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PRE-TRIAL CHAMBER I

Before: Judge Iulia Motoc, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN THE STATE OF PALESTINE

Public, with Public Annexes A to G

**Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying
Proceedings Pending Such a Notice**

Source: The State of Israel

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

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**Victims Participation and Reparations
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**Public Information and Outreach
Section**

I. INTRODUCTION

1. The State of Israel ("Israel") requests an order from the Pre-Trial Chamber requiring the Prosecutor, pursuant to article 18(1) of the Statute of the International Criminal Court, to notify Israel of any investigation that it is now conducting, or intends to conduct, into events in and around Gaza from 7 October 2023 onwards.¹

2. The Prosecution was required to provide Israel with a new or revised article 18(1) notification when the "defining parameters" of its investigation changed, as they did after 7 October 2023. The extent of the change following 7 October 2023 is reflected in two new referrals submitted by seven States that have invoked the court's jurisdiction for the first time in respect of new crimes, new circumstances, and new potential perpetrators – a new "situation of crisis". Whether a new situation has arisen, or the "defining parameters" of the Prosecution's investigation within the existing situation have changed, the result is the same: a new article 18(1) notification had to be given to Israel to allow it to exercise its procedural rights under article 18(2) to "inform the Court" that it is investigating these acts.

3. The appropriate remedy is a direction by the Pre-Trial Chamber requiring the Prosecution to give Israel and other States, pursuant to article 18(1), a notification providing sufficiently specific information concerning the scope of its investigation. Pending that notification, any proceedings arising from that investigation should be stayed, including the highly-publicised requests for arrest warrants against the Prime Minister and Minister of Defence of Israel.

4. Israel is not a Party to the Rome Statute. This filing is without prejudice to that status, to Israel's well-known position regarding the Court's manifest lack of jurisdiction over the so-called "situation in Palestine",² as well as its rights under the Rome Statute to bring jurisdictional and/or admissibility challenges before the Court.

5. These legal arguments are made in a dramatic context that started with an unprecedented attack by thousands of armed Hamas terrorists on the territory of Israel. They targeted and murdered over a thousand civilians; committed widespread sexual violence against women and

¹ This filing, which was initially submitted to the Registry on 20 September 2024, has been modified at the instruction of the Pre-Trial Chamber on 23 September 2024 to read on the cover page "Situation in the State of Palestine" rather than "Situation in Palestine". This change is made without prejudice to Israel's well-known position that "Palestine" is not a State.

² Memorandum of Israel.

girls and unspeakable outrages against the living and the dead; and kidnapped and tortured hundreds of Israeli nationals – some of whom have been murdered by their captors, while others are held to the present day in appalling conditions under constant death threats, and are being used by Hamas as pawns and human shields.

6. Despite having been forced into a bloody conflict that it did not want, Israel remains a democracy endowed with an independent judiciary and deeply committed to the rule of law, including the principles of international humanitarian law. Israel does not allow impunity for crimes and has the appropriate mechanisms – some of which are in place and operating already, others of which may be put in place, as necessary – to investigate, adjudicate and ensure accountability for any alleged crimes. Israel has primary jurisdiction and is best placed to investigate allegations of the sort raised by the Prosecutor, given the access required to relevant evidence, information and persons. In line with the principle of complementarity, a proper notification under article 18(1) would allow Israel to exercise its right to assert its primary jurisdiction, and would facilitate its ability to respond to the Prosecutor in accordance with article 18(2).

7. Instead of providing Israel with an article 18(1) notification that reflects the scope of the investigation by which Israel's own accountability efforts would be judged, the Prosecutor abruptly announced arrest warrants against the Prime Minister and Minister of Defence, based on an investigation that took the same amount of time as was required by his Office to issue arrest warrants against Hamas's murderous leadership. This reflected disregard for the fundamental principle of complementarity, and indifference to the existence of a functioning democracy with independent legal institutions committed to the rule of law.

II. PROCEDURAL HISTORY

8. On 3 March 2021, following a Palestinian referral³ and a majority decision of the Pre-Trial Chamber I concerning jurisdiction,⁴ the OTP announced the initiation of an investigation into “the Situation in Palestine.”⁵ On 9 March 2021, the then Prosecutor provided a notification of this investigation to States, including Israel, pursuant to article 18(1).⁶

9. On 8 April 2021, Israel responded to this notification, asserting that the notice was not

³ 2018 Referral. References to the 2018 referral are without prejudice to Israel's position on jurisdiction.

⁴ Decision on Jurisdiction.

⁵ OTP Statement 3 March 2021.

⁶ Annex B, Article 18(1) Notification, p. 1.

sufficiently specific. Israel emphasised that it “has and will continue to examine and investigate rigorously allegations of misconduct or crimes – regardless of their source – and to hold to account those persons within its jurisdiction found to be responsible.”⁷ The Prosecutor on 9 April 2021 sought to clarify whether Israel was asserting its right to have the investigation deferred pursuant to article 18(2) and, if so, whether further information was sought under rule 52(2).⁸ Israel responded by re-affirming its view, *inter alia*, that the article 18 notification was not sufficiently specific, which “effectively precluded Israel from making any request of the OTP in response to the Prosecutor’s letter.”⁹ The Prosecution did not reply to this communication.

10. On 1 May 2024, Israel notified the OTP that it “is willing and able to investigate and, where necessary, prosecute any alleged violations of international law relating to the current conflict,” and requested that the Prosecutor “defer any investigation it may be conducting in relation to any alleged criminal acts attributed to Israeli nationals or others within Israel’s jurisdiction, in favour of Israel’s processes for review, examination, investigation and proceedings under its national legal system, as further explained below.”¹⁰ The Prosecutor was specifically invited to bring to Israel’s attention any alleged crimes attributed to Israeli nationals or others within its jurisdiction so that “relevant Israeli authorities can examine and investigate those allegations with a view to ensuring accountability in line with the applicable law.”¹¹

11. On 7 May 2024, the OTP responded with a one-page letter referring to the exchange of correspondence in March and April 2021 and asserting: “Having expressly declined to make an application for deferral of the investigation within the prescribed time limit, Israel has no standing now, under the Statute, to make such an application.”¹²

12. On 20 May 2024, the Prosecutor announced to the media that he had filed an application seeking warrants of arrest in respect of, *inter alia*, Israel’s Prime Minister, Mr. Benjamin Netanyahu, and Israel’s Minister of Defence, Mr. Yoav Gallant.¹³

⁷ Annex C, Letter from Israel to OTP, 8 April 2021.

⁸ Annex D, Letter from OTP to Israel, 9 April 2021.

⁹ Annex E, Communication from Israel to OTP, 26 April 2021.

¹⁰ Annex F, Letter from Israel to OTP, 1 May 2024.

¹¹ *Id.*

¹² Annex G, Letter from OTP to Israel, 7 May 2024.

¹³ OTP Statement 20 May 2024.

III. APPLICABLE LAW

13. Article 18(1) provides that upon the initiation of an investigation, following either a referral under article 13(a) or an authorisation pursuant to article 15, the Prosecutor:

Shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

14. Under Article 18(2):

Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

15. Rule 52(1) of the Rules of Procedure and Evidence requires that “[s]ubject to the limitation provided for in article 18, paragraph 1, the notification shall contain information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2.”

IV. STANDING

16. States are endowed with a “right”¹⁴ under article 18(2) to “inform the Court” that they are investigating “their nationals or others within [their] jurisdiction” in respect of a Prosecutor’s investigation. This “right” can only be exercised, however, when the Prosecutor issues a notification under article 18(1). Accordingly, the Prosecutor can thwart a State’s exercise of its rights under article 18(2) by simply declining to give an article 18(1) notification.

17. The Prosecution’s obligation under article 18(1) and the rights of States under article 18(2) are therefore inter-twined. Standing is required to ensure that the rights of States specifically accorded under article 18(2) are protected, and to ensure adherence by a Prosecutor to article 18(1). The extreme scenario of a Prosecutor proceeding to an investigation without

¹⁴ *Venezuela AD*, para. 114 (“exercise its rights under article 18(2)”); *Philippines AD*, para. 108 (“right under article 18(2) to seek deferral”); *Venezuela PTD*, para. 75.

giving any article 18(1) notice, despite a clear obligation to do so, requires a remedy to protect the rights of States under article 18(2) specifically and the principle of complementarity on which the Rome Statute is built. To be clear, this is Israel's claim as set out in this request: the Prosecutor has wrongly failed to give an article 18(1) notice where it had to be given, with the consequence that it has been denied the opportunity to "inform the Court" of anything. As the Appeals Chamber has stated in a similar context, "no State should have to face the prospect of being found wanting in this regard without at least being given an opportunity to explain itself. This is why articles 18 and 19 of the Statute provide several procedural avenues for States to correct the Prosecutor's assessment of their domestic efforts."¹⁵

18. This is not an open-ended invitation to Pre-Trial Chambers to exercise supervision over the Prosecution's investigations or preliminary examinations.¹⁶ Standing arises here in respect of a specific obligation under article 18(1) of the Statute, which must be subject to judicial review to protect a specific right of a State. That right is now being denied. Israel has standing.¹⁷

V. SUBMISSIONS

(i) A new situation has arisen since 7 October 2023, as reflected in the subsequent referrals by seven States, requiring a new article 18(1) notice

a. An investigation must fall within the scope of the "situation of crisis" as referred by the State Party

19. The meaning of the term "situation" under articles 13 and 14 of the Statute is not defined in the Statute, but was apparently adopted in contradistinction to the word "cases".¹⁸ Regarding arrest warrants, chambers have held that "for the case at hand not to exceed the parameters defining the [...] situation under investigation, the crimes [...] must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the [...] referral."¹⁹

20. Referrals are not allowed to be wholesale or open-ended transfers of jurisdiction to the ICC. A State is not permitted to "permanently abdicate its responsibilities by referring a

¹⁵ *Yekatom* Admissibility AD, para. 42.

¹⁶ Venezuela's request for a Pre-Trial Chamber to "exercise judicial control over the Prosecutor's conduct of the preliminary examination" was denied. However, the Pre-Trial Chamber contemplated that its decision might have been different if article 18 had been engaged. *See Venezuela I* Control Decision, paras. 9, 14.

¹⁷ Israel has filed this abridged version of this request so that the Pre-Trial Chamber has the immediate benefit of these submissions, pending potential authorisation to present a fuller version of this request.

¹⁸ Ambos 4th ed., pp. 837, 871.

¹⁹ *Mbarushimana* Arrest Warrant Decision, para. 6.

wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether in context or duration.”²⁰ Specific crimes will be found to fall within the scope of a situation only when they are “sufficiently linked to the *situation of crisis* which was ongoing at the time of the referral and was the subject of the referral.”²¹ The nature of the “situation of crisis” may be illuminated by any subsequent article 18(1) notification,²² however, the Appeals Chamber has made clear that a pre-trial chamber is required to “determine[] whether the scope of the Prosecutor’s intended investigation falls within the boundaries of the Situation in relation to which the Court’s jurisdiction [w]as referred to the Prosecutor.”²³ Accordingly, the scope of the article 18(1) notification, and the investigation itself, may not exceed the parameters of the referral.²⁴

b. The “situation of crisis” set out in the 2018 Referral does not relate to the conduct of hostilities, but rather crimes allegedly committed in relation to Israel’s “settlement” policies, and other alleged policies of occupation

21. The “situation of crisis” that has arisen since 7 October 2023 is fundamentally different from that described in the Palestinian Referral in 2018. The focus of the 2018 Referral is the manner of Israel’s administration of occupied territory. Crimes are alleged in the 2018 Referral to have been committed “to advance [Israel’s] settlement regime to an unprecedented level with the aim of pursuing its policy of displacement and replacement of the Palestinian people. This settlement policy has been carried out through the commission of multiple crimes within the Court’s jurisdiction.”²⁵ These are described as “settlement-related crimes”:²⁶

the circumstances relevant to the present referral include but are not limited to, *all matters related to the Israeli settlement regime* outlined in earlier communications, monthly reports and submissions by the Government of Palestine, confidentially filed with or conveyed to the Office of the Prosecutor. In particular, the present referral incorporates as matters to be subject to investigation, any conduct, policies, laws, official decisions and practices that

²⁰ *Mbarushimana* Jurisdiction Decision, para. 21.

²¹ *Id.*, para. 41 (italics added). The notion of “sufficient linkage” is likewise applied to define the contours of investigations judicially authorized pursuant to article 15(4). See *Afghanistan* Authorisation AD, para. 58 (“other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002.”)

²² *Mbarushimana* Jurisdiction Decision, paras. 33-34.

²³ *Venezuela* AD, para. 227. See *Mbarushimana* Arrest Warrant Decision, para. 6 (“it is only within the boundaries of the situation of crisis for which the jurisdiction of the court was activated that subsequent prosecutions can be initiated.”)

²⁴ Ambos 4th ed. p. 875 (“In other words, a case cannot exceed the parameters of a referred situation under investigation”), p. 871, fn. 111 (“Should the Prosecutor intend to go beyond the factual boundaries of the scenario encompassed in the referral, he or she must invoke the *proprio motu* powers under Article 15.”)

²⁵ 2018 Referral, para. 2.

²⁶ *Id.*, para. 8.

underlie, promote, encourage or otherwise make a contribution *to the commission of these crimes* in accordance with the terms of the Statute.²⁷

22. A list of seven “categories of war crimes and crimes against humanity” albeit “not intended to limit the scope of the OTP’s investigation,”²⁸ are enumerated as being the “categories of crimes” that are “core to the *present* referral” (italics in the original).²⁹ Of course, an allegation of the commission of a war crime presupposes the existence of an armed conflict, but the armed conflict itself is not identified as the situation of crisis in the referral. Indeed, the only specific acts of violence attributed to Israeli forces in the referral are the suppression of protests in the Gaza Strip from March to May 2018.³⁰ Other acts of violence are also mentioned, in some cases attributed to civilians (“settlers,”)³¹ which are not referable to the conduct of hostilities as such but rather the allegation that “occupation [...] and the establishment and maintenance of settlements [...] has involved the enactment and maintenance of a multi-layered system of violence and intimidation against the Palestinian people.”³² No mention is made in this referral of any other hostilities in or around the Gaza Strip, not even in respect of 2014, and there is no reference whatsoever to any “armed conflict” between Israel and any armed group, including Hamas.

23. The Prosecution’s Article 18(1) Notification tries to go beyond the scope of the 2018 Referral by adding “2014 hostilities in Gaza” and the alleged war crimes committed by Hamas and other Palestinian armed groups.³³ Even assuming that this expansion is permissible – which it is not – the Article 18(1) Notification confirms that the situation of crisis is alleged settlement policies by Israel and crimes in relation thereto, not an ongoing armed conflict. Indeed, there is not a single reference to an “armed conflict” in the Article 18(1) Notification. The two categories of alleged improper targeting by Israeli forces are temporally limited to “the context of the 2014 hostilities in Gaza” and to “March 2018”.³⁴ No reference is made to any crime against humanity or to any war crime entailing a systematic policy, except for the allegation of transfer of civilian population into the West Bank.

²⁷ *Id.*, para. 11 (italics added).

²⁸ *Id.*, para. 12.

²⁹ *Id.*

³⁰ *Id.*, para. 16(c).

³¹ *Id.*, para. 16(b).

³² *Id.*, p. 3.

³³ Notification, pp. 1-2.

³⁴ *Id.*, pp. 1-2.

24. This differs sharply from the *Afghanistan* Situation, where the Prosecution referred repeatedly to the “armed conflict” as the situation of crisis, and to “alleged crimes that have a nexus to the armed conflict” as defining the scope of its intended investigation.³⁵ The Appeals Chamber accepted these submissions, setting the contours of the situation as being crimes that “have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation.”³⁶ This was because the Prosecution had “presented information regarding the alleged large scale commission of multiple crimes against humanity and war crimes by various armed groups and actors involved in the conflict which began prior to the entry into force of the Rome Statute on 17 July 2002 and continues to the present day.”³⁷ This contrasts with the 2018 Referral and the Article 18(1) Notification, neither of which refer to armed conflict at all.

25. Open-ended formulations in the 2018 Referral such as “past, ongoing and future crimes within the court’s jurisdiction”³⁸ contribute nothing to the definition of the Situation and are impermissible. As stated by the *Mbarushimana* Pre-Trial Chamber:

[S]uch a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral. This link is necessary, precisely with a view to avoiding that referrals become instruments “permitting a State to abdicate its responsibility for exercising jurisdiction over atrocity crimes for eternity”, which – as the Defence correctly points out – “would be wholly antithetical to the concept of complementarity.”³⁹

26. This approach is also facially contrary to the requirement in article 14(2) that a referral “shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.” Pre-Trial Chambers have similarly held in the context of judicially-authorized situations⁴⁰ that open-ended phrases like “‘included but not limited to’ and ‘in relation to the post-election violence of 2007-2008’, [are] too broad.”⁴¹

³⁵ *Afghanistan* Authorisation Request, paras. 1, 2, 13, 32, 49, 61, 74, 127, 129-137, 186, 270, 361, 376.

³⁶ *Afghanistan* Authorisation AD, p. 3, para. 79.

³⁷ *Id.*, para. 62.

³⁸ 2018 Referral, para. 9.

³⁹ *Mbarushimana* Jurisdiction Decision, para. 16.

⁴⁰ The word “investigation,” rather than “situation,” is used in articles 13(c) and article 15(4), although the matter authorized and the preliminary examination that precedes it is typically referred to as a “Situation.”

⁴¹ *Kenya* Investigation Authorisation, para. 203.

27. The obvious insufficiency of the 2018 Referral in relation to events on and following 7 October 2023 is manifested in the decision of seven States not only to urge investigation of “escalating” violence,⁴² but to refer a wider jurisdictional scope under article 13(a). Thus, while section 1 of the referral by South Africa and four other States refers to “continuing commission of the crimes detailed in the Referral by the State of Palestine,” section 2 goes on to aver that “**additional crimes** appear to have been committed within the jurisdictional scope of the Court”.⁴³ These “additional crimes” are enumerated as including genocide and the war crime of starvation.⁴⁴ The States then categorically “refer[] the Situation in Palestine to the Prosecutor of the Court, requesting the Prosecutor to investigate the Situation.”⁴⁵ The Chile and Mexico referral encompasses crimes committed by Hamas – for the first time triggering the Prosecutor’s jurisdiction in respect of such crimes.⁴⁶ The Palestinian Authority, unlike Uganda,⁴⁷ never tacitly acknowledged that its referral encompassed crimes committed by anyone other than those identified in its referral. These referrals identify a new situation of crisis, and purport to trigger a widened jurisdictional remit in respect of that situation of crisis.

28. The Prosecution attempts to argue that the events on and following 7 October 2023 fall within the scope of the 2018 Referral because: (i) they were committed “in the context of the ongoing Israeli occupation of the West Bank and Gaza, and the associated armed conflicts identified at the time of the referral;” (ii) the same perpetrators and victims are involved as identified “at the time of the referral;” and (iii) “the crimes are consistent with, and reflect a continuation of, the criminality identified at the time of the referral.”⁴⁸ Each of these submissions is wrong: no “associated armed conflicts” were identified in the 2018 Referral; the crimes are not the same, as shown by the new referrals; and the perpetrators of alleged conduct of hostilities crimes are not the same, both as to seniority but also the non-inclusion of any Palestinian armed group in any instrument triggering the Court’s jurisdiction under article 13. The Prosecution’s emphasis on “the time of the referral,” rather than on the referral itself, improperly shifts the scope of the situation as referred.

⁴² OTP Response to Amicus Submissions, para. 4.

⁴³ South Africa *et al.* Referral, para. 2.3 (bold and underline added).

⁴⁴ *Id.*, paras. 2.1, 2.3.

⁴⁵ *Id.*, p. 5.

⁴⁶ Chile and Mexico Referral, p. 2.

⁴⁷ Uganda Decision to Convene a Status Conference, para. 5 (observing that the Prosecutor had notified the Government of Uganda of his interpretation that its referral “encompasses all crimes committed in Northern Uganda” to which there was apparently never any objection. In any event, the Prosecutor never issued any arrest warrants going beyond the parameters of the referral as formulated by Uganda).

⁴⁸ OTP Response to Amicus Submissions, para. 101.

29. The scope of the referrals go far beyond merely reflecting “escalation”⁴⁹ of what is described in the 2018 Referral: by their express terms, they purport to expand the pre-existing “boundaries of the Situation in relation to which the Court’s jurisdiction [w]as referred to the Prosecutor.”⁵⁰ These referrals seek to trigger a broader jurisdiction, reflecting the reality that the “situation in the Gaza Strip has undergone a fundamental change following the murderous attacks committed by Hamas from Gaza on Israeli territory on 7 October 2023 and Israel’s large-scale military operation that followed.”⁵¹

30. These referrals triggered an obligation under regulation 45 of the RoC to “inform the Presidency in writing as soon as a situation has been referred to the Prosecutor by a State Party”. This Prosecutor appears⁵² to have failed to do so, which is unprecedented,⁵³ even in respect of referrals that the Prosecutor believed may overlap with an existing referral.⁵⁴ More consequentially, of course, the Prosecutor also failed to issue a new article 18(1) notice to Israel.

(ii) An investigation with new “defining parameters” has been taking place since 7 October 2023, requiring a new or supplemental article 18(1) notice

a. The Prosecutor is required under article 18(1) to provide sufficiently specific notice of the parameters of an investigation

31. The Appeals Chamber affirmed in the *Venezuela I* and *The Philippines* Situations that article 18(1) requires the Prosecution, as a prerequisite of a State’s ability to request a deferral pursuant to article 18(2), to define the scope of its “intended investigation.”⁵⁵ The purpose of this requirement is to enable a State to show that its own “domestic proceedings sufficiently mirror the Prosecutor’s intended investigation.”⁵⁶ While the Prosecutor could not be expected at the beginning of an investigation to identify “all potential cases that fall within the scope of a broad referral,” the “article 18(1) notification must be **sufficiently specific** in order for the State to be able to assert its jurisdiction in the proceedings under article 18(2) of the Statute.”⁵⁷ Contrary to the Prosecution’s position that the “intended investigation” under the article 18(1)

⁴⁹ *Id.*, para. 4.

⁵⁰ *Venezuela AD*, para. 227. See *Mbarushimana* Arrest Warrant Decision, para. 6 (“it is only within the boundaries of the situation of crisis for which the jurisdiction of the court was activated that subsequent prosecutions can be initiated.”)

⁵¹ OPT AO, Separate Opinion, para. 14.

⁵² Israel can find no record or mention of such a notification: see OTP Statement 17 November 2023.

⁵³ *DRC II* Assignment, p. 3; *Gabon* Assignment, p.3; *CAR II* Assignment, p.3.

⁵⁴ OTP Statement 17 February 2020; *Venezuela II* Assignment, p. 3; OTP Statement 15 June 2023; *DRC II* Assignment, p. 3.

⁵⁵ See e.g. *Philippines AD*, paras. 2, 106, 110; *Venezuela AD*, paras. 8, 10, 116, 220, 281.

⁵⁶ *Philippines AD*, para. 163. See *Venezuela AD*, para. 277.

⁵⁷ *Venezuela AD*, paras. 3, 110.

notice should be treated as simply “the sum of potential cases within the parameters of the authorized situation,”⁵⁸ the *Venezuela I* Pre-Trial Chamber held that:

The approach proposed by the Prosecution [...] **would effectively make it impossible for States to ever be able to successfully seek a deferral pursuant to article 18(2) of the Statute, thereby rendering this provision meaningless.** In order to ensure that the domestic investigations sufficiently mirror the scale of criminality that the Prosecution intends to investigate in a given situation, it is upon the Prosecution to provide information that is **specific enough** for the relevant States to exercise its right under article 18(2) of the Statute and **representative enough** of the scope of criminality that it intends to investigate in any future case(s).⁵⁹

32. The Appeals Chamber affirmed this approach, explaining that the article 18(1) notification must provide “the general parameters of the situation and sufficient detail with respect to the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality that the Prosecutor intends to investigate.”⁶⁰ On multiple occasions, the Appeals Chamber uses the expression “defining parameters” of the investigation.⁶¹

33. An initial article 18(1) notification may be supplemented by subsequent notices. Hence, the *Venezuela I* Pre-Trial Chamber found that the Prosecutor had provided a “Second Article 18(1) Notification” through which he had clarified the scope of his intended investigations.⁶² Indeed, this “Second Article 18(1) Notification” delineated substantial areas of investigation that were highly material to the Pre-Trial Chamber’s findings concerning the “defining parameters” of the Prosecutor’s investigation.⁶³

b. The Prosecution’s current investigation exceeds the “defining parameters” of its previous investigation into the “Situation in Palestine”

⁵⁸ *Philippines* OTP Request, para. 62. See also *Venezuela* OTP Request, paras. 57, 63.

⁵⁹ *Venezuela* PTD, para. 77 (bold and underline added).

⁶⁰ *Venezuela* AD, para. 8, para. 110 (“the Prosecutor’s article 18(1) notification must be sufficiently specific in order for the State to be able to assert its jurisdiction in the proceedings under article 18(2) of the Statute”); *Philippines* AD, para. 106 (“The Majority recalls that any investigation, irrespective of its stage, [will] have certain defining parameters, which may vary depending on the circumstances of each specific situation.”)

⁶¹ *Venezuela* AD, paras. 110, 182, 220; *Philippines* AD, para. 106.

⁶² *Venezuela* PTD, paras. 4, 49, 69, 74, 122.

⁶³ See e.g. *Venezuela* AD, paras. 94, 116, 221, 224; *Venezuela* PTD, paras. 48-49, 73-74, 79. *Venezuela* AD, para. 94 (“the Appeals Chamber finds no error in the Pre-Trial Chamber’s characterization of the Prosecutor’s Additional Information as a second article 18(1) notification.”)

34. The “defining parameters” articulated in the *Venezuela I* and *Philippines* cases included: (i) the potential crimes under investigation;⁶⁴ (ii) the patterns or “systematicity” of the crimes;⁶⁵ (iii) the circumstances in which the potential crimes were committed;⁶⁶ (iv) the “descriptions of the underlying acts”;⁶⁷ (v) the categories or “groups of persons allegedly involved in their commission”;⁶⁸ (vi) the level of the potential perpetrators;⁶⁹ and (vii) the period of the commission of the crimes.⁷⁰ The investigation now being undertaken under the rubric of the *Situation in Palestine* has changed in respect of each of these attributes.

35. The Prosecutor’s Article 18(1) Notification to Israel of 9 March 2021 identifies three areas of investigation in respect of Israeli nationals: (i) alleged war crimes regarding the transfer of civilian population into the West Bank committed by “members of the Israeli authorities”; (ii) alleged war crimes regarding targeting committed by the IDF in relation to “2014 hostilities in Gaza”; and (iii) allegations of crimes committed by members of the IDF related to the “use of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel.”⁷¹

36. These areas of investigation do not encompass the “defining parameters” of the investigation now being undertaken by the Prosecution, as reflected in the public statements concerning the application for the issuance of arrest warrants against the Prime Minister and Minister of Defence of Israel.

37. **First**, the crimes and the categories of crimes are different. The only alleged crime in the Article 18(1) Notification that could be characterised as being committed systematically, or as a matter of policy, is “the transfer of Israeli civilians into the West Bank.”⁷² This bears no relation to the degree of systematicity alleged in respect of a wide range of conduct of hostilities

⁶⁴ *Venezuela AD*, para. 278.

⁶⁵ *Philippines AD*, para. 160; *Venezuela AD*, para. 280.

⁶⁶ *Philippines PTD*, para. 35 (“in the context of ‘war on drugs’ operations”).

⁶⁷ *Venezuela AD*, para. 278.

⁶⁸ *Venezuela AD*, paras. 116, 278 (“committed by civilian authorities, members of the armed forces and pro-government individuals”); *Philippines PTD*, para. 65.

⁶⁹ *Philippines AD*, para. 163; *Philippines PTD*, para. 68; *Venezuela AD*, para. 348 (“a policy which “was at a minimum encouraged or approved by the Government of Venezuela”. It was therefore not an error for the Pre-Trial Chamber to observe that “high-ranking officials are expected to be the investigation’s focus”).

⁷⁰ *Venezuela AD*, paras. 222-228.

⁷¹ Article 18(1) Notification, p. 2.

⁷² *Id.*

crimes, particularly starvation, and the crimes against humanity of extermination and persecution.⁷³ Indeed, the Article 18(1) Notification does not refer to crimes against humanity.

38. **Second**, the underlying acts are fundamentally different. The acts that are alleged to have occurred since 7 October 2023 bear no meaningful relationship with the two sets of relatively circumscribed incidents described in the Article 18(1) Notification from 2014 and 2018.⁷⁴ The scale and nature of these acts set out in the Article 18(1) Notification do not entail the conclusion that they were a reflection of State policy, whereas the acts now alleged would imply such a policy. This is again reflected in the absence of any reference in the Article 18(1) Notification to any acts that could amount to crimes against humanity.⁷⁵

39. **Third**, the potential perpetrators identified for investigation are substantially different. In respect of events in Gaza, the Article 18(1) Notification refers specifically to “members of the IDF”.⁷⁶ No allegation is made that these crimes were committed as a matter of State policy or that they involved systematic orders by higher-ranking military officers, let alone civilian leadership.⁷⁷ A more general reference is made in the Article 18(1) Notification to “Israeli authorities,” but – once again – only in relation to claimed violations of article 8(2)(b)(viii) in respect of the alleged transfer of Israeli civilians into the West Bank.

40. **Fourth**, the Article 18(1) Notification sets out time periods in relation to events in Gaza that are finite. Rather than referring to an “armed conflict” as being a defining parameter of the investigation, as in the *Afghanistan* Situation,⁷⁸ notice is instead given of an investigation into two definite periods: the “2014 hostilities in Gaza” and “March 2018.”⁷⁹ Even assuming that an article 18(1) notification, like an article 15(4) decision, may encompass future events, the nature of these time-frames strongly reinforce the understanding of the Prosecutor’s notice as concerning discrete and specific events, not a course of ongoing crimes being committed systematically in relation to an ongoing armed conflict. This stands in sharp contrast to the

⁷³ OTP Statement 20 May 2024 (“these acts were committed as part of a common plan to use starvation as a method of war and other acts of violence against the Gazan civilian population”); Expert Panel Report, paras. 29, 31.

⁷⁴ Article 18(1) Notification, pp. 1-2.

⁷⁵ Cf. Expert Panel Report, para. 30 (“the crimes were committed in the context of a widespread and systematic attack against the civilian population of Gaza, pursuant to State policy.”)

⁷⁶ Article 18(1) Notification, p.2 (“members of the Israel Defense Forces (‘IDF’), (“members of the IDF”).

⁷⁷ Cf. Expert Panel Report, para. 33 (“systematic nature of the crime, and the involvement of the suspects at the apex of the Israeli governmental apparatus”).

⁷⁸ See *Afghanistan* Authorisation Request, paras. 1, 2, 13, 32, 49, 61, 74, 127, 129-137, 186, 270, 361, 376; *Afghanistan* Authorisation AD, paras. 66-67, 77-79.

⁷⁹ Article 18(1) Notification, pp. 1-2.

Prosecution's current description of the continuity of the crisis: "Since at least 2008, Israel and Hamas have been engaged in a non-international armed conflict, entailing extensive and repeated airstrikes, the killing of civilians, the destruction of property."⁸⁰ Yet this description – most importantly the focus on a NIAC between Israel and Hamas – bears no relation to the scope of the investigation defined in the Article 18(1) Notification.

41. The Article 18 Notification also contains a "catch-all" provision, asserting that a future investigation "may encompass any alleged crimes within the scope of the situation."⁸¹ As noted above, this language was put to the test in the *Venezuela I* Situation, where the Prosecution argued that its article 18(1) notifications should be treated as encompassing "the sum of potential cases within the parameters of the situation."⁸² This approach was rejected on the basis that it "would effectively make it impossible for States to ever be able to successfully seek a deferral pursuant to article 18(2) of the Statute."⁸³ On the contrary, the Appeals Chamber has been clear that an article 18(1) notice must be "sufficiently specific" to enable a State to evaluate, and then demonstrate whether its own investigations "sufficiently mirror" those of the Prosecutor's.⁸⁴

42. The "catch-all" provision in the 2021 Article 18(1) Notification is exceptionally unspecific, as it refers to the 2018 referral which *also* contains a "catch-all" provision, namely all "past, ongoing and future crimes."⁸⁵ This "catch-all" upon "catch-all" approach would strip article 18(1) of any meaning or purpose.

c. An investigation with new "defining parameters" requires a new or supplemental article 18(1) notification

43. The Prosecution has indicated in its submissions that it does not have to provide any new article 18(1) notification to Israel for two reasons: (i) article 18(1) does not require the Prosecutor to enumerate every act that it will investigate; (ii) the jurisprudence establishes that an "article 18(1) notification [...] does not limit in any way the Prosecution's investigation" which "can extend to other and subsequent acts as long as they fall within the parameters of the situation, or in any event are sufficiently linked to it."⁸⁶

⁸⁰ OTP Response to Amicus Submissions, para. 3.

⁸¹ Article 18(1) Notification, p. 2.

⁸² *Venezuela* OTP Request, paras. 57, 63.

⁸³ *Venezuela* PTD, para. 77.

⁸⁴ *Venezuela* AD, paras. 8, 110, 220, 230, 246, 277.

⁸⁵ 2018 Referral, para. 9.

⁸⁶ OTP Response to Amicus Submissions, para. 105.

44. The first argument does not reflect Israel's position and is a red herring. The *Venezuela I* and *Philippines* jurisprudence does not require that notice be given of every act to be investigated, but rather that notice pursuant to article 18(1) be "sufficiently specific, providing the general parameters of the situation and sufficient detail with respect to the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality that the Prosecutor intends to investigate."⁸⁷

45. The second argument put forward by the Prosecution is that the scope of the article 18(1) notification "does not limit in any way the Prosecution's investigation"⁸⁸ and that the scope of this (and presumably any other) Situation is subject only to "broad parameters."⁸⁹

46. This argument conflates two distinct issues: the Prosecution's latitude to expand its investigations up to the limits of a Situation; and its separate and concurrent obligation to give notice to relevant States of the defining parameters of its investigation under article 18.

47. The former is compatible with the latter, as was highlighted in the *Venezuela I* Situation. The temporal scope of the Situation referred in that case started in 2014. Venezuela, which had not been part of the State referral, argued that the article 18(1) notification had given notice of crimes starting only in 2017, and that the Pre-Trial Chamber had erroneously relied on the referral itself to assess the scope of the Prosecution's intended investigation.⁹⁰ The Appeals Chamber rejected this argument not because it was legally wrong, but as a mischaracterisation of the Pre-Trial Chamber's decision.⁹¹ The Pre-Trial Chamber, according to the Appeals Chamber, had not relied on the State referral but rather on the article 18(1) notifications (including the "Second Article 18(1) Notification") to determine that the article 18 notifications encompassed events going back to 2014, not just 2017.⁹² The Pre-Trial Chamber's references to the referral, according to the Appeals Chamber, had only been for the different purpose of ensuring that the investigation also fell within the jurisdictional scope of the situation.⁹³

⁸⁷ *Venezuela AD*, para. 8. See *Philippines AD*, para. 107.

⁸⁸ OTP Response to Amicus Submissions, para. 105.

⁸⁹ *Id.*

⁹⁰ *Venezuela AD*, para. 227.

⁹¹ *Id.*, para. 227 ("the Appeals Chamber considers that Venezuela misrepresents the Impugned Decision.")

⁹² *Id.*, para. 228.

⁹³ *Id.*, para. 227 ("the Appeals Chamber notes that, in the context of a referral by a State Party pursuant to article 13(a) of the Statute, a pre-trial chamber's assessment under article 18 of the Statute requires identification of (i) the scope of the Situation as referred by a State Party or States Parties, and (ii) the scope of the Situation under investigation, defined by the Prosecutor, on the basis of which the pre-trial chamber determines whether the scope of the Prosecutor's intended investigation falls within the boundaries of the Situation in relation to which the Court's jurisdiction as referred to the Prosecutor.")

48. It was in this context that the Appeals Chamber commented that “the obligation to provide sufficiently specific information in an article 18 notification does not limit in any way the Prosecutor’s future investigations.”⁹⁴ This does not imply that no further article 18(1) notifications are required if those investigations embark on an investigation with new defining parameters. Indeed, the concurrence of the obligation under article 18(1), and the discretion conferred on the Prosecution to expand the investigation up to the full extent of a Situation, is expressly contemplated in the full quotation from the *Venezuela I* Pre-Trial Chamber decision:

Providing the relevant States with information sufficiently specific to enable them to exercise the right to seek a deferral pursuant to article 18 of the Statute is necessary to give effect to this provision. **As this obligation merely concerns article 18 proceedings, this does not limit in any way the Prosecution’s future investigations** in these proceedings, if the [Prosecution’s Request to renew investigations] is granted. The approach proposed by the Prosecution that ‘the definition of the investigation for the purposes of article 18(2) should not be limited to potential cases which were already expressly identified by the Prosecutor for the purpose of the preliminary examination’ would effectively make it impossible for States to ever be able to successfully seek a deferral pursuant to article 18(2) of the Statute, thereby rendering this provision meaningless [...] **it is upon the Prosecution to provide information that is specific enough for the relevant States to exercise its right under article 18(2) of the Statute and representative enough of the scope of criminality that it intends to investigate in any future case(s).**⁹⁵

49. The need for a supplemental or new article 18 notice also accords with the manifest purpose of article 18(1). The “central premise of the Court’s exercise of jurisdiction is its contingency upon the failure of States to genuinely investigate and, where warranted, prosecute those that are suspected of having committed or having been complicit in crimes listed in the Statute.”⁹⁶ States have the right, corresponding to their obligations, to assert this “primary jurisdiction.”⁹⁷ Article 18 gives effect to the principle that “[n]o State should have to face” the “serious reproach” of not acting “without at least being given an opportunity to explain itself.”⁹⁸

50. States directly involved in the negotiation of article 18, both the United States and Germany, have confirmed that the provision requires a new article 18(1) notification when there is a substantial change in the scope of the Prosecutor’s investigation.⁹⁹ Indeed, any State who

⁹⁴ *Id.*, para. 230. See *Venezuela* PTD, para. 76.

⁹⁵ *Venezuela* PTD, paras. 76-77.

⁹⁶ *Yekatom* Admissibility AD, para. 42.

⁹⁷ *Burundi* Authorisation Decision, para. 17; Ambos 4th ed., p. 1015; Fernandez, Pacreau and Ubeda-Saillard 2nd ed., p. 902.

⁹⁸ *Yekatom* Admissibility AD, para. 42.

⁹⁹ US Observations, para. 21; Germany Observations, paras. 14, 17.

may wish to exercise (or may already be exercising) their “primary jurisdiction” in respect of Hamas crimes¹⁰⁰ have a right to that notification so that they can exercise their primary jurisdiction in place of the ICC.

51. The undeniable fact is that Israel, despite having made requests to the Prosecution,¹⁰¹ has never received notice of the scope of the Prosecution’s intended or actual investigation into events since 7 October 2023. Yet the Prosecutor asserts that any purported request for a deferral “must demonstrate that its proceedings sufficiently mirror the scope of the Prosecution’s intended investigations.”¹⁰² How is it possible to demonstrate such mirroring in the absence of information about the investigations that are to be mirrored? The absence of an article 18(1) notification obligation in these circumstances simply defeats its purpose. If these obligations are conceived as a “once-and-for-all” obligation, then it would mean that the Prosecution could provide notice of “at least one” alleged crime, and thereafter expand its investigation in any direction, bounded only by the “broad terms” of a Situation.¹⁰³ This reflects a purely formalistic approach to article 18(1) which simply ignores the requirements laid out in the *Venezuela I* and *The Philippines Appeals* Chamber decisions.

d. The right to an article 18(1) notice is not forfeited by any purported failure to seek a deferral in respect of a previous article 18(1) notification

52. Israel maintains that the Article 18(1) Notification – provided before the landmark decisions in the *Venezuela I* and *Philippines* Situations – was not sufficiently specific even in relation to the Prosecution’s intended investigation as it then existed. Even if this is not the case, however, this does not relieve the Prosecution of its obligation to give notice pursuant to article 18(1) in respect of an investigation with new defining parameters, or a new Situation.¹⁰⁴ The absence of a deferral request in 2021, in respect of an investigation with different parameters, at a time when neither Israel nor the Prosecutor could have foreseen the calamity to come, cannot mean that it loses its rights under article 18 to receive “sufficiently specific” notice of the changed parameters of the Prosecution’s investigation. The same justification for notice of the first investigation justifies the need for a notice in respect of the new investigation, namely, encouraging domestic investigation, incentivizing a dialogue about complementarity, and ensuring that the sovereignty of States is not infringed by the hasty actions of a Prosecutor.

¹⁰⁰ See e.g. CNN 3 Sept 2024 (US brings charges against Hamas leaders for 7 October 2023 crimes).

¹⁰¹ See section V(ii)(d).

¹⁰² OTP Response to Amicus Submissions, para. 113.

¹⁰³ *Id.*, para. 107.

¹⁰⁴ Sections V(i) and V(ii).

53. After the events of 7 October 2023, Israel engaged on a voluntary basis with the Office of the Prosecutor in a spirit of complementarity and cooperation, in the expectation that this would be reciprocated. This included provision of substantial quantities of information, the facilitation of a visit by the Prosecutor to Israel, and preparations for a second planned visit with an ICC advance team, which did not arrive as scheduled on 20 May 2024 for reasons that became clear later in the day when applications were filed for arrest warrants against the Prime Minister and Minister of Defence.¹⁰⁵

54. During these interactions, Israeli officials also indicated that they wished to explain how Israel's legal system was addressing allegations of criminality in respect of Gaza, and repeatedly sought (but did not receive) information about the scope of the Prosecutor's investigation. This is the essence of complementarity, which applies throughout every phase of the Prosecutor's activities,¹⁰⁶ including where it is gathering information to determine whether to open a new investigation or Situation. Israel was aware of public statements of the Prosecutor concerning his view of the permissible scope of his investigation under the existing Situation referral and anticipated that either the OTP would conclude that it had no basis to proceed further, or that an article 18(1) notification would be forthcoming in due course.

55. On 1 May 2024, Israel wrote to the Prosecutor and recapitulated the extent to which Israel had already engaged with his Office. Israel noted that its own legal system was already "actively involved in reviewing, examining and investigating a wide range of alleged violations of domestic and international law relating to events in Israel and Gaza" since 7 October 2023. Several examples of ongoing and prospective investigations, litigation and other processes were described. The letter also asks, "in line with the principle of complementarity," for any information concerning "alleged crimes attributed to Israeli nationals or others within Israel's jurisdiction [...] with appropriate specificity and sufficient time, so that the relevant Israeli authorities can examine and investigate those allegations with a view to ensuring accountability in line with the applicable law." Furthermore, the letter requested the Prosecution to "defer any investigation it may be conducting in relation to any alleged criminal acts attributed to Israeli nationals and/or others within its jurisdiction, in favour of Israel's processes of review, examination, investigation and/or proceedings under its national legal system and jurisdiction."¹⁰⁷ Israel thereby put the Prosecution on notice through this letter that a new

¹⁰⁵ Reuters 5 July 2024.

¹⁰⁶ OTP Complementarity Policy, para. 146.

¹⁰⁷ Annex F, Letter from Israel to OTP, 1 May 2024.

notification – as envisaged by article 18(1) – was required so that it would be placed in an adequate position to be able to assert and substantiate a deferral pursuant to the framework in the ICC Statute.

56. The OTP wrote to Israel asserting that its deferral notice was time-barred, referring to its Article 18(1) Notification from 9 March 2021. According to the Prosecution, “Israel has no standing now, under the Statute, to make such an application.”¹⁰⁸ The Prosecution then reserved to itself the power to decide any and all issues of complementarity, claiming that it would “continue to assess complementarity, in accordance with article 17 of the Rome Statute.”¹⁰⁹

57. Israel submits that the Prosecutor’s conduct in this case appears to have been designed to block any judicial review of its determination that no new article 18(1) notification was required. In other situations, the Prosecution notified Pre-Trial Chambers when it had received correspondence from States falling short of being an assertion of deferral under article 18(2) notification, but expressing a desire to do so.¹¹⁰ The Prosecution even notified a Pre-Trial Chamber that it had unilaterally extended the one-month time limit prescribed by article 18(2) in a “spirit of cooperation, dialogue and fairness.”¹¹¹ Israel received no such engagement: rather than dialogue or an explanation for the Prosecution’s view that no article 18(1) notice need be given, the Prosecution simply purported to deny Israel “standing.”¹¹²

58. Whether Israel has standing is for the Pre-Trial Chamber, not the OTP, to decide. The OTP's attempt to unilaterally deny Israel standing, or to avoid any engagement on the issue by referring to its 2021 Notification, is misplaced and avoids the important issues to be addressed. Israel regrets that the OTP has declined to engage in any discussions with Israel concerning complementarity, and that this motion has been required in the absence of the necessary framework having been provided by the Prosecution in the form of a sufficiently specific notice under article 18(1) of the scope of its investigation into the truly catastrophic terrorist attacks and unprecedented events that have occurred since the morning of 7 October 2023.

¹⁰⁸ Annex G, Letter from OTP to Israel, 7 May 2024.

¹⁰⁹ *Id.*, p. 2.

¹¹⁰ *Venezuela I* Notification, para. 6.

¹¹¹ *Id.* See also *Afghanistan* Notification Status, para. 4.

¹¹² Annex G, Letter from OTP to Israel, 7 May 2024.

VI. CONCLUSION AND RELIEF SOUGHT

59. Article 18(1) requires notification by the Prosecution of the scope of its intended investigation, followed by an opportunity for the State to assert its primary jurisdiction over the events encompassed within that intended investigation. The latter is not possible without the former: the notification must be sufficiently specific in defining the parameters of the intended investigation to allow the State to show that its own investigations sufficiently mirror those contemplated by the Prosecutor.

60. This procedure has not been honoured in this Situation. The Prosecution's article 18(1) notice from 2021 does not give sufficiently specific notice of the Prosecutor's current investigation, as reflected in its recent request for arrest warrants, which has very different defining parameters, and/or which is actually being carried out in the context of a newly referred Situation. The requirement of giving a new or supplemental notice is not burdensome; on the contrary, it gives effect to the principle of complementarity which has been described as "the cornerstone of the Statute and of the functioning of the Court."¹¹³

61. The only appropriate remedy, given that article 18(1) is a statutory pre-requisite for an investigation, is to require the Prosecutor to give an article 18(1) notice setting out the new defining parameters of his investigation in this Situation, or in any other Situation that has now been constituted as a result of the two referrals made by a total of seven States Parties following 7 October 2023. Any proceedings arising from investigation for which no sufficiently specific article 18(1) notice has been provided, including any applications for arrest warrants, should be stayed until the requirements of article 18 are satisfied.

Respectfully submitted:



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

Dated this 23 day of September 2024, at Jerusalem, Israel.

¹¹³ *Kony* First Admissibility Decision, para. 34.