

## LEGAL CORRECTOR

### International Criminal Court's Powers over Crimes in Palestine

The application for arrest warrants by the International Criminal Court (ICC) against two senior Israeli officials has unsurprisingly provoked significant political uproar and threats.<sup>1</sup> Israeli Prime Minister Benjamin Netanyahu, one of the officials named in the warrants, swiftly sought to undermine the Court's request by asserting that the ICC lacks jurisdiction over Israel.<sup>2</sup> The Biden administration, which had previously revoked Donald Trump's executive order 13928 that sanctioned ICC personnel on the grounds of it being 'inappropriate,'<sup>3</sup> appears to have altered its stance in light of the arrest warrants targeting Israeli officials. U.S. Secretary of State Antony Blinken has not only suggested that he will collaborate with lawmakers on potential sanctions against the ICC but has also echoed arguments similar to that of Netanyahu regarding the Court's purportedly 'limited' jurisdiction.<sup>4</sup>

It is therefore imperative to clarify the legalities and dispel the political noise surrounding the ICC's mandate to investigate potential crimes perpetrated by different parties in Palestine.

Netanyahu's assertion that the ICC lacks jurisdiction over Israel is not entirely incorrect, as Israel is not signatory to the Rome Statute and has not agreed that the Court exercise jurisdiction over crimes committed on its territory. However, this claim does not preclude the Court from exercising jurisdiction over crimes committed by Israeli nationals, including himself, in territory of a State Party that has accepted the Court's jurisdiction. Under Article 13 of the Rome Statute, to the ICC, the Court can exercise its jurisdiction over crimes enumerated in Article 5 of the Statute under three circumstances: if a State Party to the statute refers the situation to the Prosecutor; if the United Nations Security Council (UNSC), acting under Chapter VII of the UN Charter, refers the situation; or if the prosecutor initiates an investigation proprio motu. In any of these scenarios, the Court's jurisdiction extends to "the state on the territory of which the conduct in question occurred," as stipulated in Article 12(2)(b).<sup>5</sup>

Regarding the investigation relating to war crimes and crimes against humanity in Gaza, the State of Palestine, a State Party to the Rome Statute since June 13, 2014, has referred the matter to the Court. Consequently, although

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<sup>1</sup> The Hill. (15<sup>th</sup> May 2024). A.Dershowitz. [‘The ICC lacks jurisdiction over Israel in Gaza’](#). ; Al Jazeera. (20-05-2024). [‘US lawmakers slam ICC prosecutor’s Israel arrest warrant requests’](#).

<sup>2</sup> B. Netanyahu (20<sup>th</sup> May 2024). [‘Statement by Prime Minister Benjamin Netanyahu’](#). Israeli State Department.

<sup>3</sup> US Department of State. (2<sup>nd</sup> April 2021) [‘Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court’](#)

<sup>4</sup> R. Looker, S. Cabral. (21<sup>st</sup> May 2024) [‘US signals support for possible ICC sanctions over Israel warrants’](#). BBC.

<sup>5</sup> ICC (1998). [Rome Statute](#). Article 12(2)(b).

Israel is not a signatory to the Rome Statute, which in return means that crimes committed in Israeli territory cannot be investigated by the ICC without Israeli referral, the crimes under investigation are those allegedly committed by Israeli officials or military on the territory of a state that has acceded to the Statute—the State of Palestine.

This clarification should dispel any political assertions that Israeli officials cannot be held accountable by the ICC for their actions in Gaza or any other part of the Palestinian territories as a matter of fact. Moreover, it opens the door to address and resolve other politically motivated misconceptions regarding the Court's jurisdiction, such as: (A) the claim that Palestine is not a state with defined territorial boundaries and therefore cannot be party to the ICC, and (B) the assertion that state parties can refuse to comply with arrest warrants due to head-of-state immunity.

To dispel the misconceptions dominating political and public discourse, we will refer to the ICC's Pre-Trial Chamber ruling from February 2021 and the decision of the Appeals Chamber from May 2019 regarding Jordan's non-compliance in the Al-Bashir case.

#### **A. *The claim that Palestine is not a state with defined territorial boundaries.***

This claim, extensively debated during Palestine's accession to the ICC Statute, persists despite the Pre-Trial Chamber's decisive 2021 ruling on the matter.<sup>6</sup> The Palestinian Authority initially attempted to accept ICC jurisdiction under Article 12(3) of the Statute in 2009, but the preliminary examination concluded that Palestine could not accede to the ICC without being recognised as a state.

However, in 2012, this obstacle ceased to exist when the United Nations General Assembly (UNGA) granted Palestine "Non-Member Observer State" status.<sup>7</sup> The Pre-Trial Chamber, in paragraph 93 of its decision, concluded that the reference to "State Parties to this Statute" in Article 12(2) does not require a determination of statehood under general international law.<sup>8</sup> Furthermore, paragraph 97 clarifies that Article 125(3) of the Rome Statute permits accession by all states without imposing additional criteria for statehood.<sup>9</sup>

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<sup>6</sup> ICC. (5<sup>th</sup> February 2024). 'ICC Pre-Trial Chamber I issues [its decision on the Prosecutor's request related to territorial jurisdiction over Palestine](#)'

<sup>7</sup> UNGA. (29<sup>th</sup> November 2012) '[General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations](#)'

<sup>8</sup> ICC (1998). [Rome Statute](#). Article 12(2).

<sup>9</sup> ICC. (1998) [Rome Statute](#). {Article 125(3)}.

Consequently, the ICC's territorial jurisdiction extends to territories occupied by Israel since 1967, namely the West Bank, including East Jerusalem and Gaza. The Court emphasized in paragraph 130 that its ruling on territorial jurisdiction does not adjudicate border disputes under international law nor prejudge future borders.<sup>10</sup>

With statehood and territorial jurisdiction established, one lingering issue concerns the potential repercussions of the Oslo Accords on ICC jurisdiction. The Chamber determined that the Oslo Accords create no "legal barrier" to the Court's jurisdiction.<sup>11</sup> The Court distinguished between prescriptive acts (where jurisdiction applies) and enforcement acts (where jurisdiction under the Oslo Accords does not apply), the latter being irrelevant to the Court's territorial jurisdiction. Although the Oslo Accords divided the occupied Palestinian territories into areas A, B, and C, and granted certain military controls to Israel, these areas remain occupied. The accords cannot alter this legal reality, as the right to self-determination rests solely with the Palestinian people, a principle reaffirmed by the International Court of Justice in its advisory opinion on the 'Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory.'<sup>12</sup>

The above established distinction between the Court's perspective act and enforcement act, which brings us to the second political misconception surrounding the recent arrest warrants.

### ***B. Head of State Immunity.***

It should come as no surprise that states which have long politically and militarily backed Israel's operations in Gaza, regardless of their genocidal nature, will object to and criticise the ICC Chief Prosecutor's application for arrest warrant. However, such opinions should not hinder their legal obligation as member states to the ICC to conduct arrests if approved by the Pre-Trial Chamber. Excuses citing inability to perform arrests due to head-of-state immunity will not hold legally, especially after the ICC Chamber put an end to such claims in its decision on Jordan's non-cooperation with the arrest warrant for former Sudanese President Omar Al-Bashir.<sup>13</sup>

In 2017, following the Security Council's referral of the situation in Darfur and the ICC Chamber's issuance of arrest warrants against President Al-Bashir, Jordan failed to arrest him during his visit to its capital, Amman.<sup>14</sup>

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<sup>10</sup> ICC Pre-Trial Chamber. (5<sup>th</sup> February 2021) [Situation in the State of Palestine](#).

<sup>11</sup> Ibid.

<sup>12</sup> ICC. (8<sup>th</sup> December 2003). '[Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#)'.

<sup>13</sup> Pre-Trial Chamber II. (11-12-2017). '[The Situation In Sudan In the Case of The Prosecutor v. Omar Hassan Ahmad Al Bashir](#)'. ICC.

<sup>14</sup> Ibid.

Jordan's response to the Chamber's proceedings regarding its failure to comply with the court's arrest order centred around a clash with its duty under customary international law regarding head-of-state immunity and its duty as an ICC member state.<sup>15</sup>

The Chamber analysed Jordan's claims and reaffirmed that while head-of-state immunity may exist in customary international law, it does not provide immunity against international tribunals, only against state-based proceedings. Article 27 (1) & (2) of the Rome Statute supports this point, as they ensure that the statute applies equally to all persons without distinction based on official capacity, and any immunity attached to it cannot prevent the ICC from exercising its jurisdiction.<sup>16</sup>

Having established these legal principles, it is imperative that any State Party to the ICC adheres to the execution of arrest warrants, irrespective of the immunity Benjamin Netanyahu or others may assert under international law. In instances of non-compliance, member states can be subject to various repercussions from the ICC, including referral to the Assembly of States Parties that ratified the Rome Statute for diplomatic measures or referral to the United Nations Security Council for sanctions.

As we conclude this examination, despite attempts to politicise legal discourse, it remains that the ICC has a duty to hold accountable those responsible for crimes within the territory of a member state, including Palestine, regardless of their stature or position. While political noise may cloud the conversation, it should be asserted that no immunity or jurisdictional matter should be used to stand in the way of carrying out arrest warrants if issued by the Pre-Trial Chamber.

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<sup>15</sup> Pre-Trial Chamber II. (11<sup>th</sup> December 2017) [‘Situation In Darfur Sudan’](#). ICC.

<sup>16</sup> ICC. (1998) [Rome Statute](#). Article 27.