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THE ICC DECISIONS TO ISSUE ARREST WARRANTS AGAINST HAMAS AND ISRAELI LEADERS:

Comments on the procedure, crimes and legal effects

BY

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ABSTRACT

On 21 November 2024, the Pre-Trial Chamber of the International Criminal Court decided to issue arrest warrants with respect to the Situation in the State of Palestine. That decision has raised debate among States, scholars and public opinion, mainly because these arrest warrants have been issued not only against Hamas but also Israeli leaders, namely Israeli Prime Minister Benjamin Netanyahu and Minister of Defence Yoav Gallant. That debate mainly concerns the procedure leading to the issuance of the arrest warrants, certain crimes charged against the Israeli leaders, and the legal effects of those arrest warrants. This paper examines the legal concerns raised in relation to each of these aspects and explain how these concerns can be addressed and potentially resolved.

RÉSUMÉ

Le 21 novembre 2024, la Chambre préliminaire de la Cour pénale internationale a décidé d'émettre des mandats d'arrêt dans le cadre de la Situation dans l'État de Palestine. Cette décision a suscité des débats intenses entre les Etats, dans la littérature et au sein de l'opinion publique, principalement parce que ces mandats d'arrêt sont dirigés non seulement contre un dirigeant du Hamas mais également contre des responsables politiques israéliens, à savoir, le Premier ministre israélien Benjamin Netanyahu et le ministre de la Défense Yoav Gallant. Ces débats portent principalement sur la procédure qui a conduit à l'émission des mandats d'arrêt, certains crimes reprochés aux dirigeants israéliens et les effets juridiques de ces mandats d'arrêt. Cet article examine les difficultés juridiques que soulève chacun de ces aspects et décrit la manière dont ces difficultés peuvent être abordées et potentiellement résolues.

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I. — INTRODUCTION

In May 2024, the Prosecutor of the International Criminal Court (hereafter "ICC") requested the Pre-Trial Chamber to issue arrest warrants against three Hamas and two Israeli leaders. (1) It was not until six months later that the Chamber granted this request on 21 November 2024. (2) Given the death of two of Hamas leaders, the Pre-Trial Chamber simultaneously issued three arrest warrants against Mohammed Diab Ibrahim Al-Masri (Deif)—commander of the Izz al-Din al-Qassam Brigades, the armed wing of Hamas, whose death announced by Israel had not yet been formally established at the time, as well as Israeli Prime Minister Benjamin Netanyahu and Minister of Defence Yoav Gallant. The Pre-Trial Chamber's decisions to issue those arrest warrants were not published for ensuring the security of witnesses and the efficiency of investigations. The Chamber, therefore, confined itself to press releases summarising the main points of these decisions. (3)

In the wake of the publication of these press releases, certain States, like Argentina, "expresse[d] [their] deep disagreement with [the] decision of the [ICC] to issue arrest warrants" (4), while others, such as Algeria, "warmly welcome[ed] the issuance of [the] arrest warrants". (5) Actually, these arrest warrants have raised criticisms and debate among States, scholars and the public opinion. Such criticisms are mainly due to the fact that the arrest warrants are also directed against top Israeli leaders. Legal concerns mainly relate to the procedure that led to their issuance (II), the crimes charged against those Israeli leaders (III), and the legal effects that they are likely to produce (IV). Each aspect will be analysed in turn in this article and the relevant criticisms levelled against each point will be discussed.

As the article was accepted for publication in February 2025, it does not examine events that occurred thereafter, such as the recent procedural

(1) See the following press release: "Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine", 20 May 2024, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

(2) See the following press releases: "Situation in the State of Palestine: ICC Pre-Trial Chamber I issues warrant of arrest for Mohammed Diab Ibrahim Al-Masri (Deif)", 21 November 2024 (hereafter "Press release Deif"), available at: https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-issues-warrant-arrest-mohammed-diab-ibrahim, and "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 (hereafter "Press release Netanyahu and Gallant"), available at: https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges.

(3) Press release Deif and Press release Netanyahu and Gallant, *supra* note 2.

(4) Algeria's statement is available at: https://x.com/Algeria_MFA/status/1859650780430729417.

(5) Argentina's statement is available at: https://x.com/JMilei/status/1859606894031323568.

developments at the ICC concerning the Situation in the State of Palestine, or the renewed total blockade of humanitarian aid to Gaza by Israel between March and May 2025. These developments, however, do not affect the article's conclusions. They will nonetheless be briefly addressed at the end of the article.

II. — Procedure

The ICC Prosecutor's application for arrest warrants, which was procedurally disputed by states and scholars (B), comes after a long and intense procedure that started ten years ago (A).

A. — *A ten-year-old process*

On 1 January 2015, the ICC received a declaration of acceptance of the Court's jurisdiction from the State of Palestine, as a State not party to the Rome Statute, in accordance with Article 12(3) of the Statute. (6) The State of Palestine requested the Prosecutor at the time, Ms Fatou Bensouda, to investigate alleged international crimes committed on its territory from 13 June 2014. One day later, it acceded to the Statute. Arguably, it did not first refer the situation to the Prosecutor as a State party in accordance with Article 13(a) of the Statute, because the Statute would only come into force with respect to itself on 1 April 2015, (7) and this would have prevented it from requesting the Prosecutor to investigate crimes committed before that date. (8) Two weeks later, on 16 January 2015, the Prosecutor opened a preliminary examination into the Situation in the State of Palestine.

More than three years later, on 22 May 2018, the State of Palestine nonetheless referred the situation to the Prosecutor as a State party in order to speed up the procedure and in light of the occurrence of a series of new crimes. (9) This, indeed, meant that the Prosecutor was no longer required to obtain authorisation from the Pre-Trial Chamber to open investigations once the preliminary examination had been completed. On 20 December 2019, the Prosecutor announced the completion of such preliminary examination. However, "given the unique and highly contested legal and factual issues attaching to th[e] situation [in the State of Palestine], namely, the territory

(6) "Declaration Accepting the Jurisdiction of the International Criminal Court", 31 December 2014, available at: https: //www.icc-cpi.int/sites/default/files/iccdocs/PIDS/press/Palestine_A_12-3.pdf.

(7) See Articles 11(1) and 126(2) of the Statute.

(8) See, e.g., D. Richemond-Barak, "Of Temporal Jurisdiction and Power Struggles in the ICC's Palestine Investigation", *EJIL Talk!*, 22 January 2020.

(9) "Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute", 15 May 2018, available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/2018-05-22_ref-palestine.pdf.

within which the investigation may be conducted", (10) it was necessary for the Prosecutor to seek to ascertain the Court's jurisdiction. The Prosecutor therefore referred the matter to the Pre-Trial Chamber in accordance with Article 19(3) of the Rome Statute, for a ruling on the territorial scope of the Court's jurisdiction. This triggered a highly intense debate, and many *amicus* briefs were submitted to the Pre-Trial Chamber on the matter. (11) In its 5th February 2021 decision, the Chamber concluded that the Court's territorial jurisdiction extended to all crimes committed in the territory of the State of Palestine, including all territories occupied by Israel since 1967, whether committed by Palestinians or Israelis. (12)

A few weeks later, on 3 March 2021, the Prosecutor announced the opening of investigations into the Situation in the State of Palestine for international crimes potentially committed in the territory of the State of Palestine, namely the Occupied Palestinian Territory, which includes the Gaza Strip (hereafter "Gaza") as well as the West Bank and East Jerusalem. (13) According to this announcement, the investigations extended to crimes committed from 13 June 2014, since, in the Prosecutor's words, it was "the date to which reference [was] made in the Referral of the Situation to [her] Office". (14) On 9 March 2021, she also notified its decision to all the States concerned in accordance with Article 18(1) of the Rome Statute.

After the 7th October attacks in 2023 and the Israeli military response to these attacks, several States submitted a referral to the Prosecutor with respect to the Situation in the State of Palestine. They included South Africa, Bangladesh, Bolivia, Comoros, and Djibouti, which made such referral shortly after the outbreak of the armed conflict in Gaza, on 17 November 2023, (15) as well as Chile and Mexico, two months later, on 18 January 2024. (16) The Prosecutor at the time, Mr. Karim Khan, informed those

(10) "Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction", 20 December 2019, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine.

(11) For a list of those *amicus* briefs, see ICC, Situation in the State of Palestine, Decision on the 'Prosecution request to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', Pre-Trial Chamber, ICC-01/18, 5 February 2021, at 2-3.

(12) *Ibid.*, §§ 118 and 123.

(13) "Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine", 3 March 2021, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine.

(14) *Ibid.*

(15) Those referrals are available at: https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf.

(16) Those referrals are available at: https://www.icc-cpi.int/sites/default/files/2024-01/2024-01-18-Referral_Chile__Mexico.pdf.

States that investigations were already carried out in this situation, and that they included alleged crimes committed in the context of the events in Gaza. (17)

B. — *Procedural challenges to the Prosecutor's application for arrest warrants*

The application for arrest warrants filed by the Prosecutor against both Hamas and Israeli leaders on 20 May 2024 has given rise to a great deal of criticism and opposition. This explains the unusually long time, almost six months, taken by the Pre-Trial Chamber to rule on this application. Such delay is mainly due to three procedural events: the submission of numerous *amicus* briefs to the Chamber (1), a first request by Israel challenging the jurisdiction of the Court based on Article 19(2)(c) of the Rome Statute (2), and another based on Article 18(1) of the Statute (3). As the Pre-Trial Chamber rejected both requests, Israel filed two appeals, (18) which nonetheless did not suspend the implementation of the arrest warrants.

1. Amicus *briefs*

The Pre-Trial Chamber was inundated with *amicus* briefs. On 10 June 2024, the Chamber received a request from the United Kingdom to submit an *amicus* brief about the Prosecutor's application for arrest warrants. (19) That brief focussed on the "Oslo Accords issue". The UK argued that the ICC had no jurisdiction over the Israeli leaders because Palestine did not have any jurisdiction for the prosecution of Israeli nationals in the occupied Palestinian territories, including Gaza, and Palestine could not, therefore, delegate such jurisdiction to the Court, according to the principle of *nemo dat quod non habet*: no one can give that which they do not have. (20) One of these Accords, the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), indeed, contains a clause stating that "[t]he territorial and functional jurisdiction of the [Palestinian Interim Self-Government Authority] will apply to all persons, *except for Israelis*, unless

(17) "Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties", 17 November 2023, available at: https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine.

(18) ICC, Situation in the State of Palestine, Appeal of 'Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice' (ICC-01/18-375), Appeals Chamber, ICC-01/18, 13 December 2024; 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), Appeals Chamber, ICC-01/18, 13 December 2024. For an update on these appeals, see below after the conclusion.

(19) ICC, Situation in the State of Palestine, Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, Pre-Trial Chamber I, ICC-01/18, 10 June 2024.

(20) *Ibid.*, §§ 10, 18 and ff.

otherwise provided in this Agreement." (21) According to Article I,1(a) of Annex IV to this agreement:

> The criminal jurisdiction of the [Palestinian Interim Self-Government Authority] covers all offenses committed by Palestinians *and/or non-Israelis* in the Territory, subject to the provisions of this article.
>
> For the purposes of this Annex, "Territory" means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and *Gaza Strip territory* except for the Settlements and the Military Installation Area. (22)

In other words, under this agreement, the Palestinian Authority would have no criminal jurisdiction over crimes committed by Israelis in Gaza. The "Oslo Accords issue" was already raised before the ICC when it had to rule on its territorial jurisdiction in 2021. Many *amicus* briefs submitted to the Court at the time addressed that issue. (23) In its 5th February 2021 decision, with Judge Kovacs partially dissenting and rejecting the Court's jurisdiction on the basis of the "Oslo Accords issue", (24) the Pre-Trial Chamber expressly decided to leave that issue in abeyance. It stated that "the arguments regarding the Oslo Agreements in the context of the present proceedings [were] not pertinent to the resolution of the issue under consideration, namely the scope of the Court's territorial jurisdiction in Palestine". (25) It then added that "these issues may be raised by interested States based on article 19 of the Statute [which concerns challenges to the jurisdiction of the Court with respect to a case], rather than in relation to a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor [..]." (26)

As argued by the UK in its request to submit an *amicus* brief about the Prosecutor's application for arrest warrants against the Israeli leaders, it was time for the Pre-Trial Chamber to make a determination of its jurisdiction, in accordance with Article 19(1) of the Statute, and to deal with the "Oslo Accords issue" as this issue "necessarily form[ed] part of that initial determination". (27) On 27 June 2024, the Pre-Trial Chamber granted the UK request, and it also authorised any interested party to do the same. (28)

(21) The Agreement is available at: https://unsco.unmissions.org/israeli-palestinian-interim-agreement-west-bank-and-gaza-strip (emphasis added).

(22) The Annex is available at: https://www.peaceagreements.org/viewmasterdocument/986 (emphasis added).

(23) For such *amicus* briefs, *supra* note 11.

(24) ICC, Situation in the State of Palestine, Decision on the 'Prosecution request to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', supra note 11, Judge Péter Kovács' Partly Dissenting Opinion, § 365.

(25) ICC, Situation in the State of Palestine, Decision on the 'Prosecution request to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', *supra* note 11, § 129.

(26) *Ibid.*

(27) ICC, *supra* note 19, § 18.

(28) ICC, Situation in the State of Palestine, Public redacted version of 'Order deciding on the United Kingdom's request to provide observations pursuant to Rule 103(1) of the Rules of

Although the newly elected UK Government declined to submit its opinion on the matter, more than seventy interested parties, including States, international organisations or individuals, were authorised to submit *amicus* briefs. (29) Some briefs also dealt with the "Oslo Accord issue" (30), while others not. However, this issue does not seem to have been addressed by the Pre-Trial Chamber in its decision to issue the arrests warrants against the Israeli leaders. In the press release summarizing that decision, the Chamber merely stated the following in relation to its jurisdiction:

> At the outset, the Chamber considered that the alleged conduct of Mr Netanyahu and Mr Gallant falls within the jurisdiction of the Court. The Chamber recalled that, in a previous composition, it already decided that the Court's jurisdiction in the situation extended to Gaza and the West Bank, including East Jerusalem. Furthermore, the Chamber declined to use its discretionary *proprio motu* powers to determine the admissibility of the two cases at this stage. *This is without prejudice to any determination as to the jurisdiction and admissibility of the cases at a later stage.* (31)

Although the Chamber referred to its 5th February 2021 decision on its territorial jurisdiction in the State of Palestine, the last sentence suggests that the question of its jurisdiction, including the "Oslo Accords issue", is not settled yet, and that it could resurface later, but only after the arrest warrants have been issued. This is actually in line with its decision issued on the very same day on Israel's challenge to its jurisdiction under Article 19(2)(c) of the Statute, which provides even more details on the matter.

2. *Israel's challenge under Article 19(2)(c) of the Rome Statute*

According to Article 19(2)(c) of the Statute, the Court's jurisdiction may be challenged by the "State from which acceptance of jurisdiction is required under article 12". The Chamber rejected the Israel's request based on that Article. (32) In rejecting it, the Chamber could have confined itself to the argument that it made at the end of its decision, that a challenge to the Court's jurisdiction under Article 19 can only be brought in relation to a case, which means after arrest warrants have been issued. (33) In the

Procedure and Evidence, and setting deadlines for any other requests for leave to file amicus curiae observations', Pre-Trial Chamber I, ICC-01/18, 27 June 2024.

(29) See, e.g., A. Cohen and Y. Shany, "The ICC Palestine Case in the Aftermath of the Arrest Warrants Decisions - Part One", *Articles of War*, 25 November 2024.

(30) See, e.g., ICC, Situation in the State of Palestine, Al-Haq, Al-Mezan Center for Human Rights and the Palestinian Centre for Human Rights, Written Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, Pre-Trial Chamber I, ICC-01/18, 6 August 2024; Amicus Curiae Submission by the United Nations Mandate Holders of the Human Rights, Pre-Trial Chamber I, ICC-01/18, 6 August 2024.

(31) Press release Netanyahu and Gallant, *supra* note 2.

(32) ICC, Situation in the State of Palestine, Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute, Pre-Trial Chamber I, ICC-01/18, 21 November 2024 (hereafter "Article 19(2) decision").

(33) *Ibid.*, § 17.

present situation, it was brought by Israel before the decision to issue the arrest warrants and it had therefore, to be dismissed.

The Chamber nevertheless endeavours to show that Israel did not have any standing to bring a challenge under Article 19(2)(c), as a "State from which acceptance of jurisdiction is required under article 12". Israel had, indeed, relied on the "Oslo Accords issue" in that regard. (34) It argued that it had a standing under Article 19(2)(c) because it had *prima facie* jurisdiction over the crimes allegedly committed by the Israeli leaders in Gaza, according to the Oslo Accords, and that its acceptance of the Court's jurisdiction was therefore required. (35) The Chamber, however, sidestepped that issue. It relied on its 5th February 2021 decision, in which it had ruled that the State of Palestine was a State party to the Rome Statute and that the Court had jurisdiction over crimes committed by anyone on the territory of that State, including Israelis, in accordance with Article 12(2)(a) of its Statute. (36) As the Chamber pointed out, "the acceptance by Israel of the Court's jurisdiction [was] not required, as the Court can exercise its jurisdiction on the basis of the territorial jurisdiction of Palestine (37) in accordance with Article 12(2)(a). In other words, Israel had no standing to act under Article 19(2)(c) since it could not be a "State from which acceptance of jurisdiction is required [..]" within the meaning of that Article.

Both this Chamber's decision and its decision to issue the arrest warrants against the Israeli leaders despite challenges to its jurisdiction, notably based on the "Oslo Accords issue", seem justified in light of the relevant provisions of the Rome Statute, (38) particularly in view of the time at which those challenges were submitted, namely before and not after the arrest warrants were issued. However, the reasoning might be questioned in two respects. Firstly, it is uncertain why the Chamber allowed so many interested parties to submit *amicus* briefs, when it was expected that these briefs focus on the "Oslo Accords issue", and any challenge to the Court's jurisdiction on that basis seemed doomed to failure by virtue of the time at which it was brought. It cannot be ruled out that this was due to a change in the composition of the Chamber, as the Chamber that granted permission to submit *amicus* briefs was differently composed from the Chamber that summarily dismissed the Israel's challenges. (39) Moreover, there was no formal requirement that

(34) ICC, Situation in the State of Palestine, Public Redacted Version of 'Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute', Pre-Trial Chamber I, ICC-01/18, 23 September 2024 (hereafter "Israel's Article 19(2) request"), §§ 86-102.

(35) *Ibid.*, § 45.

(36) Article 19(2) decision, *supra* note 32, § 15.

(37) *Ibid.*, § 13.

(38) However, this may lead to problematic legal uncertainties, such as with respect to the issue of immunity, *infra* note 180.

(39) See also A. COHEN and Y. SHANY, "The ICC Palestine Case in the Aftermath of the Arrest Warrants Decisions – Part One", *supra* note 29.

those *amicus* briefs must be confined to the "Oslo Accords issue" and, in practice, certain briefs also addressed other issues, such as those related to the principle of complementarity. (40)

Secondly, it is questionable how the Court could dispense itself with ruling on the "Oslo Accords issue", without contradicting its own case law, in particular its 5th February 2021 decision on its territorial jurisdiction, in which it expressly stated that the "Oslo Accords issue" could be raised at a later stage by interested States on the basis of Article 19 of the Statute. It may be difficult to argue that, in rejecting the Israel's challenge to the Court's jurisdiction and in issuing the arrest warrants against the Israeli leaders, the Chamber implicitly rejected the Israel argument based on the Oslo Accords. The Chamber did not discuss this issue anywhere in its decisions, despite the fact that it had been raised not only by Israel but also numerous interested parties. Rather, it seems that the "Oslo Accords issue" could still resurface at a later stage – if not addressed during the appeals proceedings.

Contrary to what the Court envisages at the end of its decision on Israel's challenge under Article 19(2)(c) of the Rome Statute, this will not likely be the case if Israel submits a new request, this time "as the State of nationality under article 19(2)(b) *juncto* article 12(2)(b) of the Statute […]." (41) Article 19(2)(b) does not, indeed, concern the issue of the Court's jurisdiction as such, but rather the admissibility of a case under the principle of complementarity. Challenges may only be brought under that Article to "[the] State which has jurisdiction over a case, *on the ground that it is investigating or prosecuting the case or has investigated or prosecuted*." (42) It is therefore hard to see how the "Oslo Accords issue" could be dealt with in the context of such challenge. (43) By contrast, it could be examined in the context of requests that MM. Netanyahu or Gallant could make pursuant to Article 19(2)(a), which gives "[the] person for whom a warrant of arrest or a summons to appear has been issued [..]" the right to challenge the admissibility of the case or *the Court's jurisdiction*. This could also be the case if the Court decided to satisfy itself of its jurisdiction over the cases under Article 19(1).

In any event, as pointed out by some scholars, (44) the Oslo Accords do not appear fundamentally to constitute an obstacle to the Court's jurisdiction. Various arguments may be put forward in this regard, such as the fact that the Court's jurisdiction is not delegated by the States parties, or that the relevant agreements are not or no longer enforceable against the State of

(40) See, e.g., ICC, Situation in the State of Palestine, Federal Republic of Germany, Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence, ICC-01/18, 6 August 2024.

(41) Article 19(2) decision, *supra* note 32, § 16.

(42) Emphasis added.

(43) See, e.g., T. Dannanbaum, "Nuts & Bolts of the International Criminal Court Arrest Warrants in the 'Situation in Palestine'", *Just Security*, 22 November 2024.

(44) See e.g. A. Haque, "The International Criminal Court's Jurisdiction in Palestine and the 'Oslo Accord Issue'", *Just Security*, 9 July 2024.

Palestine, or that the State of Palestine has not ceded its criminal jurisdiction over the Israelis, but only the exercise of such jurisdiction.

3. *Israel's challenge under Article 18(1) of the Rome Statute*

The Pre-Trial Chamber was also seized by Israel of an application to challenge the jurisdiction of the Court based on Article 18(1) of the Rome Statute. That Article provides that "[when] the Prosecutor initiates an investigation [...] [they] shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned." According to paragraph 2 of the same Article, whose aim is to ensure the implementation of the complementarity principle, States then have one month to ask the Prosecutor to refer investigations to them, by informing the Prosecutor that they are "investigating or [have] investigated" into the crimes related to the notification.

In its challenge to the Court's jurisdiction, Israel requested the Pre-Trial Chamber to order the Prosecutor to give a notice in accordance with Article 18(1) of the Statute. Had such injunction been granted by the Chamber, Israel would have one month to request a deferral of investigation in order to conduct itself the investigations. Israel has put forward two main arguments in this regard. First, Israel argued that the notification that it received from the Prosecutor on 9 March 2021, after the Prosecutor's decision to open investigations into the Situation in the State of Palestine, was not sufficiently specific and therefore did not constitute a notification within the meaning of Article 18(1). (45) The Chamber rightly rejected this argument. It emphasised that the 9th March 2021 notification contained all the information relevant to the States concerned. (46) Even though Israel had informed the Prosecutor in the month of that notification that it contested the Court's jurisdiction over the Situation in the State of Palestine, (47) the Chamber noted that, despite a request for clarification from the Prosecutor about such a contestation, (48) Israel had not submitted a request for deferral of investigations in accordance with Article 18(2) of the Statute. (49) The Chamber, therefore, concluded that the one-month time limit had expired on 9 April 2021 without Israel having made any request for deferral of investigations. (50) Moreover, the Chamber added that making such a request at a late stage, in particular

(45) ICC, Situation in the State of Palestine, Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice, Pre-Trial Chamber I, ICC-01/18, 23 September 2024 (hereafter "Israel's Article 18(1) request"), §§ 9 and 31-42.

(46) ICC, Situation in the State of Palestine, Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice, Pre-Trial Chamber I, ICC-01/18, 21 November 2024 (hereafter "Article 18(1) decision"), § 11.

(47) *Ibid.*, § 10.

(48) *Ibid.*

(49) *Ibid.*, § 12.

(50) *Ibid.*, § 13.

after the Prosecutor's application for arrest warrants, would be incompatible with the object and purpose of the principle of complementarity. (51) In the Chamber's view, this principle requires that the Prosecutor's deferral in favour of the State which has jurisdiction over the crimes should take place at the beginning and not at an advanced stage of the investigations.

According to the second argument put forward by Israel in its request under Article 18(1), a new notification was needed since, in Israel's view, "a new situation ha[d] arisen" (52) after the 7th October attacks, which required "new defining parameters" (53) for conducting the investigations. (54) According to Israel, this was notably confirmed by the fact that, as mentioned above, several States again referred the Situation in the State of Palestine to the Prosecutor, with a request to investigate crimes committed during the conflict in Gaza. (55) The Chamber also – and once again rightly – rejected the argument insofar as the parameters according to which the Prosecutor decided to charge MM. Netanyahu and Gallant in his application for arrest warrants did not differ from those on which was based the 9th March 2021 decision to open the investigations. According to the Chamber, these parameters include "conduct committed in the context of the same type of armed conflicts [namely, an international armed conflict, a non-international armed conflict or a situation of occupation], concerning the same territories [including Gaza], with the same alleged parties to these conflicts [notably Israel and Hamas]." (56)

As a result, the Chamber rejected the Israel's application to challenge the jurisdiction of the Court based on Article 18(1) of the Rome Statute, as the 9th March 2021 notification was sufficiently clear and the post 7th October events did not require any new notification. That being said, the Chamber emphasized that Israel nevertheless had the possibility of challenging the admissibility of the cases on the basis of Article 19(2)(b) of the Statute. (57) As a reminder, this Article, indeed, allows any State "which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted" to "[c]halleng[e] the admissibility of a case on the grounds referred to in article 17 [which sets out the complementarity criteria] or [to] challeng[e] the jurisdiction of the Court."

(51) *Ibid.*, § 14.
(52) Israel's Article 18(1) request, *supra* note 45, §§ 2, 19-30.
(53) *Ibid.*, §§ 31-58.
(54) *Ibid.*, e.g., § 28.
(55) *Ibid.*, § 27.
(56) Article 18(1) decision, *supra* note 46, § 15.
(57) *Ibid.*, § 16.

III. — CRIMES

The two press releases, which summarize the main points of the Court's decision to approve the Prosecutor's application for arrest warrants, mention all the international crimes charged against both the Hamas and Israeli leaders (A). Among those crimes, the main disputed one is arguably the war crime of starving civilians as a method of warfare (hereafter "the war crime of starvation"), which is charged against MM. Netanyahu and Gallant (B).

A. — *Overview of the crimes charged in the arrest warrants*

According to the press release, the crimes charged against the Hamas leader, Mohammed Diab Ibrahim Al-Masri (Deif), who was presumed to be still alive at the time, include war crimes committed in the context of a non-international armed conflict between Hamas and Israel, as well as crimes against humanity. (58) Most of these crimes are alleged to have been committed in the context of the 7th October attacks. They comprise the war crime and crime against humanity of murder (Articles 8(2)(c)(i) and 7(1)(a) of the Rome Statute, respectively), the crime against humanity of extermination (Article 7(1)(b)), the war crime of hostage-taking (Article 8(2)(c)(iii)) and the war crime of intentionally directing attacks against civilians (Article 8(2)(e)(i)). Certain crimes are also alleged to have been committed after the 7th October attacks, against captives in Gaza "predominantly women, [who] were subjected to sexual and gender based violence, including forced penetration, forced nudity, and humiliating and degrading treatment." (59) In the Chamber's view, such violence amounts to war crimes and crimes against humanity of torture (Articles 8(2)(c)(i)) and 7(1)(f), respectively), war crimes and crimes against humanity of rape and other forms of sexual violence (Articles 8(2)(e)(vi) and 7(1)(g), respectively), war crimes of cruel treatment (Article 8(2)(c)(i)) and war crimes of outrages upon personal dignity (Article 8(2)(c)(ii)).

On the other hand, the arrest warrants against MM. Netanyahu and Gallant also contain charges of both war crimes and crimes against humanity. (60) Those charges mainly derive from conduct related to the impediment of humanitarian aid to the Gazan population. They include the war crime of starvation (Article 8(2)(b)(xiii)), and the crimes against humanity of murder, persecution and other inhuman acts (Article 7(1)(a),(h) and (k)). Another charge, namely the war crime of intentionally directing attacks against civilians ((Articles 8(2)(b)(i)), derives from allegedly unlawful attacks in relation to two specific events, which are not, however, disclosed by the Chamber. Among all the allegations retained by the Prosecutor in his application for

(58) Press release Deif, *supra* note 2.
(59) *Ibid.*
(60) Press release Netanyahu and Gallant, *supra* note 2.

arrest warrants, only one has not been taken up by the Chamber in its decision, namely the crime against humanity of extermination charged against the Israeli leaders. The Chamber merely stated in this respect that "[o]n the basis of material presented by the Prosecution covering the period until 20 May 2024, the Chamber could not determine that all elements of [that] crime [...] were met". (61) Those elements involve the killing of persons, including through the deprivation of access to food and medicine, (62) that "constituted, or took place as part of a mass killing of members of a civilian population". (63) It is not excluded that such a crime may be established at a later stage in light of new evidence gathered by the Prosecution. (64)

B. — *The disputed specific war crime of starvation charged against the Israeli leaders*

Many of the crimes listed in the arrest warrants, especially those charged against the Hamas leader, do not raise any particular legal problem and do not have given rise to any criticism or debate. This contrasts with the war crime of starvation charged against MM. Netanyahu and Gallant. (65) It has been highly disputed, even before it was charged by the Prosecutor and retained by the Pre-Trial Chamber. (66) The legal concerns raised by the war crime of starvation relate to its contextual (1), material (2) and mental (3) elements.

1. *Contextual element*

Any war crime provided in the Rome Statute necessarily presupposes, as part of its contextual element, that the underlying prohibited conduct "took place in the context of and was associated with" an armed conflict. (67) One specific feature of the war crime of starvation provided in the Statute is that it may only fall into the ICC's jurisdiction if it has been committed in the context of an international armed conflict, (68) unless the territorial or national State concerned has ratified the amendment which includes this

(61) *Ibid.*

(62) ICC, Elements of crimes, available at: https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf, at 4, footnote 9.

(63) *Ibid.*

(64) See, e.g., T. Dannanbaum, *supra* note 43.

(65) The war crime of intentionally directing attacks against civilians merely raises evidentiary issues. In any case, it does not involve delving into the delicate contextual issue of the legal qualification of the armed conflict, as discussed below in relation to the war crime of starvation, since, according to the Rome Statute, that crime is applicable in both international and non-international armed conflicts (Articles 8(2)(b)(i) and 8(2)(e)(i), respectively).

(66) See, e.g., G. Corn and E-Ch. Gillard, "The War Crime of Starvation – The Irony of Grasping at Low Hanging Fruit", *Articles of War*, 15 May 2024.

(67) See, e.g., ICC, Elements of crimes, *supra* note 62, at 9.

(68) Article 8(2)(b)(xxv) of the Rome Statute.

crime in the list of the war crimes applicable in non-international armed conflicts. (69) Yet, the State of Palestine has not ratified such amendment. Accordingly, in order to prosecute MM. Netanyahu and Gallant for this war crime, the Court must demonstrate that the underlying prohibited conduct of the two Israeli officials were part of an international armed conflict – or were regulated by the law of international armed conflict, such as the law of occupation. This is far from being self-evident since the Israeli military operations in Gaza are officially directed against Hamas, a non-state actor.

The Pre-Trial Chamber referred to the qualification of the armed conflict to which Israel is a party in Gaza and provided certain explanations. It stated in this regard:

> The Chamber found reasonable grounds to believe that during the relevant time, international humanitarian law related to international armed conflict between Israel and Palestine applied. This is because they are two High Contracting Parties to the 1949 Geneva Conventions and because Israel occupies at least parts of Palestine.

These explanations, however, remain limited. It is not clear whether the Chamber is endorsing the view that there is an international armed conflict between Palestine and Israel because they are both High Contracting Parties to the Geneva Conventions and that, "in accordance with Article 2 common to the Geneva Conventions, an armed conflict between two High Contracting Parties is international in character". (70) Such a view had been advocated among others by the panel of experts convened by the Prosecutor in support to his application for arrest warrants. (71) Instead, the Chamber seems to be dealing with the applicable law, while assuming the existence of an international armed conflict or a situation of occupation, without further explaining these qualifications. The Chamber, then, goes on to state:

> The Chamber also found that the law related to non-international armed conflict applied to the fighting between Israel and Hamas. The Chamber found that the alleged conduct of Mr Netanyahu and Mr Gallant concerned the activities of Israeli government bodies and the armed forces against the civilian population in Palestine, more specifically civilians in Gaza. It therefore concerned the relationship between two parties to an international armed conflict, as well as the relationship between an occupying power and the population in occupied territory. For these reasons, with regards to war crimes, the Chamber found it appropriate to issue the arrest warrants pursuant to the law of international armed conflict. (72)

(69) Resolution ICC-ASP/18/Res.5, "Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court", *The Hague*, 6 December 2019.

(70) Panel of Experts in International Law Convened by the Prosecutor of the International Criminal Court, Report of the Panel of Experts in International Law, 20 May 2024 (hereafter "Panel of Experts"), available at: https://www.icc-cpi.int/sites/default/files/2024-05/240520-panel-report-eng.pdf, § 13.

(71) *Ibid.*

(72) Press release Netanyahu and Gallant, *supra* note 2.

The Chamber does not provide any further guidance in these developments on the legal tests for qualifying the armed conflict as an international one. It first recalls the existence of a non-international armed conflict between Israel and Hamas, while indicating that the prohibited conduct of the two Israeli leaders were not part of that conflict but rather of the conflict between Israel and Palestine, insofar as such conduct were directed against civilians in Gaza. Once again, the Chamber seems to rather focus on the law applicable to the conduct in question.

It is unfortunate that the Chamber decided not to make public the legal reasons for the qualification of the armed conflict as an international one, as this did not arguably raise any security issue or hamper the effectiveness of the investigations. (73) Two lessons can nevertheless be drawn from the above Chamber's statements. The first is that two types of conflict are identified to qualify the hostilities conducted by Israel against Hamas in Gaza: one between Israel and the State of Palestine and the other between Israel and Hamas. This position seems to espouse the dual classification theory advocated by the Prosecutor in its application for arrest warrants, (74) which has recently been elaborated by the International Committee of the Red Cross in its updated commentaries on the Geneva Conventions. (75) While there is no legal difficulty in qualifying the conflict in Gaza as a non-international one, it is much more delicate to classify it as an international armed conflict, particularly because Palestine's statehood remains controversial today (76) – even if there is a clear trend of States towards acknowledging its statehood, with 148 States having recognized so far the State of Palestine as a State. (77) Three approaches have been advocated in that respect, (78) none of which

(73) See, in the same vein, A. COHEN and Y. SHANY, "The ICC Palestine Case in the Aftermath of the Arrest Warrants Decisions - Part Two", *Articles of War*, 2 December 2024.

(74) "Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine", *supra* note 1.

(75) See, e.g., ICRC, *Commentary on the First Geneva* Convention (Cambridge University Press, 2016) §§ 260-262.

(76) See, e.g., R. SABEL, *International Law and the Arab-Israeli Conflict* (Cambridge University Press, 2022) at 395-396, M. Milanovic, "Does Israel Have the Right to Defend Itself?", *EJIL Talk!*, 14 November 2023; R. VAN STEENBERGHE, "The armed conflict in Gaza, and its complexity under international law: *Jus ad bellum*, *jus in bello*, and international justice", *Leiden Journal of International Law*, 2024, at 985-988.

(77) See, e.g., the recent recognitions of the State of Palestine as a State ("Labour MPs push for Foreign Office to recognise Palestinian statehood", The Guardian, 13 April 2025, available at: https://www.theguardian.com/world/2025/apr/13/labour-mps-pressure-foreign-office-to-recognise-palestinian-statehood?utm.com) and the UN General Assembly resolution, which "[d]etermines that the State of Palestine is qualified for membership in the United Nations in accordance with Article 4 of the Charter of the United Nations and should therefore be admitted to membership in the United Nations", and "[a]ccordingly recommends that the Security Council reconsider the matter favourably, in the light of this determination and of the advisory opinion of the International Court of Justice of 28 May 1948, and in strict conformity with Article 4 of the Charter"(UN Doc. A/ES-10/L.30/Rev.1, 9 May 2024).

(78) Panel of Experts, *supra* note 70, § 13.

nonetheless appears entirely convincing. The first is that Palestine is a State within the meaning of general international law. Yet, it is unlikely that the ICC will follow such approach, given the particularly sensitive nature of that issue. In its 5th February 2021 decision on its territorial jurisdiction, the Pre-Trial Chamber cautiously avoided dealing with that issue by ruling that the State of Palestine was a State party to the Rome Statute for the purpose of determining its jurisdiction, without prejudice to its status under general international law. (79) A second approach is to draw the qualification of international armed conflict from the fact that, as mentioned above, Israel and the State of Palestine are both High Contracting Parties to the Geneva Conventions. This approach is nonetheless questionable. Common Article 2 does not provide any definition of the notion of international armed conflict, while that notion has classically been understood as the "resort to armed force *between States*" since the 1995 *Tadic* Appeals decision. (80) An entity could be a High Contracting Party to the Geneva Conventions even though its statehood is controversial, (81) as evidenced by the criticisms raised by certain States when the State of Palestine acceded to the Geneva Conventions. (82) Moreover, although an entity could be a party to the Geneva Conventions without being a State under general international law, and therefore without being party to an international armed conflict, it would remain bound by all the obligations of the Geneva Conventions that do not apply to such a party – even if such obligations are few. (83) A third and last approach is to construe the notion of State as a party to an international armed conflict, according to the classical understanding of such conflict under international humanitarian law, in a functional way, as meaning a State only for the purpose of the application of that law. (84) Such an approach would then allow the application of the law of international armed conflict to High Contracting Parties even if the statehood of those Parties is controversial under general international law. However, it may then be

(79) ICC, Situation in the State of Palestine, Decision on the 'Prosecution request to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', *supra* note 11, §§ 102-103 and 106.

(80) ICTY, *Prosecutor v. Dusko Tadić,* Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber, 2 October 1995, § 70 (emphasis added).

(81) The accession to the international humanitarian law treaties merely depends upon the decision of one government, either from the Netherlands (for the Hague Conventions) or Switzerland (for the Geneva Conventions and the Additional Protocols); see, e.g., S. SAKRAN and M. HAYASHI, "Palestine's Accession to Multilateral Treaties: Effective Circumvention of the Statehood Question and its Consequences", *Journal of International Cooperation Studies*, 2017, at 86.

(82) See, e.g., Switzerland, Federal Department of Foreign Affairs, "Notification aux Gouvernements des États parties aux Conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre", 21 May 2014, available at : https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/140521-GENEVE_f.pdf.

(83) See, e.g., Article 1 Common to the four Geneva Conventions, in particular the obligation to ensure respect for the Geneva Conventions, or the common Article containing the grave breaches regime.

(84) See, e.g., for such proposition, J. DE HEMPTINNE, *Les conflits armés en mutation*, Pedone, 2019, § 176.

difficult to identify the criteria for such functional definition of the State under international humanitarian law. (85) More generally, it is unlikely that the multiplication of functional definitions of the concept of State is advisable in international law, particularly for the sake of legal certainty.

A second lesson that can be drawn from the above Chamber's statements is that the underlying conduct charged against MM. Netanyahu and Gallant are regulated by the law of international armed conflict. This position echoes a doctrinal debate on the determination of the applicable law in the event of overlapping international and non-international armed conflicts. (86) This is a particularly delicate issue since the two armed conflicts do not merely coexist in this case, with one being easily distinguishable from the other, such as in the case of the foreign interventions in Libya on 2011, when active hostilities opposed the intervening States against armed forces of Libya, while the latter State was involved in separate fighting against a non-state armed group in other locations. (87) Instead, the two conflicts overlap in the present case, (88) with two different regimes applicable to the same conduct. It is clear that, according to the Pre-Trial Chamber, the law of international armed conflict must apply where, as in the cases at issue, the conduct *is directed* by a State *against civilians* on the territory of another State without that State's consent. (89) However, the Chamber's press release remains silent on the relevant test for such determination. In particular, it does not pronounce in favour of one of the tests proposed in legal literature, such as the *nexus* (90) or, the more convincing, *lex specialis* test. (91)

It is argued that both problems, relating to the qualification of the armed conflict and the determination of the applicable law, could be overcome if

(85) See nonetheless *ibid.*, §§ 176-185.

(86) See, e.g., P. Lesaffre, "Double Classification of Non-Consensual State Interventions: Magic Protection or Pandora's Box?", *International Legal Studies*, 2022, at 407-452; ICC, Situation in Palestine, Observations by ALMA – Association for the Promotion of IHL Pursuant to Rule 103, Pre-Trial Chamber, ICC-01/18, 5 August 2024; T. Grote, "A Tale of Two Conflicts. Dilemmas Arising from the Office of the Prosecutor's Approach to Classifying the Armed Conflict in Palestine", *Völkerrechtsblog*, 5 June 2024, available at: https://voelkerrechtsblog.org/a-tale-of-two-conflicts/; R. van Steenberghe, "Les interventions militaires étrangères récentes contre le terrorisme international. Deuxième partie : le droit applicable (*jus in bello*)", *Annuaire français de droit international*, 2017, at .69-71

(87) See, e.g., R. van Steenberghe, "L'emploi de la force en Libye : questions de droit international et de droit belge", *Journal des tribunaux*, 2011, at 531-532.

(88) See, e.g., G. Bartolini, "Gli attacchi aerei in Siria, l'operazione Inherent Resolve e la complessa applicazione del diritto internazionale umanitario", *Diritti umanie diritto internazionale*, 2017, at 420 ; R. Kolb, "La superposition du droit des conflits armés internationaux et non internationaux s'agissant d'un seul et même acte dans le cadre des conflits armés dits transnationaux", in E. Decaux and N. Hajjami (eds.), *Penser la guerre – Penser la paix. Mélanges en l'honneur du Professeur Rahim Kherad*, Pedone, 2021, at 301.

(89) Press release Netanyahu and Gallant, *supra* note 2.

(90) ICC, Situation in Palestine, Observations by ALMA…, *supra* note 86, § 22.

(91) See, e.g., P. Lesaffre, *supra* note 86, at 440-450. Concerning the precondition of a nexus to each armed conflict, see *ibid.*, at 434.

another approach is advocated, which is based on the law of occupation. (92) While uncertainties remain as to when and where Israel occupied Gaza, given the different understandings of the beginning and end of an occupation, (93) it is indisputable that an occupation as classically construed under international humanitarian law took place at certain times and in certain areas in Gaza. For example, this was arguably the case at least from January to May 2024 in the north of Gaza, (94) when and where, as detailed below, (95) the prohibited conduct underlying the war crime of starvation were allegedly committed. Such an approach based on the law of occupation may both accommodate the controversies about the statehood of Palestine and clarify the applicable law. Firstly, it is now well admitted that an occupation exists when a State exercises effective control over a foreign territory, irrespective of the sovereign status of that territory. (96) Secondly, it is also well admitted that, whatever the qualification of military interventions by States against non-State armed groups abroad, the law of occupation applies as soon as the intervening State occupies the foreign territory and extends to the civilian population in all the occupied areas. (97)

2. *Material elements*

Under Article 8(2)(b)(xxv) of the Rome Statute, the war crime of starvation is defined as "[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including *wilfully impeding relief supplies as provided for under the Geneva Conventions*." (98) In the summary of its decision, the Pre-Trial Chamber mainly refers to this last category of conduct. The Chamber, indeed, describes MM. Netanyahu and Gallant's conduct as follows:

> The Chamber considered that there are reasonable grounds to believe that both individuals intentionally and knowingly deprived the civilian population in Gaza of objects indispensable to their survival, including food, water, and medicine and

(92) See, e.g., R. VAN STEENBERGHE and J. DE HEMPTINNE, "ICC Prosecutor's application for arrest warrant against Israeli leaders: The war crime of starvation and its contextual element", *EJIL Talk!*, June 2024.

(93) See, e.g., on such controversies, R. VAN STEENBERGHE, "The armed conflict in Gaza …", *supra* note 76, at 998.

(94) See, e.g., O. BEN-NAFTALI *et al.*, "Legal Opinion on the Status of Israel in the North of Gaza", 1 April 2024, available at: https://static.gisha.org/uploads/2024/04/Legal-Opinion-on-the-status-of-Israel-in-the-north-of-Gaza-EN.pdf.

(95) Cf. below "2. Material elements".

(96) See, e.g., A. ORAKHELASHVILI, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction", *Journal of Conflict & Security Law*, 2006, at 123; Update ICRC Commentary to Art. 2 of the 1949 Geneva Convention III, Cambridge University Press, 2021, § 358.

(97) See, e.g., R. VAN STEENBERGHE, "Les interventions militaires étrangères récentes contre le terrorisme international. Deuxième partie … ", *supra* note 86, at 74; D. CARRON, *L'acte déclencheur d'un conflit armé international*, Shulthess, LGDJ, 2015, at 372-374.

(98) Emphasis added.

medical supplies, as well as fuel and electricity, from at least 8 October 2023 to 20 May 2024. This finding is based on the role of Mr Netanyahu and Mr Gallant in impeding humanitarian aid in violation of international humanitarian law and their failure to facilitate relief by all means at its disposal. The Chamber found that their conduct led to the disruption of the ability of humanitarian organisations to provide food and other essential goods to the population in need in Gaza. The aforementioned restrictions together with cutting off electricity and reducing fuel supply also had a severe impact on the availability of water in Gaza and the ability of hospitals to provide medical care.

The Chamber also noted that decisions allowing or increasing humanitarian assistance into Gaza were often conditional. They were not made to fulfil Israel's obligations under international humanitarian law or to ensure that the civilian population in Gaza would be adequately supplied with goods in need. In fact, they were a response to the pressure of the international community or requests by the United States of America. In any event, the increases in humanitarian assistance were not sufficient to improve the population's access to essential goods.

Furthermore, the Chamber found reasonable grounds to believe that no clear military need or other justification under international humanitarian law could be identified for the restrictions placed on access for humanitarian relief operations. Despite warnings and appeals made by, *inter alia*, the UN Security Council, UN Secretary General, States, and governmental and civil society organisations about the humanitarian situation in Gaza, only minimal humanitarian assistance was authorised. In this regard, the Chamber considered the prolonged period of deprivation and Mr Netanyahu's statement connecting the halt in the essential goods and humanitarian aid with the goals of war. (99)

Neither the Rome Statute nor the ICC Elements of Crimes define what amounts to "wilfully impedi[ng] relief supplies as provided for under the Geneva Conventions." In accordance with the chapeau of the list of war crimes that includes the war crime of starvation, (100) and the general introduction of war crimes in the Elements of Crimes, (101) it is therefore necessary to turn to international humanitarian law to determine the meaning of those terms, in particular to the regulation on access to humanitarian relief for the civilian population in need. Such approach is implicitly followed by the Chamber, as evidenced by its contention that "Mr Netanyahu and Mr Gallant [played a role] in impeding the provision of humanitarian assistance *in violation of international humanitarian law*." (102) The relevant applicable

(99) Press release Netanyahu and Gallant, *supra* note 2.

(100) This chapeau indeed refers to the "[o]ther serious violations of the laws and customs applicable in international armed conflict, *within the established framework of international law*" (emphasis added). Those terms have been construed by the ICC as requiring to interpret the listed war crimes in light of the relevant norms of international humanitarian law; see, e.g., ICC, *Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', Appeals Chamber, ICC-01/04-02/06-1962, 15 June 2017, §§ 56-65.

(101) This introduction indeed states that "[t]he elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict". It has already been referred to by the ICC to interpret war crimes in light of the relevant norms of international humanitarian law; see, e.g., *ibid.*

(102) Press release Netanyahu and Gallant, *supra* note 2 (emphasis added).

humanitarian law should not be confined to the Geneva Conventions, contrary to what is suggested in the definition of the war crime of starvation in the Rome Statute. As rightly pointed out by legal scholars,(103) this reference to the Geneva Conventions seems to merely indicate the type of humanitarian relief envisaged, rather than to limit the applicable international humanitarian law. Any interpretation to the contrary would have the effect of reducing that applicable law to two provisions, Articles 23 and 59 of the Fourth Geneva Convention, which only concern relief to certain categories of persons and situations of occupation, respectively. This would involve ignoring all the regulations that subsequently developed, not only in the first Additional Protocol to the Geneva Conventions,(104) to which Israel is not however a party, but also customary international law,(105) that binds Israel,(106) and which constitutes the contemporary regime of humanitarian aid in armed conflict.

That being said, it is not entirely clear from the Chamber's summary of its decision which obligations of that regime have allegedly been breached. Three categories of obligations may be envisaged. The first is specific to the law of occupation. It is the unconditional obligation of the occupying power to accept any offer of services from an impartial humanitarian organisation to provide humanitarian aid in the occupied territory where the population is in need.(107) This obligation is labelled by certain scholars as an obligation of "strategic consent."(108) It is well established that, at the begining of the armed conflict, Israel blocked all passage of humanitarian aid for at least two weeks after the 7th October attacks, when the population of Gaza was already in need.(109) It was only on 21 October 2023 that the Israeli authorities agreed to reopen the Rafah border crossing, in the south of Gaza, to allow

(103) T. DANNENBAUM, "Criminalizing Starvation in an Age of Mass Deprivation in War: Intent, Method, Form, and Consequence", *Vanderbilt Journal of Transnational Law*, 2022, at 754.

(104) See, e.g., Articles 70 and 71.

(105) Rule 55 of the ICRC study on customary international humanitarian law, applicable in both international and non-international armed conflicts, J.-M. HENCKAERTS and L. DOSWALD-BECK, *Customary International Humanitarian Law. Volume 1: Rules*, Cambridge University Press, 2005, at 258-267.

(106) Israel has not persistently objected to the customary rules relating to humanitarian aid. See, e.g., regarding the rules of the Additional Protocols to the Geneva Conventions that Israel does not recognize as having a customary nature, "Status of Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts", by Ms. Sarah Weiss Ma'udi, Legal Advisor Permanent Mission of Israel to the United Nations, New York, 20 October 2020.

(107) See Art. 59 of the Fourth Geneva Convention. For customary international law, see Rule 55 of the ICRC study on customary international humanitarian law, *supra* note 105.

(108) See, e.g., M. SHARPE, "Humanitarian Access to Gaza", *EJIL* Talk!, 20 November 2023.

(109) See the declaration of the Israeli Minister of Defence, Yoav Gallant, 9 October 2023, available at: https://www.youtube.com/watch?v = 1nxvS9VY-t0. For an update, in particular on a renewed total blockade of humanitarian aid to Gaza by Israel, between March and May 2025, see below after the conclusion.

a few humanitarian convoys to enter in that territory. (110) Such a blockade would clearly amount to a violation of the unconditional obligation of "strategic consent" if Israel were considered an occupying power at the time, or if that obligation were part of the residual obligations under the law of occupation that Israel was arguably still bound to respect due to its continued remote control over Gaza. (111) However, these issues remain controversial. Such a difficulty may nonetheless be overcome by arguing for a broad scope of application of this unconditional application. It may, indeed, be claimed that the 21st October Israel's authorisation provided to humanitarian convoys to enter Gaza through the border crossing in the south does not necessarily mean that Israel fulfilled its unconditional obligation to allow the passage of humanitarian aid in relation to other isolated regions of Gaza. This is notably the case of northern Gaza, where the population could not benefit from any humanitarian aid and rapidly ran out of goods essential to its survival, while such humanitarian aid could have reached this population by reopening a border crossing in the north. Yet, it was only on 1 May 2024 that such an access point, the Erez border crossing, was reopened. (112) Admittedly, the "northern route", which allows access to northern Gaza from the south, was reopened earlier, on 12 March 2024, but it proved ineffective in getting humanitarian aid there. (113) In other words, it can be argued that compliance with the unconditional obligation to accept the passage of humanitarian aid must be assessed in relation to each point of access that enables this humanitarian aid to reach a population in need and who does not already benefit from it by other means. In this sense, as indicated above, Israel was an undisputed occupying power of northern Gaza at least between January and May 2024, and it may, therefore, be claimed to have breached the unconditional obligation to allow access of humanitarian aid to the civilian population of that region until 1 May, when it reopened Erez border crossing.

An alternative obligation that Israel may have breached is also an obligation of "strategic consent", but it is not unconditional. (114) Its legal regime is, indeed, different due to its different material scope of application: it is applicable only in non-international armed conflicts and in international armed

(110) See, e.g., "Guerre Israël-Hamas : plus de 30 camions d'aide humanitaire sont entrés à Gaza en passant par Rafah", *Le Soir*, 30 October 2023.

(111) See, e.g., in favour of such a view, ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, separate opinion of Judge Cleveland, § 24. See *contra*: M. Sassòli, *Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edgar, 2019, at 643.

(112) See, e.g., OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #165, 13 May 2024.

(113) See, e.g., UN and Morocco deliver humanitarian aid to Gaza via land routes through Israel, *The times of Israel*, 23 March 2024.

(114) See Art. 70 of the 1977 First Additional Protocol to the four 1949 Geneva Conventions. For customary law, see Rule 55 of the ICRC study on customary international humanitarian law, *supra* note 105.

conflicts that do not amount to situations of occupation. It therefore applies in relation to the armed conflict in Gaza for the purpose of the prosecution of the war crime of starvation before the ICC, only if that conflict is qualified as an international armed conflict despite the above-described controversies surrounding Palestine's statehood. That obligation is conditional to the extent that belligerents may withhold their consent to the passage of humanitarian aid provided that such withholding of consent is not "arbitrary." This means that withholding consent must be justified by valid reasons, which, according to certain scholars,(115) include military necessity. However, even if justified by valid reasons, withholding of consent remains "arbitrary" and therefore illegal if it is contrary to another rule of international law, such as the prohibition of starvation as a method of warfare, or if the humanitarian consequences it causes are disproportionate to the military advantage sought by its author.(116) It is worth noting that, in its press release, the Chamber expressly refers to a 'clear *military need* or *other justification* under international humanitarian law [that it has not been able to identify to the benefit of Israel] for the restrictions [that Israel] placed on access for humanitarian relief operations."(117) In this case, Israel invoked such needs to justify obstructing humanitarian aid, in particular the clear risk that such aid will be diverted in favour of its adversary.(118) This might suggest that the Chamber considered the application – and the breach by Israel – of this conditional obligation, and concluded that the justifications invoked by Israel were not valid. In any event, it seems that, even if such justifications were valid, Israel's withholding of consent to the passage of any humanitarian aid at the beginning of the armed conflict remain arbitrary, because it was contrary to the prohibition of starvation (as will be seen below)(119) and disproportionate to the disastrous humanitarian consequences that such withholding of consent caused.

That said, it cannot be ruled out that the Chamber's explicit reference to possible justifications for Israel's restrictions on access to humanitarian aid relates not (only) to this conditional obligation of "strategic consent," but (also) to the obligation that scholarship qualifies as the obligation of "operational consent".(120) This obligation, unlike the two previous types

(115) See, e.g., D. AKANDE and E.-Ch. GILLARD, "Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict", *International Legal Studies*, 2016, at 499, and scholars quoted in fn 61. This is not, however, the position of the ICRC, ICRC "Q&A and lexicon on humanitarian access", *International Review of the Red Cross*, 2014, at 369.

(116) See, e.g., UNOCHA, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, 2016, at 25 and 29; Panel of Experts, *supra* note 70, § 26. See nonetheless *contra*: S. WATT, "Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Actions", *International Legal Studies*, 2019, at 27 et s.

(117) Press release Netanyahu and Gallant, *supra* note 2.

(118) See, e.g., State of Israel, Ministry of Foreign Affairs, Hamas-Israel Conflict 2023: Key Legal Aspects, 2 November 2023, at 12-13.

(119) *Cf.* below "3. Mental elements".

(120) See, e.g., M. SHARPE, *supra* note 108.

of obligation, applies in the same way regardless of the qualification of the armed conflict, whether it amounts to an international armed conflict or a situation of occupation. It requires belligerents not to impede and to facilitate the delivery of humanitarian aid once they have given their "strategic consent" to the delivery of such aid. That obligation is conditional in the sense that the belligerents may exercise control over the humanitarian aid for military reasons.(121) Israel has also justified its tight controls over the humanitarian relief destined for the Gazan population by a clear risk that this delivery might contain military goods likely to be used by Hamas or that it might be diverted to the benefit of this organisation.(122) In the same way as for the conditional obligation of "strategic consent", such controls must be considered as "arbitrary" even if they are validly justified on military grounds, when they involve the violation of another rule of international law, such as the prohibition of starvation as a method of warfare, or if they are disproportionate.(123) In this case, Israel arguably breached that conditional obligation of "operational consent". It has, indeed, been reported that the Israeli controls, exercised since the beginning of the delivery of humanitarian aid into Gaza, went beyond military necessity or, at least, have led to the slowing down of that delivery to such an extent that they resulted in starving the civilian population,(124) in breach of the prohibition of starvation (as will be seen below).(125) In any case, those controls have arguably caused humanitarian consequences manifestly disproportionate to the military advantage sought by Israel through them.

Finally, it is unclear whether the Pre-Trial Chamber also intended to refer to the issue of siege as a method of warfare. Even if it did not expressly mention it, any allusion to that issue could be implicitly induced from its reference to the military justification or need that the Chamber was unable to identify to explain Israel's restrictions to the delivery of humanitarian aid. Actually, the siege as a method of warfare is based on an age-old practice and consists in preventing the besieged enemy from resupplying itself with the goods essential for its survival in order to force it to surrender. However, this practice is now limited by the prohibition of starvation as a method of warfare, which (as seen below)(126) arguably prohibits sieges when they are expected to result in the starvation of the besieged civilian population. In this case, by imposing a complete siege on Gaza, notably at the beginning

(121) See Rule 55 of the ICRC study on customary international humanitarian law, *supra* note 105, at 197; UNOCHA, *supra* note 114, at 29. This position is also shared by the ICRC, "Q&A and lexicon …", *supra* note 115, at 369

(122) See, e.g., State of Israel, *supra* note 118, at 12-13.

(123) See, e.g., UNOCHA, *supra* note 116, at 29; Panel of Experts, *supra* note 70, § 26.

(124) See, e.g., L. Keath, "Cumbersome process and 'arbitrary' Israeli inspections slow aid delivery into Gaza, US senators say", *AP*, 6 January 2024.

(125) *Cf.* below "3. Mental elements".

(126) *Ibid.*

of the armed conflict,(127) Israel allegedly created the conditions for the population of this territory to starve.

3. *Mental elements*

In the summary of its decision, the Chamber does not refer to the mental element required to prosecute MM. Netanyahu and Gallant for the war crime of starvation. Actually, this element is debated insofar as some argue that the perpetrator of the prohibited conduct must have acted with a specific intent, that of seeking to – or having the aim of – starving the civilian population. Yet, it seems difficult to prove that the Israeli leaders acted with such purpose-oriented intent even if some of their statements could be interpreted in that way.(128) This is, however, a restrictive view of the mental element. It implies that the war crime of starvation can only be committed if the most demanding type of intents, provided under Article 30 of the Rome Statute, is fulfilled, namely the *dolus directus* of the first degree (or "direct intent"), which requires that the perpetrator acted "with the purposeful will (intent) or desire to bring about [the] material elements of the crime".(129) By contrast, acting with the mere *dolus directus* of the second degree (or "oblique intent"), according to which the perpetrator must merely act with the virtual certainty that the prohibited consequences would occur without seeking those consequences, would not be sufficient for the mental element of the crime of starvation to be fulfilled.(130)

It is difficult to settle the issue of the required intent for starvation merely in light of the Statute and the ICC Elements of Crimes. Admittedly, the restrictive view on this intent requirement may initially be complex to reconcile with the last terms of Article 8(2)(b)(xxv) of the Statute, which refer to the act of "*wilfully* impeding the provision of relief in accordance with the Geneva Conventions".(131) The adverb "wilfully" does not, as such, include any specific intent and could even be understood as less demanding than direct or oblique intent.(132) On the other hand, this act cannot be

(127) See the declaration of the Israeli Minister of Defence, Yoav Gallant, *supra* note 109. For another case of siege on Gaza, see below after the conclusion.

(128) See, e.g., statements quoted by HRW, "Israel: Starvation Used as Weapon of War in Gaza Evidence Indicates Civilians Deliberately Denied Access to Food, Water", 18 December 2023, available at: https://www.hrw.org/news/2023/12/18/israel-starvation-used-weapon-war-gaza.

(129) ICC, *Prosecutor v. Jean-Pierre Bemba Mbongo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber, ICC-01/04-01/06 A 5, 1 December 2014, § 358.

(130) See e.g. ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, ICC-01/04-01/06, 1 December 2014, §§ 447-450.

(131) Emphasis added.

(132) See, e.g., K. DÖRMAN, "Article 8(2)(a)", in O. TRIFFTERER and K. AMBOS (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, 2016, at 329, 331, 339 and 346.

considered in isolation from the more general conduct of which it is a mere component, that of starving the civilian population as a method of warfare. Yet, the ICC Elements of crimes provide among the elements of the war crime of starvation that "[t]he perpetrator *intended to* starve civilians as a method of warfare." (133) That verb "intended to" has been interpreted by some scholars as limited to the purposeful intention to starve civilians. (134)

It is therefore necessary to turn once again to the relevant international humanitarian law (135) and, in particular, to the prohibition of starvation as a method of warfare in order to determine whether this prohibition requires a specific mental element. (136) This is all the more useful because that prohibition, as seen above, makes it possible to determine whether the restrictions to and control over the passage of humanitarian aid are "arbitrary" and therefore unlawful, even when they are justified by valid reasons, or whether sieges as a method of warfare amount to a violation of international law. That being said, international humanitarian law does not seem any clearer on that issue. It is true that the prohibition of starvation as a method of warfare has traditionally been interpreted as requiring that the perpetrator must seek starving the civilian population. (137) However, this interpretation is now seriously challenged, notably in light of a certain practice (138) and a combined reading of this general prohibition with the particular methods (139) that are the most "usual ways" of starving a population (140) which do not depend on any specific intent. (141) These methods, prohibited under international humanitarian law, include "attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population." (142)

(133) ICC, Elements of crimes, *supra* note 62, at 21 (emphasis added).

(134) See, e.g., the authors quoted in T. Dannenbaum, *supra* note 103, at 712-715.

(135) *Cf. supra* notes 100 and 101 regarding the legal bases in the Rome Statute and the ICC Elements of crimes for such renvoi to international humanitarian law.

(136) That prohibition is provided in Article 54, 1) of the First Additional Protocol with respect to international armed conflicts, and Rule 53 of the ICRC study on customary international humanitarian law, applicable in both international and non-international armed conflicts, *supra* note 105, at 186.

(137) See, e.g., for a similar observation, D. Akande and E.-Ch. Gillard, "Conflict-induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare", *Journal of International Criminal Justice*, 2019, at 761.

(138) See, e.g., the practice quoted in T. Dannenbaum, *supra* note 103, at 739, fn 330.

(139) See, e.g., G. Gaggioli, "Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?", *EJIL Talk!*, 30 January, 2019; D. Akande and E.-Ch. Gillard, *supra* note 137, at 762-765; T. Dannenbaum, *supra* note 103, at 733.

(140) See, e.g., Y. Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987, § 742.

(141) See, e.g., R. van Steenberghe, "The armed conflict in Gaza…", *supra* note 76, at 1001-1002, in particular, fn 180.

(142) See Article 54, 2) of the First Additional Protocol, and Rule 54 of the ICRC study on customary international humanitarian law, applicable in both international and non-international armed conflicts, *supra* note 105, at 189.

In any event, it does not seem that the prosecution of MM. Netanyahu and Gallant for the war crime of starvation would run against the *nullum crimen sine lege* principle if a purpose-oriented intent was not retained, and that the two leaders would be condemned on the mere basis of an oblique intent. The main reason is that Israel appears to have adopted a broad understanding of the prohibition of starvation, which requires Israeli authorities to abstain from conduct starving the civilian population even if they do not seek to do so. Such a broad understanding has been explicitly endorsed by Israel before the Israeli Supreme Court in relation to the delivery of humanitarian aid. In a case concerning Israel's restrictions on the supply of electricity and heating oil to the population of Gaza during a previous conflict with Hamas, the Israeli government acknowledged that the prohibition of starvation as a method of warfare imposed an absolute limit. In particular, it admitted that it must not refuse or impede access to humanitarian aid to the point of depriving the population of its essential humanitarian needs,(143) even if the purpose is not, in so doing, to starve the population. In other words, according to the Israeli government, the prohibition of starvation is breached once the expected consequences of the restriction to humanitarian aid are so extreme that the civilian population does no longer benefit from essential goods for its survival, irrespective of whether those restrictions aim at starving that population.

This broad understanding of the prohibition of starvation by Israel is also expressed in its 2006 military manual with respect to the siege tactic.(144) The proof of purposive intent to starve a civilian population does not appear to be required in order to conclude that the prohibition on starvation has been breached when the passage of humanitarian aid to a besieged area has been refused. Indeed, in its 2006 manual, Israel begins by stating that "[u]ntil recently, there were no rules attached to [the siege as a] method of warfare, and it was permitted to exploit the suffering of the local population in order to overcome the enemy." However, the manual goes on to state that "[t]he [1977] Additional Protocols to the Geneva Convention contain a provision banning starvation of the civilian population in battle." According to the manual, "[t]he meaning to be extracted from this provision is that the residents of a city need to be allowed to leave it if it is besieged [or that, in] cases where civilians do not have the opportunity to leave the besieged city, *a duty arises to supply them with food, water and humanitarian aid*."(145)

(143) Supreme Court of Israel, *Jaber Al-Bassiouni Ahmed and others v Prime Minister and Minister of Defence*, HCJ 9132/07, 30 January 2008, §§ 14 and 15. The Israeli government referred to Article 70 (which deals with the delivery of humanitarian aid) and Article 54 (which prohibits starvation as a method of warfare) of the First Additional Protocol, which it considered as part of customary law (*ibid.*, § 14).

(144) Israel, *Rules of Warfare on the Battlefield*, MilitaryAdvocate-General's Corps Command, IDF School of Military Law, Second Edition, 2006, at 37.

(145) Emphasis added.

According to Israel, the prohibition of starvation, therefore, requires that the belligerent must allow humanitarian aid to reach the besieged civilian population if it does not provide itself that aid or if the population is not evacuated, regardless of that belligerent's aim in besieging the town.

IV. — Legal effects

The Chamber's decision to issue arrest warrants against MM. Netanyahu and Gallant has been subject to a mixed reception from the States. Some, including States party to the Rome Statute, criticised the decision and suggested that they would not act on the arrest warrants, (146) while others accepted the decision and undertook to arrest the two Israeli leaders if they were found on their territory. (147) Still others were more nuanced and indicated that they would comply with the Chamber's decision while nonetheless respecting their obligations with regard to the immunity of foreign States' officials. (148) While traditional views on immunity suggest that certain immunities may validly be invoked in this case (A), disputable arguments could be put forward to exclude or disregard them (B).

A. — *Traditional view on immunities*

The immunity issue arises in this case because it involves officials of a State that is not a party to the Rome Statute. By ratifying the Statute, States parties have, indeed, agreed to waive the immunity of their representatives before the ICC. Article 27(2) of the Statute, indeed, provides that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." The immunity issue is, however, more delicate where officials of third States are concerned. While States parties must "comply with requests for arrest and surrender" (149) by the Court and thus implement the arrest warrant in accordance with their general obligation to cooperate, (150) the Court, under Article 98(1) of its Statute,

(146) See, in particular, statements by Hungary (available at: https://x.com/PM_ViktorOrban/status/1859905807577726996) and Paraguay (available at: https://x.com/mreparaguay/status/1859623966245073097).

(147) See, in particular, statements by Algeria (available at: https://x.com/Algeria_MFA/status/1859650780430729417), Finland (available at https://yle.fi/a/74-20126365) and Switzerland (available at: https://www.aljazeera.com/news/2024/11/21/world-reacts-to-icc-arrest-warrants-for-israels-netanyahu-gallant).

(148) See, in particular, statements by France (available at: https://www.diplomatie.gouv.fr/fr/dossiers-pays/israel-territoires-palestiniens/article/israel-cour-penale-internationale-27-11-24).

(149) See Article 89(1) of the Rome Statute.

(150) See Article 86 of the Rome Statute.

> may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

This provision therefore requires the Court to secure the cooperation of the third State when it requests one of its States parties to hand over an official of that third State, who enjoys immunity in accordance with international law. (151) Accordingly, Article 98(1) allows States parties to comply with a request to surrender an official of a third State to the Court, without being constrained to breach any immunity.

It is now well established that heads of State, heads of government and Ministers for Foreign Affairs enjoy personal immunity (or immunity *ratione personae*) in the relations between States. It has traditionally been considered as an absolute immunity from foreign criminal prosecutions, as it covers any act performed by these officials, whether in a private or official capacity, while they are in office, even with respect to alleged international crimes. (152) Accordingly, if the disputed progressive approaches discussed below are disregarded, Mr. Netanyahu should not normally be arrested or surrendered to the ICC if found on the territory of a State Party. However, the issue should be decided by a national court. The United Kingdom has stated in that sense that "[i]f there were to be such a visit [of M. Netanyahu] to the UK there would be a court process and due process would be followed in relation to those issues". (153) It is therefore unlikely, as evidenced by recent events, (154) that the Israeli leader would take the risk of travelling on the territory of States parties that have expressed their commitment to respect the Chamber's decision, on pain of being subject to national legal proceedings.

This risk as well as that of being handed over to the ICC are even greater for M. Gallant, the former minister of Defence, as he does not enjoy any personal immunity but only a material immunity (or immunity *ratione materiae*). This immunity merely covers acts performed in his official capacity

(151) See the interpretation of Article 98(1) by the ICC Appeals Chamber: ICC, *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, Appeals Chamber, ICC-02/05-01/09 OA2, 6 May 2019 (hereafter "Jordan/Bashir Appeals case"), §§ 129-130.

(152) See, e.g., ICJ, *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002, at 20-22, §§ 51, 54 and 55; ILC, Immunity of State officials from foreign criminal jurisdiction. Texts and titles of the draft articles adopted by the Drafting Committee on first reading, UN Doc. A/CN.4/L.969, 31 May 2022, draft articles 3 and 4 of the draft articles.

(153) Statement by the Minister of Foreign Affairs, available at: https://www.youtube.com/watch?v = TEa2dieRIqo&ab_channel = DRMNews.

(154) See, e.g., "Netanyahu to avoid Auschwitz memorial in Poland, fearing ICC war crimes arrest", *The New Arab*, 23 December 2024, available at: https://www.newarab.com/news/netanyahu-avoid-poland-memorial-fearing-icc-arrest.

while being in office. In practice, there is an evolution in this respect, with a tendency to exclude material immunity in the case of the commission of international crimes. This trend is followed by several national courts (155) and the International Law Commission in its draft articles adopted on first reading on the immunity of State officials from foreign criminal jurisdiction. (156) War crimes and crimes against humanity are among the crimes for which material immunity is not a bar to any foreign criminal prosecutions. (157) Accordingly, M. Gallant should be surrendered to the ICC, if he were found on the territory of a State party that recognises such exceptions to material immunity.

B. — *Disputable specific ways to set aside the immunities*

That said, States parties are likely to be able to invoke M. Netanyahu's personal immunity to oppose any request for surrender by the Court or even the immunity of M. Gallant if they consider that material immunity is available under international law despite the allegation of international crimes. Two different ways must be considered whereby States parties could set aside those immunities. The first is to rely on the case law developed by the ICC itself on the matter (1), while the second is to invoke a circumstance precluding wrongfulness (2).

1. *ICC stance on immunity*

Recently, an ICC Pre-Trial Chamber condemned Mongolia, a State party to the Rome Statute, for failing to arrest the incumbent President of a third State, M. Putin, when he was on the Mongolian territory and subject to an ICC arrest warrant. (158) The Chamber rejected the personal immunity argument raised by Mongolia, which invoked Article 98(1) of the Rome Statute, although, as seen above, that immunity is normally granted to any head of State while being in office. The Chamber relied exclusively on the Rome

(155) See, e.g., A. Epik, "No Functional Immunity for Crimes under International Law before Foreign Domestic Courts. An Unequivocal Message from the German Federal Court of Justice", *Journal of International Criminal Justice*, 2021, at 1266; R. Pedretti, "Immunity of Heads of State and the State Officials for International Crimes", *Swiss Revue of International and European Law*, 2016, at 757-760; R. van Alebeek, "Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts", in T. Ruys, N. Angelet and L. Ferro (eds.), *The Cambridge Handbook of Immunities and International Law*, Cambridge University Press, 2019, at 509-515.

(156) ILC, Immunity of State officials from foreign criminal jurisdiction, *supra* note 152, draft article 7.

(157) *Ibid.*

(158) ICC, Situation in Ukraine, Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, Pre-Trial Chamber II, ICC-01/22, 24 October 2024.

Statute, in particular Articles 27(2) and 98(1) of the Statute. Its main findings are as it follows:

> [A]rticle 27 of the Statute has the effect of removing any and all international law immunities of officials, including Heads of State, and binds to that effect States Parties, as well as States that have accepted the Court's jurisdiction, not to recognise any kind of immunity or apply special procedural rules that they may attach to any persons. Whether these persons are nationals of States Parties or nationals of non-States Parties is irrelevant. The Statute, in any case, does not make any distinction in this regard. States Parties and States that have accepted the Court's jurisdiction have therefore the obligation to arrest and surrender any person for whom the Court has issued a warrant of arrest, irrespective of their official capacity and nationality. [...]. Therefore, any arguable bilateral obligation that Mongolia may owe to the Russian Federation to respect any applicable immunity that international law may allow to Heads of State is not capable of displacing the obligation that Mongolia owes to the Court [...]. (159)

These findings were based on two main arguments. The first is that the ICC is a court of international nature, acting on behalf of the international community, which involves that "[t]he vertical nature of the obligations towards the Court supersedes traditional interstate immunity principles, meaning that States Parties must act in accordance with their obligations under the Statute, even if it conflicts with horizontal relations with non-States Parties." (160) The second controversial argument is that Article 98(1) must not be construed as considering immunities of heads of States. Otherwise, in the Chamber's view, the ICC would be precluded to request a State party to surrender such a person to it, and this would run against the object and purpose of the Statute, as well as Article 27(2). (161) The Chamber made such interpretation on the basis of the principle of effectiveness as well as on the wording of Article 98(1), which, in the Court's view, "does not address the immunity of the head of State, but that of the State *per se*, with reference to diplomatic premises, property, documents or other assets belonging to the State of whom the sought person is a national, which may be linked to the investigation and may not be seized without the consent of that State." (162) Consequently, according to the Court, it did not need to obtain the cooperation of the third State in question, namely Russia, with a view to waiving the immunity of its official, in accordance with Article 98(1). (163)

Those arguments and the Chamber's reasoning are highly questionable. Firstly, it is controversial whether the ICC can be qualified as a court acting on behalf of the international community as a whole, given its non-universal

(159) *Ibid.*, §§ 27 and 28.
(160) *Ibid.*, § 33.
(161) *Ibid.*, § 34.
(162) *Ibid.*, § 35.
(163) *Ibid.*, § 36.

nature. (164) Secondly, the Chamber referred, in that regard, (165) to the fourth situation that the ICJ identified in the *Arrest Warrant* case as a possible situation where the immunity of an incumbent head of States could not act as a bar to criminal prosecution, namely when prosecutions are conducted before an international court such as the ICC. (166) However, the ICJ dictum is not clear enough to settle the issue of the immunity of heads of States that are not party to the treaty establishing the international jurisdiction, in particular, the Rome Statute. (167) Thirdly, the Chamber's assertion that the requested State must comply with a request of the Court "even if it conflicts with horizontal relations with non-States Parties" (168) is highly problematic, especially in light of Article 98(1). The rationale of that Article is, indeed, to avoid putting the requested States in a position of conflicts of obligations and of having to violate one obligation in favour of the other. (169) Fourthly, the Chamber makes a very questionable interpretation of that Article when considering that it does not envisage the issue of immunity of heads of States. Article 98 has traditionally been construed as referring to any issue of potential conflict of obligations related to immunity, especially the "most powerful international law immunity", (170) namely the *rationae personae* immunity, including the immunity of incumbent heads of States. That Article expressly refers to "the State or diplomatic immunity of *a person*". Finally, and most importantly, the Chamber's reasoning is entirely confined to the Rome Statute. The Chamber pays no attention at all to immunities that States parties might be bound to respect in relation to third States under general international law, and that could conflict with their obligations under the Rome Statute.

This is the reason why certain scholars believe that the Chamber should have resorted to customary international law, as the Court had already done previously with regard to the proceedings against Al-Bashir, the then

(164) See, e.g., on this nature, C. Kreb and K. Prost, "Article 98", in O. Triffterer and K. Ambos (eds.), *supra* note 132, at 2132-2133.

(165) ICC, Situation in Ukraine, Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, Pre-Trial Chamber II, *supra* note 158, § 29.

(166) ICJ, *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002, § 61.

(167) See, e.g., C. Kreb and K. Prost, *supra* note 164, at 2128.

(168) ICC, Situation in Ukraine, Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, Pre-Trial Chamber II, *supra* note 158, § 158.

(169) See, e.g., C. Kreb and K. Prost, *supra* note 164, at 2120.

(170) *Ibid.*, at 2125.

incumbent Sudanese President. (171) Both certain Pre-Trial Chambers (172) and the Appeals Chamber (173) had concluded that there was no immunity under customary international law for any States' officials before an international court. However, their reasoning was most often supplemented by developments specific to this case, namely referral of the situation to the Court by the UN Security Council on the basis of a resolution adopted under Chapter VII of the UN Charter, which required Sudan to cooperate with the Court. (174) Moreover, even if one dissociates this customary international law approach from such specific developments, such approach remains disputable. It is uncertain that this reflects the current state of international law. Firstly, the practice from which it is deduced, in particular the statutes and case law of the International Military Tribunal for Nuremberg, the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone, (175) does not seem pertinent, insofar as the unavailability of immunities is explained either by the obligation on States to cooperate on the basis of a decision of the UN Security Council or by the implicit waiver of that immunity by the State concerned. (176) Secondly, it is difficult to see how States could avoid complying with the immunity of third States' officials by establishing an international criminal tribunal through an *ad hoc* treaty and by having those officials tried by that court. (177) At most, as the Special Court for Sierra Leone pointed it out (178) and as left opened by the ICJ in its dictum in the *Arrest Warrant* case, (179) such a tribunal would have to be designed to act in the interests of the international community as a whole rather than in the interests of certain States. As mentioned above,

(171) See K. KAWAI, "The ICC's Turn to Cynical Solipsism: The PTC II's Finding of Mongolia's Non-compliance in the Case against Putin", *EJIL Talk!*, 26 November 2024.

(172) See, e.g., ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 12 December 2011 (hereafter "Malawi/Bashir case"); ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 26 March 2013 (hereafter "Chad/Bashir case").

(173) Jordan/Bashir Appeals case, *supra* note 151, §§ 100-119.

(174) See, e.g., Malawi/Bashir case, *supra* note 172, § 40; Jordan/Bashir Appeals case, *supra* note 151, §§ 133-149.

(175) Jordan/Bashir Appeals case, *supra* note 151, §§ 103-113.

(176) See, in this regard, O. CORTEN and V. KOUTROULIS, *Tribunal for the crime of aggression against Ukraine – A legal assessment*, European Parliament, 9 December 2022, at 26-27; D. AKANDE, "ICC Issues Detailed Decision on Bashir's Immunity (At long Last) But Gets the Law Wrong", *EJIL Talk!*, 15 December 2011.

(177) See also D. AKANDE, "ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals", *EJIL Talk!*, 6 May 2019.

(178) SCSL, *Prosecutor v. Charles Taylor*, Decision on Immunity from Jurisdiction, Appeals Chamber, SCSL-2003-01-I, 31 May 2004, §§ 38-40.

(179) ICJ, *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), *supra* note 166, § 61

this is, however, not necessarily the case of the ICC. Moreover, as evidenced in the present case, the Court's jurisdiction may still be challenged after the arrest warrants are issued. This makes the unavailability of immunities before the Court unsettled until its jurisdiction is well established. (180) In the meantime, it would, therefore, be up to the courts of the State requested to surrender the suspects to deal with the Court's jurisdiction.

2. *Self-defence as a circumstance precluding wrongfulness*

Another noteworthy way whereby States parties could disregard Mr Gallant's immunity and, potentially, Mr Netanyahu's immunity, is to invoke a circumstance precluding wrongfulness. Such circumstance could be self-defence within the meaning of Article 21 of the Articles on Responsibility of States for Internationally Wrongful Acts, making it possible to justify non-compliance with obligations other than the prohibition on the use of force in response to an armed attack. Indeed, some have argued that such a circumstance could justify setting up an international criminal tribunal to prosecute the incumbent Russian President Putin, thereby disregarding his personal immunity. (181) Non-compliance with this immunity would thus be justifiable as a peaceful measure taken in collective self-defence in response to Russia's armed attack against Ukraine. However, such a justification seems questionable, particularly in the situation in Palestine. It is uncertain that, unlike Russia's use of force against Ukraine, Israel's use of force in Gaza amounts to an armed attack. This is not so much because the conditions for the use of force were not allegedly respected by Israel, in particular, the condition of proportionality. (182) It is instead because the applicability of the rules relating to the use of force – and therefore to armed attack – remain open to debate concerning Gaza. (183) Such rules are only applicable to relations between States. (184) As already evoked, Palestine's statehood remains controversial today. In any case, self-defence within the meaning of Article 21 of the Articles on Responsibility of States for Internationally Wrongful Acts was conceived by the International Law Commission only to exclude wrongfulness arising from measures taken in connection with a use of force in self-defence on the basis of Article 51 of the United Nations

(180) See, e.g., O. Flasch, "The interplay between Articles 27 and 98 of the Rome Statute: A familiar friend makes a new appearance in the arrest warrants against Netanyahu and Gallant", *EJIL Talk!*, 10 December 2024.

(181) O. Corten and V. Koutroulis, *supra* note 176, at 29-31.

(182) In its letter to the UN Security Council (UN Doc. S/2023/742, 9 October 2023) and in the debates before that body (see, in particular, UN Doc. S/PV.9439, 16 October 2023, at 12), Israel appears to have invoked self-defence in response to the armed attack by Hamas on 7 October, within the meaning of Article 51 of the United Nations Charter. For an examination of compliance with the conditions of this right, see e.g. O. Corten's article in this issue.

(183) See, e.g., R. van Steenberghe, "The armed conflict in Gaza…", *supra* note 76, pp. 992-993.

(184) See, e.g., ICJ, *Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo*, Advisory Opinion, 22 July 2010, § 80.

Charter, and not independently from such a use of force. (185) Any failure by States party to the Rome Statute to respect the immunities of Israeli leaders would not constitute a measure combined with a use of force in self-defence by those States. Self-defence as a circumstance precluding wrongfulness does not, therefore, seem a valid ground to disregard the immunities concerned. Moreover, it does not appear that such a role could be played by any other circumstance, such as countermeasures within the meaning of Article 22 of the Articles on Responsibility of States for Internationally Wrongful Acts. It is unlikely that the conditions for this circumstance could be met in the present case. Non-compliance with the immunity of the Israeli leaders would not consist of a temporary measure, (186) and the primary objective would not be to compel the responsible State, in this case Israel, to comply with its obligations, (187) in particular the obligation of not starving the Gazan population. This objective would rather be to prosecute the perpetrators.

It nonetheless remains unfortunate to observe the double standards that States apply to the immunity issue. (188) Some, like France, have rejected the idea of handing Mr Netanyahu over to the ICC on the grounds of personal immunity (189) despite supporting the arrest warrant issued against incumbent Russian President Putin in March 2023, (190) as well as the proposal to create a special tribunal to try this president. (191) Since neither Israel nor Russia are parties to the ICC Statute, the cases of the arrest warrants against MM. Netanyahu and Putin are legally the same with respect to the question of immunities before the ICC. Hence, this difference in treatment has no basis in law, nor, as just seen, in the fact that Russia's use of force would constitute an armed attack contrary to that of Israel.

V. — CONCLUSION

The Pre-Trial Chamber's decision to issue arrest warrants in the situation of the State of Palestine has been met with challenges and criticism from States, scholars and public opinion—mainly because it involves senior

(185) See, e.g., the in-depth study by F.I. PADDEAU, "Self-Defense as a circumstance precluding wrongfulness: Understanding Article 21 of the Articles on State Responsibility", *British Yearbook of International Law*, 2015, at 113-118.

(186) Article 49, 1) of ARSIWA.

(187) Article 49, 2) of ARSIWA.

(188) See, e.g., O. FLASCH, *supra* note 180.

(189) France's statement is available at: https://www.diplomatie.gouv.fr/fr/dossiers-pays/israel-territoires-palestiniens/article/israel-cour-penale-internationale-27-11-24.

(190) France's statement on the arrest warrant against Mr Putin is available at: https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/justice-internationale/evenements/article/lutte-contre-l-impunite-emission-de-mandats-d-arret-de-la-cour-penale.

(191) See, e.g., "France backs plans for tribunal for Russian officials over Ukraine war", *The Guardian*, 1st December 2022, available at: https://www.theguardian.com/world/2022/dec/01/france-backs-plans-for-tribunal-for-russian-officials-over-ukraine-war.

Israeli officials. While the decision admittedly raises certain legal concerns, many of these issues can be addressed and potentially resolved. First, the Pre-Trial Chamber did sidestep the "Oslo Accords issue" when rejecting challenges to the Court's jurisdiction. However, as the Chamber rightly ruled, such challenges were premature. The "Oslo Accords issue" could resurface later, notably if MM. Netanyahu and Gallant file challenges to the Court's jurisdiction. In any case, the Pre-Trial Chamber had sufficient grounds to reject any dismissal of the Court's jurisdiction based on the Oslo Accords.

Secondly, the war crime of starvation may arguably be charged against MM. Netanyahu and Gallant, despite the difficulty in qualifying the armed conflict in Gaza international in nature and, in case of dual qualification, notwithstanding the issue of determining the law applicable to MM. Netanyahu and Gallant's conduct. Such difficulties may be overcome by relying on the law of occupation, since that qualification does not involve settling the controversial issue of Palestine's statehood, and Israel undisputably occupied parts of Gaza where and when the prohibited conduct occurred. It is also unproblematic to prosecute the two Israeli leaders for the war crime of starvation even if they did not personally seek the starvation of the civilian population. The broad interpretation espoused by Israel of the prohibition of starvation under international humanitarian law renders it sufficient to prove that MM. Netanyahu and Gallant acted with the virtual certainty that their conduct would starve the Gazan population.

Thirdly, public opinion may be sceptical about the concrete legal effects of the decision to issue arrest warrants. Admittedly, immunities could be invoked by the two Israeli leaders if a State party to the Rome Statute arrested them. However, many States now acknowledge exceptions to material immunity in case of international crimes, which may cause concern not only for Mr Gallant but also for Mr Netanyahu when his term in office ends. Moreover, the ICC case law has cast doubt on the right of a State party to oppose a request for surrender based on any immunity. Although this a questionable case law, this issue will have to be dealt with by the courts of the States where the Israeli leaders would be found. This represents a serious disincentive for these leaders from travelling into the territory of State parties. The ideal way to escape such geographical isolation, which is to voluntarily appear before the ICC, is unlikely to happen in this case. A more acceptable avenue for the two suspects remains in national criminal proceedings. Nonetheless, the Chamber's decision sends a strong signal to the international community: No one, even incumbent senior officials of third States' Western democracies, is immune from criminal prosecutions for international crimes. This is a major leap for international criminal law.

* * *

As mentioned in the introduction, new relevant events occurred after February 2025, when the article was accepted for publication. They bear on the procedure, the crimes, and the legal effects related to the issuance of the arrest warrants.

Article's comments on the procedure should be updated in light of two main procedural developments. Firstly, on 26 February 2025, the ICC Pre-Trial Chamber decided to terminate the proceedings against the Hamas leader, Mohammed Diab Ibrahim Al-Masri (Deif), after a notification by the Prosecutor that "it had obtained sufficient and reliable information that Mr Al-Masri ('Deif') was killed in Gaza". (192) This decision was "without prejudice to pursuing proceedings again, should information become available that Mr Al-Masri [was] still alive". (193)

Secondly, on 15 April 2025, the ICC Appeals Chamber ruled on the two appeals filed by Israël against the Pre-Trial Chamber's decisions to reject its challenges to the ICC's jurisdiction under Articles 18(1) and 19(2)(c) of the Rome Statute. As a reminder, according to its request based on Article 18(1), Israel claimed that the Prosecutor failed to give a new notice to the States concerned after the 7th October attacks, while, in its request based on Article 19(2)(c), Israel refers to the Oslo Accords to challenge the Court's jurisdiction. The Appeals Chamber dismissed the appeal as inadmissible with respect to Israel's request based on Article 18(1). (194) By contrast, it found the other appeal admissible (195) and considered that "the Pre-Trial Chamber committed an error of law by failing to sufficiently direct itself to the relevant submissions brought before it in respect of the particular legal basis underpinning the challenge to the jurisdiction of the Court". (196) However, it did not settle the matter itself, and instead decided to "remand [that] matter to the Pre-Trial Chamber for it to rule on the substance of the jurisdictional challenge". (197) As a result, the "Oslo Accord issue" could resurface later before that Pre-Trial Chamber, and not (only) through other requests based on Article 19(1) or Article 19(2)(a). The Pre-Trial Chamber will have

(192) ICC, Situation in the State of Palestine, Decision terminating proceedings against Mr Mohammed Diab Ibrahim Al-Masri (Deif), Pre-Trial Chamber I, ICC-01/18, 26 February 2025, para. 4.

(193) *Ibid.*, para. 7.

(194) ICC, Situation in the State of Palestine, Decision on the admissibility of the appeal of the State of Israel against Pre-Trial Chamber I's "Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice", Appeals Chamber, ICC-01/18 OA, 24 April 2025 (hereafter "Article 18(1) appeal"), para. 37.

(195) ICC, Situation in the State of Palestine, Judgment on the appeal of the State of Israel against Pre-Trial Chamber I's "Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute", Appeals Chamber, ICC-01/18 OA2, 24 April 2025 (hereafter "Article 19(2) appeal"), para. 5.

(196) *Ibid.*, para. 37.

(197) *Ibid.*, para. 64.

to rule again on the ICC jurisdiction and better explain its rulings (198). In any case, the Appeals Chamber rejected the Israel request to suspend the execution of the arrest warrants against the Israeli leaders in both appeal proceedings. (199)

Article's observations on the crimes, in particular on the material elements of the war crime of starvation charged against the Israeli leaders, should be updated in light of the renewed total blockade of humanitarian aid to Gaza by Israel, between March and May 2025 (200). This is the second total blockade after the complete seizure of Gaza at the beginning of the armed conflict. (201) This a clear case of Israel's withholding of "strategic consent" to humanitarian relief. This amounts to a breach of Israel's unconditional obligation to give its consent to such relief under international humanitarian law (202), provided that Israel could be qualified as an occupying power at the time, or such obligation could be considered as part of the residual obligations of the law occupation applicable to Israel, that are commensurate to its (remote) control over Gaza. (203) Alternatively, it would constitute a violation of Israel's conditional obligation to give its "strategic consent" to humanitarian relief under international humanitarian law, (204) if the armed conflict in Gaza may be qualified as international in nature – as required for the application of the war crime of starvation in this case – and if such Israel's withholding of consent was arbitrary. This seems to be case. Israel's justifications for such withholding of consent, including to put pressure on Hamas to release the hostages, (205) do not appear valid. In any case, this blockade involved devastating humanitarian consequences that are disproportionate to the military advantage sought. (206)

Finally, article's comments on the legal effects of the arrest warrants should be updated in light of the recent conduct of Hungary, a State party to the Rome Statute, that welcomed Mr Netanyahu to the country in April 2025

(198) In its 14th May 2025 decision, the Chamber indicated that it "will do so in due course" (ICC, Situation in the State of Palestine, Decision on 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'", Pre-Trial Chamber I, 14 May 2025, ICC-01/18, para. 8).

(199) Article 18(1) appeal, *supra* note 194, para. 41, and Article 19(2) appeal, *supra* note 95, para. 66.

(200) See, e.g., "Israel has cut off all supplies to Gaza. Here's what that means", *AP*, 2 March 2025, available at: https://apnews.com/article/gaza-israel-hamas-palestinians-aid-explainer-ecc0e-70d5ff1120a04bf36626dfd96f4.

(201) *Supra* note 109.

(202) *Supra* notes 107-108.

(203) *Supra* note 111.

(204) *Supra* note 114.

(205) See, e.g., "Israel cuts off humanitarian supplies to Gaza as it seeks to change ceasefire deal", *The Guardian,* 2 March 2025, available at: https://www.theguardian.com/world/2025/mar/02/israel-cuts-off-humanitarian-supplies-to-gaza-as-it-seeks-to-change-ceasefire-deal.

(206) See, e.g., declaration of Mr. Tom Fletcher, Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator before the UN Security Council on 15 May 2025, UN Doc. S/PV.9914, 13 May 2025, pp. 2-3.

without arresting him. (207) After the issuance of the arrest warrants, Hungary already stated that it would not enforce the ICC decisions. (208) On 2 June 2025, Hungary notified its withdrawal from the Rome Statute, which will be effective as of 2 June 2026. (209)

(207) See, e.g., "Israeli Prime Minister Benjamin Netanyahu to pay an official visit to Hungary", available at: https://miniszterelnok.hu/en/israeli-prime-minister-benjamin-netanyahu-to-pay-an-official-visit-to-hungary/?utm.com.

(208) See, e.g., "Hungary invites Netanyahu to visit as world leaders split over ICC arrest warrant", *The Guardian,* 22 November 2024, available at: https://www.theguardian.com/world/2024/nov/22/hungary-invites-netanyahu-to-visit-as-world-leaders-split-over-icc-arrest-warrant.

(209) Article 127 of the Rome Statute.