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Date: **13/12/2024**

THE APPEALS CHAMBER

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

SITUATION IN THE STATE OF PALESTINE

Public

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: **The State of Israel**

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

The Office of the Prosecutor
Mr Karim Khan KC
Mr Andrew Cayley KC

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicant

Unrepresented Victims

Unrepresented Applicants for 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

Registrar
Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Public Information and Outreach Section

I. INTRODUCTION

1. The issues arising in this appeal are (1) the standing of specially affected States to file a jurisdiction challenge under article 19(2)(c) of the Rome Statute; and (2) the appropriate juncture for States to be permitted to do so.[1] These issues are of critical importance to ensuring that the Court adheres to its jurisdictional limitations, including prior to issuing arrest warrants. Appellate clarification in relation to these issues is essential for preventing 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.

2. In its Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute ("Decision"),[2] the Pre-Trial Chamber held that: (i) Israel does not have standing to file a jurisdictional challenge pursuant to article 19(2)(c) at all; and (ii) States do not have standing to file a jurisdictional challenge pursuant to article 19(2) prior to the issuance of arrest warrants. In reaching these findings, the Pre-Trial Chamber also determined that a decision on jurisdiction made by a Pre-Trial Chamber pursuant to article 19(3) that specifically reserves an issue for further consideration nonetheless operates as *res judicata*, thus barring future scrutiny of the issue that it reserved.

3. The significance of the Decision cannot be over-stated. The Court's article 19(1) obligation to "satisfy itself that it has jurisdiction in any case brought before it" and the standing of States to bring challenges to the jurisdiction of the Court under article 19(2) are not mere formalities. 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 under the Rome Statute to challenge the Court's jurisdiction.

[1] 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.
[2] 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 ("Decision").

4. Israel respectfully submits that the Pre-Trial Chamber's findings are erroneous. The specific errors of law and fact which afflict the Decision are reflected in three grounds of appeal.

A. The **first ground of appeal** is that 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". This ground comprises three sub-errors:

   i. first, the Pre-Trial Chamber erred in law by conflating article 12(2)'s preconditions to the exercise of the Court's jurisdiction with the legal test for standing to bring a jurisdictional challenge under article 19(2)(c);

   ii. second, the Pre-Trial Chamber erred in law by providing insufficient reasons for rejecting Israel's submissions as to its standing to file an article 19(2) challenge; and

   iii. third, the Pre-Trial Chamber erred in law in reaching a decision on standing that is contrary to the object and purpose of article 19(2)(c).

B. The **second ground of appeal** is that the Pre-Trial Chamber erred in fact and law in rejecting Israel's standing under article 19(2) on the basis that to find otherwise would be to override its previous article 19(3) decision which had become *res judicata*. This ground comprises four sub-errors:

   i. first, the Pre-Trial Chamber erred in law by applying the principle of *res judicata* in circumstances in which the identity of the parties to the article 19(3) and article 19(2) proceedings was not the same;

   ii. second, the Pre-Trial Chamber erred in law by applying the principle of *res judicata* in circumstances where the previous article 19(3) decision was preliminary in nature and was not a "final judgment";

   iii. third, the Pre-Trial Chamber erred in fact and law by applying the principle of *res judicata* to bar a challenge arising out of the Oslo Accords premised on a previous decision which expressly did not deal with, and indeed reserved, the legal effect of the Oslo Accords on the Court's capacity to exercise jurisdiction; and

iv. fourth, the Pre-Trial Chamber erred in law by failing to provide reasons for rejecting Israel's submissions as to why the 2021 article 19(3) decision does not operate as a bar to Israel's standing to bring a jurisdictional challenge under article 19(2)(c).

C. The **third ground of appeal** is that 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. This ground comprises three sub-errors:

i. first, the Pre-Trial Chamber erred in finding that States may only challenge the Court's jurisdiction in relation to a 'particular case' or that a case for this purpose only arises after the issuance of an arrest warrant;

ii. second, the Pre-Trial Chamber erred in law and fact by rejecting Israel's article 19(2) jurisdictional challenge "as premature" due to the fact that "the Prosecution typically conducts the entire application process under Article 58 of the Statute *ex parte*"; and

iii. third, the Pre-Trial Chamber erred in law by failing to provide reasons for rejecting Israel's submission that article 19(5) exhortation for States to bring jurisdictional challenges at the earliest opportunity provided further support for Israel's standing to exercise prerogatives under article 19(2)(c) prior to the issuance of arrest warrants.

5. Each error materially affected[3] the Decision's outcome. The errors giving rise to the first and second grounds of appeal manifestly impacted upon, and constituted the reasons for, the Chamber's rejection of Israel's standing to file a jurisdiction challenge pursuant to article 19(2)(c). The errors giving rise to the third ground of appeal also manifestly impacted upon, and constituted the reason, for the Chamber's rejection of Israel's standing to file an article 19(2) jurisdiction challenge prior to the issuance of arrest warrants as premature.

6. The appropriate remedy is for the Appeals Chamber to reverse the Decision and issue an order declaring that:

[3] *Prosecutor v. Gbagbo & Blé Goudé*, Judgment on Gbagbo's Appeal against the Third Review Decision on his Detention, ICC-02/11-01/11-548-Red, 29 October 2013; *Prosecutor v. Katanga & Ngudjolo*, Judgment on the Unlawful Detention and Stay of Proceedings Appeal, ICC-01/02-01/07-2259, 12 July 2010, para. 34.

i. Israel has standing to challenge the jurisdiction of the Court pursuant to article 19(2)(c), including prior to the issuance of arrest warrants;

ii. Israel's 19(2)(c) jurisdictional challenge shall be remitted to the Pre-Trial Chamber for consideration on the merits.

iii. The arrest warrants against Mr Netanyahu and Mr Gallant, which were erroneously issued by the Pre-Trial Chamber prior to it providing a substantive determination on the merits of Israel's jurisdictional challenge, are null and void.

II. PROCEDURAL HISTORY

7. On 1 January 2015, the Registrar received a purported declaration under Article 12(3) of the Statute,[4] claiming to be signed by the "President of the State of Palestine", 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".[5]

8. 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.[6]

9. On 16 January 2015, the OTP announced that it had decided to open a preliminary examination into the "*Situation in Palestine*" ("the Situation").[7]

10. 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".[8]

11. On 22 January 2020, the OTP filed a request for a jurisdictional ruling pursuant to Article 19(3) of the Statute,[9] seeking a ruling from the Pre-Trial Chamber on "the scope of the Court's territorial jurisdiction in the situation of Palestine".[10]

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[4] ICC Press Release, "Palestine declares acceptance of ICC jurisdiction since 13 June 2014", 5 January 2015.
[5] Declaration from Palestine, "Declaration Accepting the Jurisdiction of the International Criminal Court", 31 December 2014.
[6] United Nations, Depositary Notification, C.N.13.2015.TREATIES-XVIII.10, 6 January 2015.
[7] ICC Press Release, "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine", 16 January 2015.
[8] Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine, 22 May 2018.
[9] 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 ("Prosecution's Article 19(3) Request").
[10] *Id*. para. 220.

12. On 5 February 2021, the Pre-Trial Chamber issued its Decision on the "Prosecution request pursuant to article 19(3)". That 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 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".[11] The Decision did not address 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".[12] The Pre-Trial Chamber deemed it "opportune to emphasise" that its conclusions pertained only to "the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor".[13] 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".[14] 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* or *ratione loci* transferred to the Palestinian Authority pursuant to the Oslo Accords that created it.[15]

[11] 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, p. 60 ("Article 19(3) Decision").
[12] *Id.*, para. 129.
[13] *Id.*, para. 131.
[14] *Id.* (emphasis added).
[15] Judge Kovács' Partly Dissenting Opinion, ICC-01/18-143-Anx 1, paras 370-371 *et seq*.

13. 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.[16]

14. On 20 May 2024, the Prosecutor announced the filing of confidential and *ex-parte* applications under article 58 of the Statute for warrants of arrest against Israel's Prime Minister, Mr. Benjamin Netanyahu, and Israel's then Minister of Defence, Mr. Yoav Gallant ("Article 58 Application"), as well as against three senior Hamas operatives. The Prosecutor chose to make public certain details regarding his applications.[17]

15. 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'.[18] 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.[19] The large majority of the requests was subsequently granted.[20] The Pre-Trial Chamber issued additional Orders with respect to the participation of victims,[21] and the OPCD.[22] 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.[23]

[16] Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine, 3 March 2021.
[17] Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024. The Prosecutor also released, in conjunction with his announcement, a report by a "Panel of Experts In International Law Convened by the Prosecutor of the International Criminal Court". This report purports to offer further information about the Prosecutor's confidential and *ex parte* allegations, including regarding the Court's purported jurisdiction over the "*Situation in Palestine*", *Id.* para. 10.
[18] 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.
[19] 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.
[20] 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.
[21] 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.
[22] 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.
[23] Prosecution Consolidated Response to Observations by Interveners 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.

16. On 23 September 2024, Israel filed its Challenge to the Jurisdiction of the Court pursuant to article 19(2)(c) of the Rome Statute.[24]

17. On 27 September 2024, the Prosecution submitted its Response to Israel's Jurisdiction Challenge.[25] The Prosecution argued that Israel's Jurisdiction Challenge should be dismissed for prematurity and lack of standing.[26]

18. On 4 October 2024 Israel submitted a Request for Leave to Reply to the Prosecution's Response to Israel's Jurisdiction Challenge.[27]

19. On 21 November 2024, Pre-Trial Chamber I rejected Israel's Jurisdictional Challenge,[28] and in a press release on the same day announced that it had filed a decision, classified as 'secret', issuing arrest warrants against the Prime Minister of Israel, Benjamin Netanyahu, and the former Minister of Defence, Mr. Yoav Gallant.[29] The Chamber also rejected Israel's request for leave to reply to the Prosecutor's response to its jurisdictional challenge.

20. On 27 November 2024 Israel filed a Notice of Appeal against the Pre-Trial Chamber's Decision on Israel's Challenge to the Jurisdiction of the Court pursuant to Article 19(2) ("the Decision").[30] Out of an abundance of caution, Israel also filed an application for leave to appeal the Decision before Pre-Trial Chamber I on the same day.[31]

21. On 29 November 2024 the Prosecution responded to Israel's Notice of Appeal requesting that it be dismissed *in limine*.[32]

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[24] 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").
[25] 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.
[26] *Id.*, paras 5-26.
[27] 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, 4 October 2024.
[28] Decision.
[29] 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.
[30] Notice of Appeal of 'Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute', ICC-01/18-386, 27 November 2024.
[31] 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', ICC-01/18-388, 27 November 2024.
[32] Prosecution Response to Israel's Notice of Appeal of Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute, ICC-01/18-392, 29 November 2024.

22. On 2 December 2024 the Prosecution responded to Israel's Request for leave to appeal the Decision requesting that it be dismissed.[33]

III. SUBMISSIONS

A. First Ground of Appeal: 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"

23. The Pre-Trial Chamber made multiple errors of law 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".[34]

i. The Pre-Trial Chamber erred in law by conflating article 12(2)'s preconditions to the exercise of the Court's jurisdiction with the legal test for standing to bring a jurisdictional challenge under article 19(2)

24. Rather than addressing issues of standing substantively under article 19(2)(c), the Pre-Trial Chamber premised its rationale for denying Israel standing to bring a jurisdictional challenge under article 19(2)(c) 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".[35] To this end, the sole authority 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*.[36] However, that decision, which arose out of article 15, did not address the question of standing to file an article 19(2)(c) jurisdictional challenge. It simply addressed 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.[37]

25. The Pre-Trial Chamber therefore erroneously conflated 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). This is a material error of law. It does not follow

[33] 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, ICC-01/18-393, 2 December 2024.
[34] Decision, para. 13.
[35] *Id*.
[36] Decision, fn. 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.
[37] *Id.*, para. 58.

from the fact that the Court may, under the Statute, exercise jurisdiction if only one precondition under article 12(2) is satisfied that States, whose acceptance of jurisdiction is required under article 12 (i.e. States specially affected in the Situation pursuant to either precondition prescribed by article 12(2)), should be denied standing to challenge the Court's jurisdiction under article 19(2)(c).

26. Article 12(2) and article 19(2)(c) have different functions. The fact that the requirements of article 12(2) are fulfilled if "one or more" of the States of nationality and the State on the territory of which alleged conduct occurred are Parties to the Statute does not mean that *no more than one* State has standing to challenge the jurisdiction of the Court under article 19(2)(c). Not only does this reasoning invert the language of the *chapeau to* article 12(2) (which refers to "one or more" States) but the Pre-Trial Chamber's assertion also implies that standing under article 19(2)(c) is contingent on the ultimate basis on which the Court exercises jurisdiction pursuant to article 12(2). This is demonstrably inaccurate, as article 19(2)(c) provides a basis for potentially multiple States to assert standing to challenge the Court's admissibility or the exercise of jurisdiction, in addition to the State pursuant to which jurisdiction is asserted under Article 12(2).

27. In other words, even if one of the States of nationality or the State on the territory of which alleged conduct occurred *has* accepted the jurisdiction of the Court, other States remain permitted to challenge the jurisdiction of the Court under article 19(2). In the *Situation in Afghanistan*, the Appeals Chamber substantiated the view that in such circumstances an "interested" State may, at an appropriate stage, challenge an assertion of jurisdiction by the Court over its nationals.[38] The Prosecutor appears to have previously accepted that position.[39] No doubt this is because the assertion of jurisdiction by an international criminal court over a

[38] *Situation in the Islamic Republic of Afghanistan*, Judgment on the Appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138, 5 March 2020 ("Afghanistan Appeal Decision"), para. 44 "As highlighted by the Prosecutor and LRV 1, article 19 allows States to raise challenges to the jurisdiction of the Court [….] Thus, these issues may be raised by interested States should the circumstances require, but the arguments are not pertinent to the issue of the authorization of an investigation.". *Situation in the Islamic Republic of Afghanistan*, Transcript of hearing, ICC-02/17-T-003-ENG, 6 December 2019 ("Afghanistan Hearing Transcript"), pp. 39- 40. "Afghanistan or the United States can challenge the admissibility of the case or the jurisdiction of the case under Article 19(2)(b). […] Now, if Afghanistan or the United States were to disagree with a jurisdiction or an admissibility decision of the Pre-Trial Chamber, they have an appeal as of right to the Appeals Chamber under Article 19(6) and the now famous Article 82(1)(a)".

[39] In asserting that it was premature to entertain arguments concerning whether the court could assert its jurisdiction over the nationals of States not Party to the Rome Statute, the Prosecution reassured the Appeals Chamber that such arguments could be heard later, as "the Statute itself provides for mechanisms for States to avail themselves of if they consider it justified, such as challenges to jurisdiction of the Court, or consultations procedure in Article 97 for part 9 requests made by the Court": Afghanistan Hearing Transcript, p. 37, line 23 to p. 38, line 2; p. 40, line 13 to p. 41, line 15.

State's nationals may touch upon sovereign rights and interests that States have a legitimate interest in ensuring are not unduly infringed upon.

28. In this situation, the Pre-Trial Chamber has previously held, with respect to the impact of the Oslo Accords on "the scope of the Court's territorial jurisdiction in Palestine," that "these issues may be raised by interested States based on article 19 of the Statute."[40] Likewise Judge Kovács, in his Partly Dissenting opinion, also referred to Israel as one of the "directly interested States in the present […] situation"[41] whose consent is required under Article 12(3) of the Statute in respect of any exercise of jurisdiction by the Court that exceeds the limits set out in the Oslo Accords.[42]

29. In circumstances where the Court asserts jurisdiction with respect to conduct committed by nationals of a State, or on the territory of a State, that State is a "[a] State from which acceptance of jurisdiction is required under Article 12" within the meaning of Article 19(2)(c). Depending on the circumstances, there may be situations where more than one State is entitled to challenge the jurisdiction of the Court under Article 19(2)(c) (for example, an assertion of jurisdiction by the Court with respect to a national of a State that occurred in the territory of another State, or with respect to a person with dual nationality).

ii. The Pre-Trial Chamber erred in law by providing insufficient reasons for rejecting Israel's submissions as to its standing to file an article 19(2) challenge

30. In reaching its erroneous conclusion as to Israel's lack of standing, the Pre-Trial Chamber failed to grapple with the Court's previous indications that Israel has standing to bring a jurisdictional challenge. The Pre-Trial Chamber's reasoning 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" is insufficient as it is summary in nature and fails to address Israel's substantive submissions on this issue.[43]

31. The Pre-Trial Chamber fails to reason how or why the mechanics of the operation of article 12(2) of the Statute impacts on article 19(2)(c)'s standing requirements. There is no attempt to analyse the textual content of article 19(2)(c), its context, or its drafting history. The Chamber's

[40] Article 19(3) Decision, para. 129.
[41] Judge Kovács' Partly Dissenting Opinion, para. 378.
[42] Judge Kovács' Partly Dissenting Opinion, paras 365, 370-371 "the Prosecutor should satisfy herself that Israel […] also consents according to article 12(3) of the Statute".
[43] Jurisdictional Challenge, paras 40, 42.

summary dismissal of Israel's challenge on the basis of a purported lack of standing is substantiated by a single reference to case law that does not address the issue at hand. This is all the more concerning in circumstances where Israel's jurisdictional challenge constituted the first ever challenge which was the subject of judicial consideration under article 19(2)(c).[44] It was incumbent on the Pre-Trial Chamber to properly reason its position when addressing Israel's submissions.

32. More specifically, 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 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.[45]

33. The Pre-Trial Chamber's failure to provide adequate reasons for not accepting Israel's case as to its standing being premised on the requirement for the acceptance by Israel of the Court's jurisdiction was a failure to provide a reasoned opinion,[46] as such, it was a material error of law which resulted in Israel being wrongfully deprived of adjudication of its jurisdiction challenge.

iii. The Pre-Trial Chamber erred in law in reaching a decision on standing that is contrary to the object and purpose of article 19(2)

34. The Pre-Trial Chamber erred in law by adopting an unduly restrictive approach to a State's standing to file an article 19(2) jurisdiction challenge in contravention of the object and purpose of article 19(2).

[44] *Nb*. Cote d'Ivoire's challenge in the *Gbagbo* case before Pre-Trial Chamber I invoked article 19(2)(c) in addition to article 19(2)(b). However, in its decision, the Chamber did not address article 19(2)(c) but instead only relied upon article 19(2)(b). This matter remains unaddressed on appeal. *See Prosecutor v. Gbagbo*, Requête de la République de Côte d'Ivoire sur la recevabilité de l'Affaire le Procureur c. Simon Gbagbo, et demande de sursis à execution en vertu des articles 17, 19 et 95 du Statut de Rome, ICC-02/11-01/12-11-Red, 30 September 2013, paras 16-17; *Prosecutor v. Gbagbo*, Public redacted version of Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, ICC-02/11-01/12-47-Red, 11 December 2014, para. 26; *Prosecutor v. Gbagbo*, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", ICC-02/11-01/12-75-Red, 27 May 2015.

[45] *See* William Schabas, The International Criminal Court: A Commentary on the Rome Statute, OUP, 2010, p. 368 ("Schabas").

[46] *Prosecutor v. Abd-Al-Rahman*, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against two oral decisions of the Pre-Trial Chamber and the decision entitled 'Decision on the Defence Request to provide written reasoning for two oral decisions', ICC-02/05-01/20-236, 18 December 2020, para. 14 "chambers of the Court must indicate with sufficient clarity the grounds on which they base their decisions" .

35. The Pre-Trial Chamber erroneously failed to consider the object and 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. If it had taken into account the *travaux preparatoires* to those provisions it would have found that their object and purpose was to *enable,* rather than to *restrict,* jurisdictional challenges to the jurisdiction and admissibility of the case by specially affected individuals and States whose sovereign interests might otherwise be infringed.

36. The Rome Conference considered that the term "interested State", which had been utilised in the earlier draft article 34, enabled "too vague" a category of States to be permitted to bring admissibility or jurisdiction challenges. The Preparatory Committee sought a further definition of the category of States which should be permitted to bring such challenges, and it was proposed that this category include 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.[47]

37. Although some Rome Conference participants had initially proposed that States falling within this category should also be parties to the Statute if they were to be permitted to bring a jurisdiction or admissibility challenge, other participants made clear that "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". On this basis, the final formulation of article 19(2)(c) which appeared in the Rome Statute was drafted so that "any State that had a right to consent to the Court's jurisdiction under the Statute should be able to challenge that jurisdiction".[48] Indeed, commentators have noted that article 19(2)(c) "necessarily refers to a non-party State".[49]

38. It is therefore clear that article 19(2) was designed to facilitate challenges to be brought to jurisdiction and admissibility by States Parties and non-Party States: of the nationality of the accused, of the nationality of the victims, where the conduct was committed, and which are custodians of the accused. Rather than being a provision intended to restrict concerned States from being able to bring a jurisdiction challenge at the correct juncture, article 19(2) more broadly was designed to facilitate challenges being brought by a wide variety of specially

[47] 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.
[48] *Id*.
[49] Schabas, p. 368.

affected States whose sovereign interests might otherwise be infringed in a plethora of different ways.

39. The Pre-Trial Chamber's failure to consider the enabling, rather than restrictive, purpose of article 19(2), which is to allow a variety of specially affected States to have standing to bring jurisdiction challenges, was a material error which infected its ultimate wrongful determination that Israel's standing under article 19(2) should be rejected.

B. Second Ground of Appeal: The Pre-Trial Chamber erred in fact and law in rejecting Israel's standing under article 19(2) on the basis that to find otherwise would be to override its previous article 19(3) decision which had become *res judicata*

40. The Pre-Trial Chamber made multiple errors of fact and law when rejecting Israel's standing pursuant to article 19(2)(c), including fundamentally misunderstanding the scope of the arguments as to standing which Israel was seeking to rely upon. It will be recalled that Israel had argued that it had standing to bring its article 19(2)(c) jurisdictional challenge on two independent grounds. These were: firstly, as a state of nationality under Article 12(2)(b) (i.e. irrespective of whether there is another basis for the Court's jurisdiction); and secondly, as "a State which is not Party to this Statute" in respect of which a declaration accepting the exercise of jurisdiction of the Court is required under Article 12(3) (i.e. on the presumptive basis that the Court would otherwise lack jurisdiction with respect to Israeli nationals).[50] However, the Pre-Trial Chamber wrongly rejected Israel's submissions as to standing as being premised "on an argument – which was already ruled upon – that a particular State party does not have jurisdiction".[51] It is plain from the language used by the Pre-Trial Chamber that, but for the fact that it considered the Article 19(3) decision to be *res judicata*, it would have accepted that Israel would have standing under article 19(2)(c) on the basis of the *prima facie* validity of the jurisdictional challenge. Yet, that previous decision was a majority decision issued on 5 February 2021 by a differently constituted Pre-Trial Chamber I upon an *ex parte* application by the Prosecution for a preliminary ruling on territorial jurisdiction pursuant to article 19(3) ("Article 19(3) Decision").[52]

i. The Pre-Trial Chamber erred in law by applying the principle of res judicata in circumstances where the identity of the parties to the article 19(3) and article 19(2) proceedings was not the same

[50] Jurisdictional Challenge, paras 39-45.
[51] Decision, para. 15.
[52] Article 19(3) Decision.

41. 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 the identity of the parties to the litigation was not the same. The Pre-Trial Chamber's erroneous conclusion as to the applicability of the principle of *res judicata* to preclude Israel's standing to bring its article 19(2) jurisdiction challenge thus negates one of the three traditional conditions of *res judicata* in international law, which requires (1) the same parties, (2) the same object, and (3) the same cause.[53]

42. If the Pre-Trial Chamber had not materially erred in law in failing to apply the requirement for there to be the same parties to the litigation in order for *res judicata* to apply, no issue of *res judicata* could have arisen as the article 19(2) jurisdiction challenge was brought by Israel as a "new party". This view accords with the general scope and effect of proceedings under article 19(3). As stated in the Ambos Commentary: "an Article 19(3) decision should not *per se* prevent a concerned State from subsequently demonstrating to the Court […] that the Court does not have jurisdiction [….] Article 19(2) is not nullified by the existence of an Article 19(3) decision".[54] The effect of the Pre-Trial Chamber's erroneous finding to the contrary is to wrongfully empty article 19(2) of its corrective function, because an individual or a State would not, on the Pre-Trial Chamber's analysis, be permitted to bring a jurisdictional challenge once a Chamber has made a preliminary, *ex parte*, assessment of the Court's capacity to exercise such jurisdiction pursuant to article 19(3).

ii. The Pre-Trial Chamber erred in law by applying the principle of res judicata in circumstances where the previous article 19(3) decision was preliminary in nature and was not a "final judgment"

[53] Rose Theofanis, *The doctrine of Res Judicata in International Criminal Law*, *in* 3 INT'L. CRIM. L. REV. (2003), p. 196 ("*The doctrine of Res Judicata*"); *Prosecutor v. Chui*, Judgment on the Prosecutor's Appeal against the Decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute', ICC-01/04-02/12-271-Corr, 7 April 2015, para. 246; *Prosecutor v. Gaddafi*, Decision on the Admissibility Challenge by Dr Saif Al-Islam Gaddafi pursuant to articles 17(1)(c), 19 and 20(3) of the Rome Statute, ICC-01/11-01/11-662, 5 April 2019, fn. 49; *Situation in the Islamic Republic of Afghanistan*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled 'Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation', ICC-02/17-218, 4 April 2023, fn. 96; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision establishing general principles governing applications to restrict disclosure pursuant to rule 81(2) and (4) of the Rules of Procedure and Evidence, ICC-01/04-01/06-568, 13 October 2006, paras 16-21.

[54] Kai Ambos, *Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case*, *in* Rome Statute of the International Criminal Court: Article-by-Article Commentary (4th ed., 2022), p. 1064, mn. 53.

43. The Pre-Trial Chamber erred by applying the notion of *res judicata* to a decision that was not a "final judgment" on a matter, which is an essential component of the rule,[55] but to a decision that was by definition, and expressly stated, to be preliminary in nature, and which has not had been subject to appellate review.

44. The Pre-Trial Chamber's erroneous reliance on the principle of *res judicata* contradicts the majority of the judges' explicit statement, contained within the article 19(3) decision, that issues relating to the Oslo Accords "may be raised by interested States based on article 19 of the Statute."[56] In the article 19(3) decision, the Pre-Trial Chamber deemed it "opportune to emphasise" that its conclusions pertained only to "the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor".[57] The Pre-Trial Chamber went further still, expressly reserving further consideration of jurisdictional issues as and when the Prosecution might bring an article 58 application, or if 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".[58] Despite these clear statements as to the inapplicability of the doctrine of *res judicata* in the article 19(3) decision, the Pre-Trial Chamber fell into legal error by subsequently relying upon the principle of *res judicata* to deprive Israel of standing to make its jurisdictional challenge.[59]

45. The Pre-Trial Chamber also fell into manifest legal error by treating a preliminary ruling by a first instance chamber, which has not been subjected to appellate review, as *res judicata*. It is a well- known feature of the principle of *res judicata* that a matter is not considered to be a "matter judged" until it is a "final judgment".[60] It was an error of law to apply *res judicata* to a preliminary jurisdiction ruling by a majority of a first instance chamber which was not subject

[55] *The doctrine of Res Judicata*, pp. 204-207.
[56] Article 19(3) Decision, para. 129.
[57] *Id*., para. 131.
[58] *Id*. (emphasis added).
[59] Decision, para. 15.
[60] ICJ, *Guinea-Bissau v. Senegal*, Arbitral Award of 31 July 1989, ICJ Reports 1991, 23 August 1989, p. 53 at p. 121, para. 7, dissenting opinion of Judges Aguilar Mawdsley and Ranjeva, "[T]he irrebuttable presumption of legal truth that attaches to a judicial decision once it has become final is an institution common to all systems of law and serves as a basis for the binding character of judicial decisions", cited by Shahabuddeen Opinion in Semanza, fn. 5.

to appellate review, thus precluding further judicial consideration of jurisdictional issues which the previous ruling had expressly reserved in a different procedural context.[61]

46. Indeed, if it were otherwise, this would mean that in any situation where an article 19(3) decision was issued by a Pre-Trial Chamber, no challenges to jurisdiction under article 19(2) could subsequently be made in those proceedings, and there could never be appellate consideration of a finding that the Court is permitted to exercise jurisdiction prior to confirmation of charges. In essence, the result would be that the OTP could through *ex parte* proceedings unilaterally seek to block any possibility of a challenge to the Court's jurisdiction prior to the confirmation of charges by requesting and successfully litigating an article 19(3) decision before a Pre-Trial Chamber. That materially erroneous outcome cannot be in keeping with the statutory scheme of safeguards as to the Court's jurisdiction which is set out in article 19 of the Statute.

iii. The Pre-Trial Chamber erred in fact and law by applying the principle of res judicata to bar a challenge arising out of the Oslo Accords premised on a previous decision which expressly did not deal with, and indeed reserved, the legal effect of the Oslo Accords on the Court's capacity to exercise jurisdiction

47. The Pre-Trial Chamber erred in both fact and law by finding that the article 19(3) decision was *res judicata* and barred Israel's standing to file an article 19(2)(c) jurisdiction challenge in circumstances where the previous article 19(3) decision did not have the same object as Israel's article 19(2)(c) application.

48. More specifically, the Pre-Trial Chamber fell into error by mischaracterising Israel's case on standing, which was based on Palestine's competences under international law, including the issue of the Oslo Accords and the sovereign status of the territory in question, so as to render applicable the principle of *res judicata*. However, the majority reasoning in the Pre-Trial Chamber's 2021 article 19(3) decision expressly did not deal with Israel's position with respect to 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".[62] Taking these statements together, it is clear that the topic of the Oslo Accords was not the *dispositif* or the "decisory part

[61] *Prosecutor v. Chui*, Judgment on the Prosecutor's Appeal against the Decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute', ICC-01/04-02/12-271-Corr, 7 April 2015, para. 247.
[62] Article 19(3) Decision, para. 129.

of the judgment" and therefore issues surrounding the Oslo Accords and their impact on the Court's jurisdiction were not matters which could not thereafter be put into question.[63]

49. The principle of *res judicata* cannot bar consideration of Israel's submissions showing that the Oslo Accords make it clear that the Palestinian authorities have no criminal jurisdiction over Israeli nationals and thus cannot validly delegate such jurisdiction to the Court. Israel's multi-facted submissions with respect to the effect of the Oslo Accords which are contained within its article 19(2) jurisdiction challenge and the majority findings of Pre-Trial Chamber I, which did not deal with the Oslo Accords, reached pursuant to article 19(3), are plainly two separate legal proceedings, brought pursuant to a different statutory mechanism which do not have the same object. The Pre-Trial Chamber's findings to the contrary constitute a material error of fact[64] and law. The importance of this error cannot be overstated not least as this was the very issue which was determinative to Judge Kovac's view, contained in his partly dissenting opinion, that the Court lacks jurisdiction over Israeli nationals and over certain areas within the territory in question due to the limited competences of the Palestinian authorities under the Oslo Accords.[65]

iv. The Pre-Trial Chamber erred in law by failing to provide reasons for rejecting Israel's submissions as to why the 2021 article 19(3) decision does not operate as a bar to Israel's standing to bring a jurisdictional challenge under article 19(2)(c)

50. In ruling that Israel did not have standing to bring an article 19(2)(c) jurisdiction challenge due to the purported *res judicata* effect of the article 19(3) decision,[66] the Pre-Trial Chamber failed both to refer to or attempt to explain its implicit rejection of Israel's submissions to the contrary.[67]

51. The impact of the Pre-Trial Chamber's error was grave, resulting as it did in the Pre-Trial Chamber not considering Israel's arguments as to the effect of the Oslo Accords on the Court's capacity to exercise jurisdiction, and the corollative decision to issue arrest warrants against

[63] *The doctrine of Res Judicata*, p. 197.
[64] See *Prosecutor v. Katanga & Ngudjolo*, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, ICC-01/04-01/07-572, 9 June 2008, para. 25 "misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into accounts facts extraneous"; *Prosecutor v. Gbagbo & Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on Mr Gbagbo's Detention", ICC-02/11-01/15-992, 19 July 2017, para. 16.
[65] Judge Kovács' Partly Dissenting Opinion, paras 372-374.
[66] Decision, para. 15.
[67] Jurisdictional Challenge, paras 58-62.

Israel's Prime Minister and former Defence Minister. In the absence of proper reasons for refusing Israel's case as to the non-applicability of *res judicata*, the Pre-Trial Chamber's decision not to consider issues relating to the effect of the Oslo Accords is particularly hard to comprehend for at least two reasons. Firstly, 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 article 19(1) jurisdiction assessment,[68] and invited interested participants to file *amicus* submissions on the "exceptional" basis that they were considered "desirable for the proper determination of the case"[69] prior to the Court issuing an article 58 decision. Secondly, in issuing the arrest warrants – and notwithstanding the secrecy it has maintained as to its legal reasoning – the Chamber appears to have stated that its article 58 Decisions were "without prejudice to any determination as to the jurisdiction and admissibility of the cases at a later stage".[70] It is unclear what there could be left to determine on jurisdiction if the article 19(3) decision resolved all such issues. There is no explanation in the Decision for the Pre-Trial Chamber's apparent inconsistency on this matter.

52. The Pre-Trial Chamber's failure to address the reasons for not accepting Israel's case as to the inapplicability of the doctrine of *res judicata* was a failure to provide a reasoned opinion,[71] and was a material error of law which resulted in Israel being wrongfully deprived of standing for its jurisdiction challenge and also led to the wrongful issuance of arrest warrants against Israel's Prime Minister and former Defence Minister.

[68] 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, para. 5.
[69] *See* ICC Rules of Procedure and Evidence, Rule 103; *Id*., para. 2; *Prosecution v. Ntaganda*, Decision on the Application by the Redress Trust to Submit Amicus Curiae Observations, ICC-01/04-02/06-259, 18 February 2024, paras 3-4.
[70] 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.
[71] *Prosecutor v. Abd-Al-Rahman*, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against two oral decisions of the Pre-Trial Chamber and the decision entitled 'Decision on the Defence Request to provide written reasoning for two oral decisions', ICC-02/05-01/20-236, 18 December 2020, para. 14 "chambers of the Court must indicate with sufficient clarity the grounds on which they base their decisions".

C. Third Ground of Appeal: 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

53. The Pre-Trial Chamber fell into multiple legal errors when determining 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".[72]

i. The Pre-Trial Chamber erred in finding that States may only challenge the Court's jurisdiction in relation to a particular 'case' or that a case for this purpose only arises after the issuance of arrest warrants

54. In reaching this conclusion, the Pre-Trial Chamber erred by misconstruing the only authority it cited in support of its finding that States may only challenge the Court's jurisdiction in relation to a particular case. The authority relied upon by the Pre-Trial Chamber is the decision of a differently constituted Pre-Trial Chamber I with respect to the *Situation in Venezuela*, which itself cites back to Pre-Trial Chamber I's previous decision.[73] However, in the *Venezuela* decision the Pre-Trial Chamber merely stated that a jurisdiction challenge would be premature where the Prosecution has not yet identified any "suspects".[74] Once the Prosecution had filed an article 58 application, this threshold had plainly been surpassed.

55. Moreover, the Pre-Trial Chamber failed to undertake a proper textual analysis of article 19(2)(c), which permits jurisdictional challenges to be brought in relation to the Situation as a whole, rather than only in relation to "a case".[75] 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). The Decision does not address the absence of the word 'case' from article 19(2)(c) which must have been a deliberate choice by the drafters given the care which had been applied by them in formulating the circumstances in which States were to be permitted to challenge admissibility or jurisdiction under article 19(2).[76]

56. The plain language of Article 19(2)(c) makes clear that it expressly permits jurisdictional challenges to be brought in relation to a Situation as a whole, and not only in relation to "a

[72] Decision, para. 17.
[73] Decision, fn. 23 citing Pre-Trial Chamber I, *Situation in the Bolivarian Republic of Venezuela I*, Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute, ICC-02/18-45, 27 June 2023, paras 35-36; with reference to Article 19(3) Decision, paras 73-74.
[74] *Situation in the Bolivarian Republic of Venezuela I*, Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute, ICC-02/18-45, 27 June 2023, para. 36.
[75] Jurisdictional Challenge, paras 51-54.
[76] *See* paras 39-41 above.

case". Hence, the title of article 19 is "[c]hallenges to the jurisdiction of the Court or to the admissibility of a case". The distinction is repeated in the chapeau language of Article 19(2): "[c]hallenges to the admissibility of a case […] or challenges to the jurisdiction of the Court may be made by [….]". Indeed, as the Prosecution has previously argued:

> The use of the conjunction "or" suggests that the word "case" applies only to admissibility proceedings and not to those concerning jurisdiction. This accords with the Court's jurisdictional design. The Rome Statute, unlike the constitutive instruments of other ad hoc international criminal tribunals, does not establish the precise temporal or territorial parameters of all potential situations. Rather, articles 11 to 14 set out the jurisdictional requirements for all situations, and the Court must ultimately define the jurisdictional scope of its activities within a given situation. Moreover, while "admissibility is an 'ambulatory' process" and complementarity assessments might vary, the territorial scope of the Court's jurisdiction within any given situation is generally static. It thus makes sense to resolve jurisdictional questions as promptly as possible, including before an individual prosecution is commenced or even before an investigation is opened.[77]

Accordingly, the ordinary meaning of article 19, as reinforced by the statutory context elucidated by the OTP, demonstrates that there is no requirement of a pre-existing "case" for a State to make a jurisdictional challenge under Article 19(2)(c).

57. This interpretation is reinforced further by the absence of any reference – direct or indirect – to a "case" in Article 19(2)(c), unlike in articles 19(2)(a) and (b). Article 19(2)(a) expressly limits jurisdictional challenges to "[a]n accused or a person for whom a warrant of arrest or a summons to appear has been issued". Article 19(2)(b) expressly limits admissibility challenges to a "State which has jurisdiction over a case". *A contrario*, article 19(2)(c) contains no reference to "a case" in respect of jurisdictional challenges by a State.

58. This distinction in language is manifest in guidance from the Appeals Chamber as to the "specific procedural mechanisms based on the full participation of relevant parties, participants and States" that are "provided for … in the Court's legal framework ensuring that the Court pursues investigation and prosecutions only in relation to admissible cases".[78] That guidance, which does not add the additional precondition of a 'case' to the requirements for when a State may bring a jurisdictional challenge under article 19(2)(c), states:

> Challenges may also be brought by an accused person or person for whom a warrant of arrest or summons to appear has been issued, a State which has jurisdiction over a case and is investigating or prosecuting or has investigated or prosecuted the case, or a State from which acceptance of jurisdiction is required (Article 19(2) of the Statute).[79]

[77] Prosecution's Article 19(3) Request, para. 24.
[78] Afghanistan Appeal Decision, para. 42, fn. 59.
[79] *Id.*

Indeed, as both Appeals Chambers and Pre-Trial Chambers have routinely held, the non-inclusion of a condition that appears in a neighbouring sub-clause is indicative of the non-applicability of that condition.[80]

59. Indeed, as the Prosecution previously argued in seeking a jurisdictional ruling under Article 19(3) that it was incorrect to insert the "case" requirement by analogy into provisions of article 19 where it is not found: "[a]part from article 19(1), no other sub-paragraph of article 19 textually limits jurisdictional proceedings or decisions to 'cases'".[81] Although this statement is not textually correct, the reasoning is: there is no reference to the word "case" in article 19(2)(c), unlike other provisions addressing challenges by other actors (article 19(1)(a)) or other types of challenge (article 19(2) chapeau and article 19(2)(b)).

60. Even assuming that the requirement of a "case" could somehow be imported into article 19(2)(c) from other subsections of article 19, this term must be approached with sensitivity to the context and stage of proceedings. In interpreting the word "case" in article 53(1)(b), concerning the investigation stage, the *Kenya* Pre-Trial Chamber held that "the reference to 'case' in article 53(1)(b) of the Statute does not mean that the text is mistaken but rather that the Chamber is called upon to construe the term 'case' in the context in which it is applied" which meant, in that context, that "the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation".[82] More particularly, article 15(4) also requires a Pre-Trial Chamber to examine whether a "case appears to fall within the jurisdiction of the Court" as a prerequisite to the opening of an investigation. The word "case" in article 19 must likewise be interpreted as not precluding a jurisdictional challenge until after an article 58 decision.

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[80] *Prosecutor v. Lubanga*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change, ICC-01/04-01/06-2205, 8 December 2009, para. 93 (finding that an express limitation in Article 74(2) limiting re-characterisation of the charges to facts and circumstances implies "*a contrario* that article 74(2) of the Statute does not rule out a modification of the legal characterisation of the facts and circumstances"); *Prosecutor v. Ongwen*, Decision on the Confirmation of Charges, ICC-02/04-01/15-422-Red, 23 March 2016, para. 151 (permitting the defence of duress, provided under Article 31(1), to be raised at confirmation of charges stage where other defences were expressly limited under Article 31(3) to "at trial"); Article 19(3) Decision, para. 73 (finding that the absence of reference to "case" in Article 19(3), unlike in Article 19(1) and (2), "confirms, *a contrario*, that this mechanism extends beyond a case.").

[81] Prosecution's Article 19(3) Request, para. 24.

[82] *Situation in the Republic of Kenya*, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, para. 48.

61. Finally, even if the term "case" is interpreted narrowly according to the Pre-Trial Chamber's reasoning and somehow imported into article 19(2)(c), the provision arguably operates, for the purposes of a jurisdictional challenge, as soon as an application is made for an arrest warrant or summons. This is implied in article 19(1), which expressly requires a Pre-Trial Chamber to "satisfy itself that it has jurisdiction in any case brought before it". Hence, the jurisdictional assessment begins no later than the moment that the case is "brought before" the Pre-Trial Chamber, and is "a prerequisite for the issue of a warrant of arrest".[83] On this basis, it is plainly not premature for a State to raise a jurisdictional challenge once a case has been "brought before" a Chamber, especially where the Prosecutor has authorised the issuance of an external report that identifies the suspects; provided a description of the conduct; and even has offered a legal explanation as to the ostensible basis for the Court's jurisdiction over the case.[84] A "case" therefore may be properly said to have existed insofar as "the defining elements of a concrete case before the Court are the individual and the alleged conduct"[85] at the time that Israel's article 19(2) jurisdiction challenge was erroneously deemed premature by the Pre-Trial Chamber.

62. The Pre-Trial Chamber's material error of law in finding that States may only challenge the Court's jurisdiction in relation to a particular case requires reversal by the Appeals Chamber.

ii. The Pre-Trial Chamber erred in law and fact by rejecting Israel's article 19(2) jurisdictional challenge "as premature" due to the fact that "the Prosecution typically conducts the entire application process under Article 58 of the Statute ex parte"

[83] *Prosecutor v. Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/05-01/08-14-tENG, 10 June 2008, para. 11; *Prosecutor v. Ntaganda*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-02/06-1-Red-tENG, 6 March 2007, paras 25-26; *Prosecutor v. Kony*, Warrant of Arrest, ICC-02/04-01/05-53, 27 September 2005, para. 38; *Prosecutor v. Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, ICC-01/04-01/10-1, 28 September 2010, paras 5-8; *Situation in Georgia*, Public redacted version of 'Arrest warrant for Gamlet Guchmazov', ICC-01/15-41-Red, 24 June 2022, para. 2; *Prosecutor v. Ngaissona*, Public Redacted Version of "Warrant of Arrest for Patrice-Edouard Ngaïssona", ICC-01/14-01/18-89-Red, 7 December 2018, para. 4; *Prosecutor v. Al-Werfalli*, Second Warrant of Arrest, ICC-01/11-01/17-13, 4 July 2018, para. 20.

[84] Report of the Panel of Experts in International Law, 20 May 2024, paras 9-10, 22-33. *See also* Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024.

[85] *Prosecutor v. Ruto et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-01/11-307, 30 August 2011, para. 40.

63. A core rationale for the Pre-Trial Chamber's conclusion that States cannot challenge jurisdiction pursuant to article 19 prior to the issuance of arrest warrants was the Prosecution's "typical" conduct of the "entire application process under Article 58 of the Statute *ex parte*", as a result of which States "therefore only become aware of the existence of the proceedings after the Court has ruled on the application when the arrest warrant or summons is notified to them or made public".[86] This justification of the Pre-Trial Chamber's findings demonstrates a mixed error of law and fact on the part of the Pre-Trial Chamber caused by it taking into account irrelevant facts[87] when making legal determinations as to the timeliness of a State's article 19(2) application.

64. Article 19(2) does not require, or even permit, a Chamber to take into account whether or not any article 58 proceedings, are being conducted on an *ex parte* basis when determining whether or not that State's jurisdictional challenge must be considered on the merits. Further, article 19(2) does not circumscribe the Prosecution's typical practice in choosing whether or not to publicise the making of an article 58 application, as being of any relevance to the question of when a State has standing to make an article 19(2) application. It is respectfully submitted that if the drafters of the Statute had intended for such matters to be taken into account by a Chamber determining the timeliness of a State's standing to make a jurisdictional challenge, this would have been set out clearly in the text. In taking such irrelevant considerations into account, the Pre-Trial Chamber fell into error. An ongoing *ex-parte* procedure, or indeed the Prosecution's usual practice of not making public such a procedure, cannot negate, suspend, or limit a State's prerogatives to challenge "the jurisdiction of the Court" under article 19(2).

65. Moreover, even if, *arguendo*, the Pre-Trial Chamber had been permitted to take into account such matters, such consideration was inapposite with respect to the "Situation in the State of Palestine" in any event. Contrary to the "typical" practice of the Prosecution, the underlying article 58 application had been made public by the Prosecution at the time Israel's jurisdictional challenge was made. Further, the article 58 proceedings in the "Situation in the State of Palestine" had been transformed into a highly unusual procedure, far removed from the

[86] Decision, para. 17.
[87] *Prosecutor v. Gbagbo & Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on Mr Gbagbo's Detention", ICC-02/11-01/15-992, 19 July 2017, para. 16; *Prosecutor v. Ngaïssona*, Judgment on the appeal of Mr. Patrice Edouard Ngaissona against the decision of Trial Chamber V of 6 October 2023 entitled "Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules", ICC-01/14-01/18-2502, 20 May 2024; *Prosecutor v. Mokom*, Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled "Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022", ICC-01/14-01/22-124-Red, 19 December 2022, para. 21.

typical *ex parte* process, in which the Pre-Trial Chamber had granted leave to numerous actors – including States Parties and non-States Parties to the Rome Statute – to participate by opining on jurisdictional issues by virtue of *amici* briefs. Indeed, the thorny jurisdictional matters that arise in the current situation involve difficult issues of public international law, resolution of which is assisted by an open procedure involving a specially affected State. There is nothing inherently confidential in clarifying the Court's jurisdiction and it is no doubt for this reason that the Prosecution included its substantive submissions as to the jurisdictional concerns, which had been raised by many participants in the rule 103 proceedings, in its public consolidated response to the amicus curiae.[88] 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 and constitutes a material error of law.

iii. The Chamber erred in law by failing to provide reasons for rejecting Israel's submission that the article 19(5) exhortation for States to bring jurisdictional challenges at the earliest opportunity provided further support for Israel's standing to exercise prerogatives under article 19(2)(c) prior to the issuance of arrest warrants

66. In ruling that Israel's article 19(2) jurisdiction challenge was premature, the Pre-Trial Chamber noted but 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 stage of proceedings in the Situation".[89] That "immediate right" arose as a result of "the fact that it now knows, based on the public statements of the Prosecutor and on the basis of the Requests for Assistance it received from the Court, that Israeli nationals are the subjects of applications for arrest warrants in relation to acts that took place on the territory of Gaza".[90]

67. Israel had submitted that resolving jurisdictional challenges prior to the issuance of arrest warrants has the beneficial effect of ensuring that the legality of any such future warrants – which may have momentous and irreversible practical consequences – is assessed as soon as possible. Article 19(5) therefore provides an important safeguard for the Court by allowing for

[88] Prosecution's consolidated response to observations by interveners pursuant to article 68(3) of the Rome Statute and rule 103 of the Rules of Procedure and Evidence, ICC-01/18-346, 22 August 2024, paras 13-82.
[89] Jurisdictional Challenge, paras 47-49.
[90] Decision, para. 14.

a procedure, "at the earliest opportunity" that averts or minimises the impact of acts that may subsequently be found to be outside of the ICC's capacity to exercise jurisdiction.[91]

68. The Pre-Trial Chamber's failed expressly to address the application of article 19(5)'s statement that States "shall make a challenge at the earliest opportunity" to situations where the Prosecution has published the purported jurisdictional basis of its article 58 applications prior to the issuance of arrest warrants, and this is the jurisdictional basis which that State seeks to challenge. This was a failure to provide a reasoned opinion.[92] It constituted an error of law as article 19(5) provides the critical metric for a Chamber making a determination as to whether a State's article 19(2)(c) jurisdiction challenge is timely, and therefore ought to be considered on the merits.

69. In spite of the essential nature of article 19(5) for determining the timeliness of a State's article 19(2)(c) jurisdiction challenge, and despite the Pre-Trial Chamber's failure to grapple with Israel's submissions on the impact of this provision on Israel's immediate standing to bring an article 19(2)(c) challenge, the Pre-Trial Chamber ultimately rejected Israel's challenge to jurisdiction for prematurity. This was a material error of law which resulted in Israel's jurisdiction challenge being wrongfully deprived consideration on the merits and meant that the Pre-Trial Chamber wrongly considered that "there was no reason to halt the consideration of the applications for warrants of arrest".[93] Substantial prejudice was therefore occasioned to Israel by this error of law which cannot be cured by the filing of a new article 19(2)(c) jurisdictional challenge now that wrongful warrants of arrest have been issued.

IV. CONCLUSION AND RELIEF SOUGHT

70. In light of the foregoing material errors, the appropriate remedy is to reverse the Decision and issue an order declaring that:

i. Israel has standing to challenge the jurisdiction of the Court pursuant to article 19(2)(c), including prior to the issuance of arrest warrants;

[91] Jurisdictional Challenge, paras 49, 50, 57.
[92] *Prosecutor v. Abd-Al-Rahman*, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against two oral decisions of the Pre-Trial Chamber and the decision entitled 'Decision on the Defence Request to provide written reasoning for two oral decisions', ICC-02/05-01/20-236, 18 December 2020, para. 14 "chambers of the Court must indicate with sufficient clarity the grounds on which they base their decisions".
[93] 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.

ii. Israel's 19(2)(c) jurisdictional challenge shall be remitted to the Pre-Trial Chamber for consideration on the merits.

iii. The arrest warrants against Mr Netanyahu and Mr Gallant, which were erroneously issued by the Pre-Trial Chamber prior to it providing a substantive determination on the merits of Israel's jurisdictional challenge, are null and void.

Respectfully submitted:

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

Dated 13 December 2024, at Jerusalem, Israel.