

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public Document

**Observations on Israel's Challenge to Jurisdiction
Pursuant to Article 19(2) of the Rome Statute**

Source: Victim

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I. Introduction

1. In “Israel’s challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute” (the “Challenge”), [t]he State of Israel (“Israel”) “challenges, pursuant to **Article 19(2)(c)** of the Rome Statute (“the Statute”), the jurisdiction of the ICC (“the Court”) in the pending application concerning Benjamin Netanyahu and Yoav Gallant, or in any other investigative action on the same jurisdictional basis” (paragraph 1 of the Challenge; all emphasizes added).
2. Israel lacks standing to challenge the Court’s jurisdiction under Article 19(2)(c) because it is not a State from which acceptance of jurisdiction is required under Article 12. Article 12(2) commands that to qualify as a ‘State’ from which acceptance is required under Article 12(2)(a) or 12(2)(b), such State has to accept the Court’s jurisdiction within the meaning of Article 12(1) or 12(3).
3. Israel does not meet this precondition: it is neither a State Party which has *generally* accepted the Court’s jurisdiction with respect to Article 5 crimes (Article 12(1)); nor is it a State that lodged a declaration with the Registrar accepting the Court’s jurisdiction with respect to the *specific* crimes ‘in question’, i.e., the crimes allegedly perpetrated by Netanyahu and Gallant (Article 12(3)).
4. Israel’s acceptance of the Court’s jurisdiction is not required for the purpose of exercising the Court’s jurisdiction under Article 12. It is required to challenge this jurisdiction under Article 19(2)(c). Because Israel has **not accepted** the Court’s jurisdiction within the meaning of Article 12, it is barred from arguing that the Court lacks jurisdiction under Article 19(2)(c). Because Palestine has accepted the Court’s jurisdiction, Israel’s acceptance is also **not required** under Article 12, and the Court may exercise jurisdiction over Article 5 Crimes that allegedly occurred in Gaza, irrespective of the nationality of the perpetrators.

5. Israel submits that because the alleged perpetrators are its nationals, its acceptance of the Court's jurisdiction is *also* required under **Article 12(2)(b)**, i.e., *in addition* to the acceptance of the territorial State under Article 12(2)(a). But no State is 'required' to accept the Court's jurisdiction. Rather, for the Court to exercise its jurisdiction, the Statute requires that *at least one* State has accepted it, in this case Palestine.

6. As per Article 12(2), the Court may exercise its jurisdiction over crimes committed on the territory or by nationals of States that are either "*Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3*". This means that the Court can exercise its jurisdiction *only* if the territories on which the crimes occurred (12(2)(a)) *or* the persons perpetrating them (12(2)(b)) 'belong' to States that have accepted the Court's jurisdiction under Article 12(1) or 12(3). Since Israel has not accepted the Court's jurisdiction within the meaning of Article **12(2)**, it is not a 'State' under Article 12(2)(b), and accordingly lacks standing to challenge it under Article 19(2)(c).

7. In the alternative, Israel claims that its acceptance of the Court's jurisdiction is required, this time not *in addition* to the acceptance of Palestine, but in its stead. Israel claims that because Palestine cannot accept the Court's jurisdiction under Article 12, Israel is the *sole* State from which acceptance required. Because Israel is a State not Party to the Statute from which acceptance of jurisdiction is required under Article 12(3), Israel has standing under Article 19(2)(c).

8. Israel claims that because Palestine is not a State, it cannot be a State Party under Article 12(1); because it is not a State Party, the preconditions to the exercise of the Court's jurisdiction have not been met; to meet these conditions, Israel's acceptance of the Court's jurisdiction is *required* under Article 12(3), Israel has standing under Article 19(2)(c) *to argue* that Palestine is not a State Party under

Article 12(1); at the same time, because such requisite acceptance was *not given*, the preconditions to the exercise of the Court's jurisdiction have not been met.

9. This somewhat tautological argument conflates standing and merits. Whether the preconditions to the exercise of the Court's jurisdiction under Article 12 have been met or not is immaterial as to who is entitled to so argue under Article 19(2). The lack of jurisdiction does not confer standing on Israel; on the contrary, the lack of standing bars Israel from arguing the Court lacks jurisdiction.
10. At any rate, as per Article 12(3), if an Article 5 crime is committed on a territory or by a national of a State not Party to the Statute, that State "*may, by declaration lodged with the Registrar, **accept** the exercise of jurisdiction by the Court with respect to the crime in question*". Israel could have but chose not to lodge a declaration with the Court's Registrar. Israel could have but chose not to accept the Court's jurisdiction with respect to the crimes 'in question'. Consequently, Israel lacks standing to challenge the Court's jurisdiction on the basis of Article 12(3).
11. To conclude, Israel's acceptance of the Court's jurisdiction was required to have standing to challenge the Court's jurisdiction, but it was not required in order to exercise this jurisdiction. As the Pre-Trial Chamber ruled, twice, in two different compositions, the jurisdictional basis of the Situation in Palestine is based on Palestine's acceptance of the Court's jurisdiction over Article 5 crimes, not the State of Israel (Article 12(1)). These crimes were allegedly committed in the territory of Palestine, not Israel (Article 12(2)(a)). The fact that the alleged perpetrators are Israeli nationals does not mean that Israel's acceptance of the Court's jurisdiction is required under Article 12 and that Israel has standing to challenge the Court's jurisdiction under Article 19(2)(c). Rather, it means that Israel is a State that has jurisdiction over the case and thus it has standing to challenge the case's admissibility under Article 19(2)(b).

I. Article 19(2)

12. Article 19(2) defines *who* has standing to challenge the Court or a case and on *what* ground. The standing certain States and individuals have to challenge the Court's jurisdiction or a case's admissibility hinges on the affinity these States or individuals have to the proceedings. As per article 19 of the Statute (*Challenges to the jurisdiction of the Court or the admissibility of a case*):

...

“(2) Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.”

13. **Article 19(2)(a)** enables persons for whom a warrant of arrest has been issued to challenge the Court's jurisdiction. As the persons most affected by the exercise of the Court's jurisdiction, not the State of Israel but its Prime Minister and (former) Minister of Defence have standing to challenge the Court's jurisdiction. Unlike the State of Israel, therefore, they could have challenged the Court's jurisdiction. Unlike the State of Israel, they could have done so on any ground. In fact, they could have submitted the present Challenge in Israel's stead. The fact that the Prime Minister and (former) Minister of Defence of the State of Israel **could have but chose not to** challenge the Court's jurisdiction, reflects a tacit acceptance of the Court's jurisdiction.

14. **Article 19(2)(b)** enables a State which has jurisdiction over a specific case to challenge its admissibility but only on the ground that it is investigating or has

investigated it. Under Article 17(1)(b), this is so even if upon investigation the State had found the allegations are baseless and decided to close the case. Israel is a State not Party to the Statute which has jurisdiction over the case. Had Israel investigated the allegations against Netanyahu and Gallant, it would have prevailed in Court. The fact that Israel **could have but chose not to** raise a challenge on this ground, indicates it has not investigated allegations implicating its two most senior officials in the most atrocious crimes mankind invented and sanctioned. The fact its judiciary has failed to enforce the Law's Rule, suggests it is unable or unwilling to do so.

15. Notwithstanding its Prime Minister could have submitted the same jurisdictional challenge in Israel's stead under Article 19(2)(a), although Israel could have investigated the allegations and prevail in a challenge under Article 19(2)(b), the Israeli government chose to ground its sole opportunity to challenge the Court's jurisdiction - as per Article 19(4) - in **Article 19(2)(c)**.
16. To substantiate its alleged standing under Article 19(2)(c), Israel submits that "[t]he 2021 Decision presupposes that Israel would have standing to bring a jurisdictional challenge at the appropriate juncture. In respect of the impact of the Oslo Accords on "the scope of the Court's territorial jurisdiction in Palestine," the Pre-Trial Chamber held that "these issues may be raised by interested States **based on article 19** of the Statute." Judge Kovács referred to Israel as one of the "directly interested States in the present [...] situation" (paragraph 40 of the Challenge).
17. The PTC Decision on Article 19(3) however does *not* presuppose that Israel would have standing to bring a jurisdictional challenge **under Article 19(2)(c)** as "a State from which acceptance of jurisdiction is required under article 12". The 2021 Decision simply states the obvious, namely that issues concerning the *scope* (but not the *existence*) of the Court's territorial jurisdiction in Palestine,

may be raised in accordance with the rules set out in **Article 19**, including those regulating standing. The additional quote from a partly dissenting opinion is not inconsistent with this clear view of the majority with respect to the legal framework that is applicable to these issues.

18. The reason the Pre-Trial Chamber in its *previous* composition held that these issues may be raised by States “based on Article 19” and not specifically under Article 19(2)(c) is also clear. While Israel has not accepted the Court’s jurisdiction, it has jurisdiction over the case. While it cannot challenge the Court’s jurisdiction under Article 19(2)(c), it has standing to challenge the case’s admissibility under Article 19(2)(b).
19. The Pre-Trial Chamber in its *present* composition echoed this view in its decision on Israel’s Challenge. While the PTC found Israel’s argument under Article 19(2)(c) “incorrect as a matter of law”, it acknowledge that “Israel clearly would have standing... under Article 19(2)(b)” (paragraph 16 of the “Decision on Israel’s challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute”; hereafter “PTC Decision on Article 19(2)”).

II. Article 12

20. Because Israel’s Prime Minister and former Minister of Defence refrained from challenging the Court’s jurisdiction under Article 19(2)(a), since Israel has refrained from challenging the case’s admissibility under Article 19(2)(b), it had no choice but to resort to Article 19(2)(c), the sole provision enabling States to challenge the Court’s jurisdiction.
21. Under this Article, Israel can challenge the Court’s jurisdiction if it is a “*State from which acceptance of jurisdiction is required under article 12.*” Alas, as shown below, this avenue is strictly reserved to either States Parties, i.e. States that

generally accepted the Court's jurisdiction (Articles 12(1)), or to States that have accepted the Court's jurisdiction with respect to *specific* crimes (Article 12(3)).

22. As per Article 12 of the Statute ("*Preconditions to the exercise of jurisdiction*"):

"1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

*2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following **States are Parties to this Statute or have accepted the jurisdiction** of the Court in accordance with paragraph 3:*

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

*3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, **accept the exercise of jurisdiction** by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."*

23. "Israel is a State not party to the Statute" (paragraph 4 of the Challenge). Thus, it is not a State "which become a Party to the Statute" and thereby *generally* accepts the Court's jurisdiction within the meaning of **Article 12(1)**.

24. Israel neither lodged a declaration with the Registrar pursuant to **Article 12(3)**. Thus, it is not a State that has accepted the exercise of the Court's jurisdiction respect to the *specific* crimes 'in question', i.e., the crimes allegedly committed by Netanyahu and Gallant.

25. Drawing on its neighbouring provisions, **Article 12(2)** introduces **two preconditions** to the exercise of the Court's jurisdiction. With the exception of a referral of a Situation by the Security Council of the United Nations ("UNSC")

under Article 13(b), these two preconditions apply to *all* cases, be them State referrals (Article 13(a)) as the case at hand, or *proprio muto* investigations initiated by the Prosecutor (Article 13(c)):

- a. **First**, States must *either* become a State Party thereby accepting *general* subject matter jurisdiction of the Court over all Article 5 crimes under **Article 12(1)**, or accept *specific* jurisdiction of the Court, limited to the Article 5 crime(s) 'in question' under **Article 12(3)**.
- b. Second, the alleged crime(s) must *either* occur on that State's territory (Article 12(2)(a)) or committed by that State's national(s).

26. To exercise the jurisdiction of the Court, therefore, the alleged Article 5 crime must be committed either on a territory (Article 12(2)(a)) or by a national (Article 12(2)(b)) of a State, but **only a State which has accepted the Court's jurisdiction** - be it by becoming a State Party to the Rome Statute (Article 12(1)), or by accepting jurisdiction with respect to specific crime(s) (Article 12(3)).

27. It follows that in order to be considered a 'State' for the purpose of Article 12(2)(b), Israel had to accept the Court's jurisdiction. This was also the view of the Pre-Trial Chamber, in its previous composition, in its Decision on Article 19(3), with respect to Palestine and Article 12(2)(a):

"in the view of the Chamber, Palestine acceded to the Statute in accordance with the procedure defined by the Statute... Palestine is therefore a State Party to the Statute, and, as a result, a 'State' for the purposes of article 12(2)(a) of the Statute. These issues have been settled by Palestine's accession to the Statute" (paragraph 112 of the PTC Decision on Article 19(3)).

28. To sum, because Israel has not accepted the Court's jurisdiction as required by Article 12(2), it is not considered a "*State of which the person accused of the crime is a national*" within the meaning of Article 12(2)(b) and, consequently, its acceptance cannot be required within the meaning of Article 19(2)(c).
29. Israel submits that "[i]n circumstances where the Court asserts jurisdiction with respect to conduct committed by nationals of a State, or in the territory of a State, that State would be a "[a] State from which acceptance of jurisdiction is required under Article 12", within the meaning of Article 19(2)(c). Depending on the circumstances, **there may be situations where more than one State is entitled to challenge the jurisdiction** of the Court under Article 19(2)(c) (for example, an assertion of jurisdiction by the Court with respect to a national of a State that occurred in the territory of another State, or with respect to a person with dual nationality)" (paragraph 41 of the Challenge).
30. However, as explained above there are *no* situations where more than one **State** is entitled to challenge the jurisdiction of the Court under Article 19(2)(c). Rather, there may be situations where more than one **State accepts the Court's jurisdiction** ("*one or more of the following States...*"). Accordingly, under Article 12(2) only a State that has accepted the Court's jurisdiction can be entitled to challenge the jurisdiction of the Court under Article 19(2)(c).
31. The only case-law Israel found in purported support of this argument is the Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan. Similar to Israel's own reference to the PTC Decision on Article 19(3), however, the Appeal Chamber generally notes that "article 19 allows States to raise challenges to the jurisdiction of the Court", without specifying under which provision of Article 19 these States would have standing, and without making

any specific reference to Article 19(2)(c).¹ In fact, Israel further cites from the transcript of the hearing, which does make an explicit reference to a specific provision under Article 19, only this reference is not to Article 19(2)(c) but to Article 19(2)(b): “Afghanistan or the United States can challenge the admissibility of the case or the jurisdiction of the case under Article 19(2)(b)”.²

32. In any event, as this Pre-Trial Chamber noted, in the present case “the acceptance of Israel for the Court’s jurisdiction is not required, as the Court can exercise its jurisdiction on the basis of the territorial jurisdiction of Palestine. As soon as there is one jurisdictional basis pursuant to article 12(2)(a) or (b) of the Statute, there is no need for an additional one” (paragraph 13 of the Decision on Article 19(2)).

33. To conclude, Israel’s claim that *in addition* to the acceptance of Palestine, Israel’s acceptance is *also* required under Article 12(2)(b) is unfounded twice: Israel is not a State within the meaning of Article 12(2)(b) because it has not accepted the Court’s jurisdiction, and its acceptance is not required given Palestine’s acceptance of the Court’s jurisdiction in connection with Article 12(2)(a).

34. In parallel to its claim that more than one State may be required to accept the Court’s jurisdiction, Israel submits that it is “the sole State whose acceptance of jurisdiction” is required, purportedly pursuant to article 12(3). This time “the basis of this jurisdictional challenge is that “Palestine” is not “the State on the territory of which the conduct in question occurred” within the meaning of Article 12(2)(a) of the Rome Statute. Accordingly, Israel’s acceptance of jurisdiction as “a State which is not a Party to [the] Statute” is required under Article 12(3) in respect of any case based on acts purportedly committed by

¹ Situation in the Islamic Republic of Afghanistan, Appeals Chamber, Judgment on the Appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138, 5 March 2020 (“Afghanistan Appeal Decision”), para. 44.

² Situation in the Islamic Republic of Afghanistan, Transcript of hearing, ICC-02/17-T-003-ENG, 6 December 2019 (“Afghanistan Hearing Transcript”), p. 39- 40.

Israeli nationals on the territory of the Gaza Strip, or any other claimed territory of “Palestine”. This again means, pursuant to Article 19(2)(c) of the Statute, that Israel is “a State from which acceptance of jurisdiction is required under article 12”, entitling it to challenge the jurisdiction of the Court under that provision.” (para 44 of the Challenge).

35. As explained above, Israel cannot rely on Article 12(3) to substantiate its standing under Article 19(2)(c) because it chose not to lodge a declaration with the Registrar thereby accepting the exercise of the Court’s jurisdiction with respect to the *specific* crimes in question, i.e., the crimes allegedly committed by Netanyahu and Gallant, as required under Article 12(3).

36. In any event, in its Decision on Article 19(3) the “Pre-Trial Chamber I found **unanimously** that “Palestine is a State Party to the Statute” and by majority... that “Palestine **qualifies as ‘[t]he State on the territory of which the conduct in question occurred’ for the purposes of article 12(2)(a) of the Statute**”, and that “the Court’s territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely **Gaza** and the West Bank, including East Jerusalem” (paragraph 10 of the “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”).

37. Israel was invited to participate in the proceedings under Article 19(3) but chose not to. As the Pre-Trial Chamber noted, the Court cannot simply “ignore its previous decision... which has now become *res judicata*”, four years after it was rendered (paragraph 15 of the Decision on Israel’s Challenge under Article 19(2)).

38. Based on the foregoing, Israel is not “a State from which acceptance of jurisdiction is required under article 12” within the meaning of Article 19(2)(c) of the Statute.

III. Conclusion

39. *To exercise* the Court's jurisdiction over Article 5 crimes that occur on a State's territory or perpetrated by nationals of that State, Article 12(2) requires that State to **accept** the Court's jurisdiction. This does not mean that a State not Party to the Statute is required to accept the Court's jurisdiction, or that the Court is required to obtain such acceptance. It simply means that the existence of such acceptance is a precondition to the exercise of the Court's jurisdiction.
40. *To challenge* the Court's jurisdiction, Article 19(2)(c) stipulates that this acceptance has to be **required** under Article 12, that is, necessary to the exercise of the Court's jurisdiction. Article 12(2) acknowledges that more than one State may accept the Court's jurisdiction in a given case ("one or more of the following States..."), but only one State's acceptance is required to exercise its jurisdiction, and accordingly to challenge it. In any event, a State that could have but chose not to accept the Court's jurisdiction does not have standing to challenge the establishment of this jurisdiction on the acceptance of another State, be it in addition to the standing of the other State, or in its stead.
41. States not Party to the Statute, whose nationals are allegedly committing Article 5 crimes on a territory of a State Party, do not have standing to challenge the jurisdiction of the Court under Article 19(2)(c). They do have jurisdiction to investigate and if necessary to prosecute these crimes, and in so far they do, they have standing to challenge the case's admissibility under Article 19(2)(b).
42. To conclude, Israel lacks standing because it has **not accepted** the Court's jurisdiction. Under Article 19(2)(c), "*a State from which acceptance of jurisdiction is required under article 12*" may only refer to States that have accepted jurisdiction under Article 12(1) or 12(3), as explicitly stipulated in Article 12(2). Only these

States may have standing to challenge the jurisdiction of the Court, for example on the ground that the crime in question was not committed in their territories (Article 12(2)(a)), or was not committed by their nationals (Article 12(2)(b)).

43. Israel also lacks standing because its acceptance is **not required**: The exercise of the Court's jurisdiction concerns the Situation in the State of Palestine, not the State of Israel. This Situation meets the two preconditions to the exercise of the Court's jurisdiction under Article 12: Palestine has become a State Party thereby accepting the Court's jurisdiction over Article 5 crimes; And Palestine is the State on the territory of which the crimes in question allegedly occurred.



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27 June 2025

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