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## DOCUMENTACIÓN I. INTERNATIONAL CRIMINAL COURT - PALESTINE - ISRAEL - WARRANTS OF ARREST FOR B. NETANYAHU AND Y. GALLANT<sup>1</sup>

ENRIQUE DEL ÁLAMO MARCHENA<sup>2</sup>

### Presentación

El pasado 21 de noviembre de 2024, la Sala de Cuestiones Preliminares I de la Corte Penal Internacional, compuesta para la *Situación en el Estado de Palestina*, emitía un comunicado informando de dos noticias de interés para el desarrollo del proceso, siendo una de ellas de acceso público, mientras que la otra revestía un carácter secreto.

La comunicación de naturaleza pública concierne a la decisión de la Sala, por unanimidad, de rechazar dos impugnaciones que presentó Israel, donde se cuestionaba, en primer lugar, la competencia de la Corte en base al artículo 18(1) del Estatuto, y, en segundo lugar, se impugnaba la admisibilidad de la causa sobre el examen de las órdenes de detención en virtud del artículo 19(2) del Estatuto.

La segunda de las noticias trasciende porque la Sala ha emitido órdenes de detención contra Benjamin Netanyahu, Presidente de Israel, y Yoav Gallant, Ex ministro de Defensa de Israel, por crímenes contra la humanidad y crímenes de guerra, cometidos desde, al menos, el 8 de octubre de 2023, hasta, al menos, el 20 de mayo de 2024, día en que el Fiscal solicitó a la Sala que dictase las órdenes de detención, en base al artículo 58(1) del Estatuto.

<sup>1</sup> FUENTE/SOURCE – International Criminal Court: <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>

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La Sala motivó su decisión de que las órdenes de detención sean clasificadas como secretas en aras de asegurar la protección de los testigos, manteniéndolos en el anonimato, y garantizar el buen desarrollo de las investigaciones, en virtud del artículo 68(1) del Estatuto.

El hecho de que la Sala de Cuestiones Preliminares I de la Corte Penal Internacional haya decidido emitir órdenes de arresto contra los dos máximos dirigentes de los sucesos cometidos durante el plazo de tiempo objeto de la investigación, significa que la Sala ve motivos razonables para creer que se ha cometido un crimen de la competencia de la Corte (crímenes contra la humanidad y crímenes de guerra, en este caso), y la detención se cree necesaria para impedir que los individuos destinatarios de la misma sigan cometiendo los crímenes bajo competencia de la Corte, según se establece en el artículo 58(1) letras a) y b) subapartado iii) del Estatuto.

Tras la orden de detención dictada por la Sala, a solicitud del Fiscal el pasado 20 de mayo de 2024 tras los hallazgos fruto de la investigación, el momento procesal en el que se encuentra el proceso es el relativo al procedimiento de detención en el Estado de detención, en base al artículo 59 del Estatuto, y por medio del cual los individuos deberán ser puestos a disposición de la Corte en aras de poder avanzar en las primeras diligencias, desarrolladas en el artículo 60 del Estatuto. Sucedido lo anterior, esta primera fase previa del proceso debiera culminar en la confirmación de los cargos antes de dar comienzo el juicio, en virtud del artículo 61 del Estatuto.

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› 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

Press Release: 21 November 2024 | العربية عبرית

## 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



Today, on 21 November 2024, Pre-Trial Chamber I of the International Criminal Court ('Court'), in its composition for the *Situation in the State of Palestine*, unanimously issued two decisions rejecting challenges by the State of Israel ('Israel') brought under articles 18 and 19 of the Rome Statute (the 'Statute'). It also issued warrants of arrest for Mr Benjamin Netanyahu and Mr Yoav Gallant.

### Decisions on requests by the State of Israel

The Chamber ruled on two requests submitted by the Israel on 26 September 2024. In the first request, Israel challenged the Court's jurisdiction over the *Situation in the State of Palestine* in general, and over Israeli nationals more specifically, on the basis of article 19(2) of the Statute. In the second request, Israel requested that the Chamber order the Prosecution to provide a new notification of the initiation of an investigation to its authorities under article 18(1) of the Statute. Israel also requested the Chamber to halt any proceedings before the Court in the relevant situation, including the consideration of the applications for warrants of arrest for Mr Benjamin Netanyahu and Mr Yoav Gallant, submitted by the Prosecution on 20 May 2024.

As to the first challenge, the Chamber noted that the acceptance by Israel of the Court's jurisdiction is not required, as the Court can exercise its jurisdiction on the basis of territorial jurisdiction of Palestine, as determined by Pre-Trial Chamber I in a previous composition. Furthermore, the Chamber considered that pursuant to article 19(1) of the Statute, States are not entitled to challenge the Court's jurisdiction

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under article 19(2) prior to the issuance of a warrant of arrest. Thus Israel's challenge is premature. This is without prejudice to any future possible challenges to the Court's jurisdiction and/or admissibility of any particular case.

[Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19\(2\) of the Rome Statute](#)

The Chamber also rejected Israel's request under article 18(1) of the Statute. The Chamber recalled that the Prosecution notified Israel of the initiation of an investigation in 2021. At that time, despite a clarification request by the Prosecution, Israel elected not to pursue any request for deferral of the investigation. Further, the Chamber considered that the parameters of the investigation in the situation have remained the same and, as a consequence, no new notification to the State of Israel was required. In light of this, the judges found that there was no reason to halt the consideration of the applications for warrants of arrest.

[Decision on Israel's request for an order to the Prosecution to give an Article 18\(1\) notice](#)

#### Warrants of arrest

The Chamber issued warrants of arrest for two individuals, Mr Benjamin Netanyahu and Mr Yoav Gallant, for crimes against humanity and war crimes committed from at least 8 October 2023 until at least 20 May 2024, the day the Prosecution filed the applications for warrants of arrest.

The arrest warrants are classified as 'secret', in order to protect witnesses and to safeguard the conduct of the investigations. However, the Chamber decided to release the information below since conduct similar to that addressed in the warrant of arrest appears to be ongoing. Moreover, the Chamber considers it to be in the interest of victims and their families that they are made aware of the warrants' existence.

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.

With regard to the crimes, the Chamber found reasonable grounds to believe that Mr Netanyahu, born on 21 October 1949, Prime Minister of Israel at the time of the relevant conduct, and Mr Gallant, born on 8 November 1958, Minister of Defence of Israel at the time of the alleged conduct, each bear criminal responsibility for the following crimes as co-perpetrators for committing the acts jointly with others: the war crime of starvation as a method of warfare; and the crimes against humanity of murder, persecution, and other inhumane acts.

The Chamber also found reasonable grounds to believe that Mr Netanyahu and Mr Gallant each bear criminal responsibility as civilian superiors for the war crime of intentionally directing an attack against the civilian population.

#### Alleged crimes

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. 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. The Chamber also found that the alleged crimes against humanity were part of a widespread and systematic attack against the civilian population of Gaza.

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 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.

The Chamber therefore found reasonable grounds to believe that Mr Netanyahu and Mr Gallant bear criminal responsibility for the war crime of starvation as a method of warfare.

The Chamber found that there are reasonable grounds to believe that the lack of food, water, electricity and fuel, and specific medical supplies, created conditions of life calculated to bring about the destruction of part of the civilian population in Gaza, which resulted in the death of civilians, including children due to malnutrition and dehydration. On the basis of material presented by the Prosecution covering the period until 20 May 2024, the Chamber could not determine that all elements of the crime against humanity of extermination were met. However, the Chamber did find that there are reasonable grounds to believe that the crime against humanity of murder was committed in relation to these victims.

In addition, by intentionally limiting or preventing medical supplies and medicine from getting into Gaza, in particular anaesthetics and anaesthesia machines, the two individuals are also responsible for inflicting great suffering by means of inhumane acts on persons in need of treatment. Doctors were forced to operate on wounded persons and carry out amputations, including on children, without anaesthetics, and/or were forced to use inadequate and unsafe means to sedate patients, causing these persons extreme pain and suffering. This amounts to the crime against humanity of other inhumane acts.

The Chamber also found reasonable grounds to believe that the abovementioned conduct deprived a significant portion of the civilian population in Gaza of their fundamental rights, including the rights to life and health, and that the population was targeted based on political and/or national grounds. It therefore found that the crime against humanity of persecution was committed.

Finally, the Chamber assessed that there are reasonable grounds to believe that Mr Netanyahu and Mr Gallant bear criminal responsibility as civilian superiors for the war crime of intentionally directing attacks against the civilian population of Gaza. In this regard, the Chamber found that the material provided by the Prosecution only allowed it to make findings on two incidents that qualified as attacks that were intentionally directed against civilians. Reasonable grounds to believe exist that Mr Netanyahu and Mr Gallant, despite having measures available to them to prevent or repress the commission of crimes or ensure the submittal of the matter to the competent authorities, failed to do so.

### **Background**

On 1 January 2015, The State of Palestine lodged a declaration under article 12(3) of the Rome Statute accepting jurisdiction of the Court since 13 June 2014.

On 2 January 2015, The State of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. The Rome Statute entered into force for The State of Palestine on 1 April 2015.

On 22 May 2018, pursuant to articles 13(a) and 14 of the Rome Statute, The State of Palestine referred to the Prosecutor the Situation since 13 June 2014, with no end date.

On 3 March 2021, the Prosecutor announced the opening of the investigation into the Situation in the State of Palestine. This followed Pre-Trial Chamber I's [decision](#) on 5 February 2021 that the Court could exercise its criminal jurisdiction in the Situation and, by majority, that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem.

On 17 November 2023, the Office of the Prosecutor received a further referral of the Situation in the State of Palestine, from South Africa, Bangladesh, Bolivia, Comoros, and Djibouti, and on 18 January 2024, the Republic of Chile and the United Mexican State additionally submitted a referral to the Prosecutor with respect to the situation in The State of Palestine.