previously agreed that at least its own decisions are *res judicata* binding subsequent first instance chambers in the same proceedings.[123] It did not demur in that context with the Prosecution's submission that this doctrine concerns more generally the binding effect of prior decisions in the "very same matter in the very same proceedings involving the very same actors" and is not to be confused with questions of judicial precedent (for the purpose of other proceedings) as addressed in article 21(2) of the Statute.[124]

52. Israel's main criticism of the Decision in this respect is misplaced because it assumes that the proceedings which the Chamber considered to be affected by the doctrine of *res judicata* were proceedings in which it was a party.[125] It also wrongly asserts that, "but for the fact that [the Chamber] considered the Article 19(3) Decision to be *res judicata*, it would have accepted that Israel would have standing under article 19(2)(c)".[126] This misreads the Decision.

53. As noted above, since the Chamber found Israel's jurisdictional challenge to be premature because a case before the Court had not yet been initiated, its consideration of its potential standing under article 19(2)(c) was essentially hypothetical and an *obiter dictum*[127]—there is no difference in the threshold applying to the sub-provisions of article 19(2), so it was immaterial whether Israel had standing under any particular limb of the provision.[128] In formal terms, therefore, the Decision was merely an ancillary matter to the ongoing proceedings of

[122] *See above* para. 16. This is notwithstanding the permission granted by the Chamber for the intervention of a number of *amici curiae*, including 11 groups of one or more victims, 31 States Parties (directly from eight States Parties, and from two international organisations representing more than 20 States Parties and more than 30 non-States Parties), and 34 academics or non-governmental organisations (individually or in groups).
[123] *See e.g.* ICC-02/17-218 OA5 ("*Afghanistan* Article 18(2) Appeal Judgment"), para. 59.
[124] *See e.g.* ICC-02/17-198 OA5 ("*Afghanistan* Article 18(2) Appeal Brief"), para. 27.
[125] *Contra* Appeal, paras. 41-42.
[126] *Contra* Appeal, para. 40.
[127] *See* Decision, paras. 12-17.
[128] *See above* paras. 12-20, 31.

which the Chamber was seised under article 58—in which the Prosecution was the sole party, as it had been in the article 19(3) proceedings. At least within this limited context, it was permissible for the Chamber to note that the Article 19(3) Decision was *res judicata* with regard to the issue raised by Israel concerning the alleged status of Palestine. Importantly, it is clear that the Chamber did not consider that the *res judicata* effects of the Article 19(3) Decision prevented Israel from challenging jurisdiction at all, once article 19(2) became ripe, because it specifically recalled that this option remained open to Israel once any article 58 decision had been issued.[129] Certainly, nothing in the Decision supports Israel's suggestion that the Chamber considered the Article 19(3) Decision necessarily "resolved all such issues".[130]

54. Israel's further and more general claim that the Article 19(3) Decision cannot be *res judicata* because it is not a "final judgment" is incorrect.[131] For the purpose of this doctrine, and within its natural limits, the decision was "final" once the deadlines for any potential appeal had elapsed, as they did; it was not necessary for it to be positively confirmed by an interlocutory appeal, which is exceptional in nature.[132] In the course of deciding any future jurisdictional challenge brought under article 19(2), however, the precise manner and extent to which the Article 19(3) Decision may be applied as *res judicata* remains open and is not foreclosed by the Decision.[133] Relevant questions in this regard may well include the relationship between articles 19(2) and (3) of the Statute,[134] as well as a close reading of the precise terms in which the Article 19(3) Decision was phrased.[135] Yet, what is important is that these matters do not form part of the Decision and have not yet been decided. As such, and consistent with the principle of judicial economy, they should not be addressed further in the present appeal proceedings.

55. While the discussion of *res judicata* in the Decision was brief,[136] consistent with its status as an *obiter dictum*, Israel fails to show that the Chamber's reasoning was legally inadequate.[137] As previously noted, there is no prescribed formula for what is sufficient, and the extent of reasoning required may vary according to the particular circumstances of the decision.[138]

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[129] *See* Decision, paras. 16, 18. *Contra* Appeal, para. 42.
[130] *Contra* Appeal, para. 51.
[131] *Contra* Appeal, paras. 43-46.
[132] *Contra* Appeal, para. 45.
[133] *Cf.* Appeal, paras. 43-44, 46.
[134] *Cf.* Appeal, paras. 43, 46. *See also* para. 42.
[135] *Cf.* Appeal, para. 44.
[136] *See* Decision, para. 15.
[137] *Contra* Appeal, paras. 50-52.
[138] *See above* paras. 32, 45.

B.3.b. The holding in the Article 19(3) Decision was relevant to Israel's claim of standing under article 19(2)(c)

56. Within the confines of the Chamber's limited reliance on *res judicata*, outlined above,[139] Israel fails to show any error in the Chamber's view that the claim advanced by Israel within the context of its arguments on standing was at least partly inconsistent with the holding in the Article 19(3) Decision.[140] While the Article 19(3) Decision did not consider it necessary to rule on arguments regarding the Oslo Agreements, as Israel notes,[141] it nonetheless held that:

> In view of its accession, Palestine shall thus have the right to exercise its prerogatives under the Statute and be treated as any other State Party would […] Palestine is therefore a State Party to the Statute, and, as a result, a 'State' for the purposes of article 12(2)(a) of the Statute. These issues have been settled by Palestine's accession to the Statute.[142]

57. In this context, the Chamber was therefore correct and reasonable to consider that this was relevant to Israel's claim that "Palestine is not a State on the territory of which the alleged conduct occurred",[143] for the purpose of article 12(2)(a) of the Statute and therefore its own claim of standing under article 19(2)(c). Israel fails to address the significance of this passage at all in its appeal.

B.3.c. The Decision was not, in any event, materially affected by any error in this regard

58. In any event, and as noted above, the Chamber's consideration of Israel's claim of standing under article 19(2)(c), and among other considerations in that context its reliance on the *res judicata* effects of the Article 19(3) Decision, was no more than an *obiter dictum*. As the Decision states in so many words, "[i]n any event, Israel's standing is not an issue in this instance".[144] Rather, the *ratio decidendi* of the Decision, as the Chamber noted, was whether Israel could bring a jurisdictional challenge "before the Chamber has ruled on the Prosecution's applications for warrants of arrest".[145] The Chamber correctly determined that it could not, as addressed above.[146] For this reason, even if the Chamber had erred in its approach to *res*

[139] *See above* paras. 51-54.
[140] *Contra* Appeal, paras. 47-49. *See also* Decision, para. 15.
[141] Article 19(3) Decision, para. 129. *See also* Appeal, paras. 48-49.
[142] Article 19(3) Decision, para. 112.
[143] Decision, para. 14.
[144] Decision, para. 16.
[145] Decision, para. 16.
[146] *See above* paras. 10-34.

judicata, this did not materially affect the Decision and consequently this ground of appeal must in any event be dismissed.

B.4. Suspensive effect is not warranted

59. Finally, the Appeals Chamber should reject Israel's request to suspend the warrants of arrest, which are not subject to appeal in these proceedings.[147] Israel has failed to demonstrate that any suspensive effect is warranted on the basis of the present appeal.

60. First, Israel cannot use the Appeal to request suspension of decisions to which it is not a party, such as the Article 58 Decisions and ensuing warrants of arrest. Israel argues that these proceedings and their outcome are inextricably connected,[148] because reversal of the Decision on appeal will leave it "open to the Court's judges to conclude that the arrest warrants are invalid."[149] Yet the extreme remedy of suspending the arrest warrants is not the inevitable consequence of the mere existence of a jurisdictional challenge, even if the Appeals Chamber were to conclude that the Pre-Trial Chamber had erred in finding that Israel's jurisdictional challenge was premature.[150]

61. Jurisdictional challenges have frequently been brought both in the course of confirmation and trial proceedings.[151] In those cases, it is plain that the mere fact of a jurisdictional challenge did not lead to the suspension or reversal of *previous* decisions with legal force and effect (such as the arrest warrant or the decision committing a suspect to trial on the basis of confirmed charges). Rather, such outcomes would only be a remedy *if* the jurisdictional challenge were successful. The only interim relief contemplated by article 19 is set out in article 19(7).[152] Irrespective whether this relates only to admissibility challenges (as it may appear),[153] or whether it also relates to jurisdiction challenges,[154] the clear implication is at least that no *broader* form of interim relief was contemplated by the drafters. This is further confirmed by

[147] ICC-01/18-386 OA2 ("Notice of Appeal"), paras. 29-37.
[148] Notice of Appeal, para. 33.
[149] Notice of Appeal, para. 33.
[150] Notably, even if the Chamber did err in its procedural conclusion, it still respected the spirit of rule 58(2) by considering the jurisdictional question raised by Israel before rendering its decision under article 58: *see* ICC RPE, rule 58(2).
[151] *See also* Statute, art. 19(4), 19(6); ICC RPE, rule 58(2).
[152] Statute, art. 19(7) ("[i]f a challenge is made by a State referred to in paragraph 2(b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17").
[153] *See e.g.* Statute, art. 19(7) (referring to articles 17 and 19(2)(b)).
[154] *See e.g.* Statute, art. 19(7) (referring to article 19(2)(c)).

article 19(9), which states in plain terms that "[t]he making of a challenge shall not affect the validity of […] any order or warrant issued by the Court prior to the making of the challenge."

62. Second, and in any event, Israel has failed to demonstrate that suspensive effect is warranted at all. The Appeals Chamber has consistently held that "[s]uspensive effect is the exception, not the rule".[155] In exercising its discretion to decide on applications for suspensive effect,[156] the Appeals Chamber will consider "the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances".[157] In so doing, the Appeals Chamber has considered whether the implementation of the decision under appeal: "(i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the appeal'".[158] None of these conditions is met in this case.

63. In order to justify its Request, Israel refers to: (i) "the reputational damage to the Court that would arise from calling for the arrest of a democratically elected leader of a country fighting a war not of its own choosing", (ii) "to the extent that the arrest warrants purport to create obstacles to travel to State Parties who may believe that they are bound to give effect to these arrest warrants" or (iii) "that they are used as an excuse to cut off diplomatic communications".[159] Israel also refers to the "facially cursory reasoning and manifest indications of error" of the Decision.[160]

64. Israel nevertheless fails to show that the validity and enforceability of the warrants pending resolution of the Appeal actually would create an irreversible situation, lead to irreversible consequences, or defeat the purpose of the Appeal. Israel's arguments regarding the purported cursory or erroneous nature of the Decision—in addition to being incorrect—simply relate to the merits and cannot justify the suspension of the Decision. Furthermore, Israel's arguments only appear to relate to the warrant against Mr Netanyahu, as the

[155] ICC-01/09-01/11-1370 OA7 OA8 ("*Ruto* Suspensive Effect Decision"), para. 10.
[156] *See e.g.* ICC-01/04-01/06-1347 OA9 OA10 ("*Lubanga* (Victims' Participation) Suspensive Effect Decision"), para. 10; ICC-01/04-01/06-1290 OA11 ("*Lubanga* (Oral Decision) Suspensive Effect Decision"), para. 7.
[157] *Lubanga* (Victims' Participation) Suspensive Effect Decision, para. 10. *See also Lubanga* (Oral Decision) Suspensive Effect Decision, para. 7; ICC-01/11-01/11-387 OA4 ("*Gaddafi and Al-Senussi* Suspensive Effect Decision"), para. 22.
[158] *See e.g.* ICC-01/05-01/08-817 OA3 ("*Bemba* Suspensive Effect Decision"), para. 11; *Gaddafi and Al-Senussi* Suspensive Effect Decision, para. 22.
[159] Notice of Appeal, para. 34.
[160] Notice of Appeal, para. 35.

"democratically elected leader of a country",[161] and would not concern Mr Gallant, who held the position of Minister of Defence until 5 November 2024.

65. In any event, there is no "reputational damage" from the validity and enforceability of the warrants, within the framework of the Court's established procedures and consistent with the applicable law. Whether one or both suspects fear arrest during their travels is not an irreversible situation, nor would lead to irreversible consequences or defeat the purpose of the Appeal, which relates to different matters. Israel's submissions regarding possible "cut off" of diplomatic communications are likewise speculative and non-substantiated.

C. CONCLUSION

66. For all the reasons above, Israel's Appeal should be dismissed *in limine* as inadmissible under article 82(1)(a), or in any event dismissed on its substantive merits and Israel's request for suspensive effect should be rejected.

Karim A. A. Khan KC, Prosecutor

Dated this 13th day of January 2025
At The Hague, The Netherlands

[161] Notice of Appeal, para. 34.