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No.**: ICC-01/18**
Date: **13 January 2025**

THE APPEALS CHAMBER

Before: **Judge Tomoko Akane, Presiding Judge**
Judge Luz del Carmen Ibañez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE STATE OF PALESTINE

Public with Confidential Annexes A and B

Prosecution response to Israel's "Appeal of 'Decision on Israel's request for an order to the Prosecution to give an article 18(1) notice' (ICC-01/18-375)"

Source: **Office of the Prosecutor**

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A. INTRODUCTION

1. Israel's appeal against Pre-Trial Chamber I's decision dismissing Israel's abridged request for an order to the Prosecution to give an Article 18(1) Notice ("the Decision") should be dismissed.[1] Not only is the Appeal inadmissible,[2] but Israel fails to show any error in the Decision.

2. In rejecting Israel's submissions that "a new 'situation of crisis'" had arisen on 7 October 2023 and that therefore a new article 18 notification had to be issued,[3] the Chamber properly considered both the content of the Prosecution's Article 18 Notification[4] and its applications under article 58 (together with the Prosecutor's public statement).[5] It reasonably concluded that the alleged conduct described in the Applications was committed in the context of the same type of armed conflict(s), concerned the same territories, and featured the same alleged parties to the conflict(s). Accordingly, it correctly found that "no substantial change has occurred to the parameters of the investigation into the situation" and "[t]here was, and is, therefore, no obligation for the Prosecution to provide a new notification to the relevant States pursuant to article 18(1) of the Statute".[6]

3. Indeed, the events arising from 7 October 2023 fall squarely within the parameters of the investigation in the *Situation in the State of Palestine* and are in any event sufficiently linked to it. These events are yet another manifestation of the ongoing criminality in this situation, which has been under investigation since March 2021. In reaching this conclusion, the

[1] *Contra* ICC-01/18-401 OA ("Appeal"), paras. 4-7, 62-63; *see also* ICC-01/18-375 ("Decision"); ICC-01/18-355-AnxI-Corr ("Abridged Request"). Since Israel considers the Decision to be a decision "with respect to [] admissibility" under article 82(1)(a) the page limit (60 pages) in regulation 38(2)(c) of the Regulations of the Court (concerning challenges to admissibility or jurisdiction, *mutatis mutandis* for the purpose of appeals against such decisions) would apply, even though it filed a brief of 20 pages (not including the title pages). This also appears to be the understanding of Israel, which in its separate but simultaneous appeal concerning jurisdiction, filed a brief of 26 pages (not including the title pages), exceeding the ordinary 20-page limit under regulation 37(1): *see* ICC-01/18-402 OA2 ("Article 19(2) Appeal"). Likewise, the Appeals Chamber seems also to have accepted this understanding: *see e.g.* ICC-01/18-400 OA OA2 ("Prosecution Extension of Time Request"), para. 9 (anticipating that "Israel would consider itself entitled to file two briefs of up to 60 pages each", citing regulation 38(2)(c) of the Regulations of the Court); ICC-01/18-403 OA OA2 ("Extension of Time Decision"), paras. 6-7 (reducing the extension of time granted to the Prosecution to respond to the appeal, given the actual length of Israel's submissions, but not disagreeing with the Prosecution's understanding of the applicable framework). Accordingly, consistent with the chapeau of regulation 38(2), the Prosecution files a response of the present length.
[2] *See* ICC-01/18-391 OA (arguing that the Decision, in its operative part, was not a ruling on admissibility).
[3] Abridged Request, paras. 2, 19-58.
[4] *See* Annex A.
[5] Prosecutor Public Statement, 20 May 2024. The Prosecution will refer to these applications as "Article 58 Applications" or "Applications".
[6] Decision, para. 15.

Chamber followed the correct approach, referred to apposite jurisprudence, and relied on relevant criteria.

B. SUBMISSIONS

4. Israel advances three grounds of appeal. First, Israel argues that the Chamber erred in law in asserting that the timing of Israel's request was contrary to the "very object and purpose of the complementarity framework".[7] Second, Israel argues that the Chamber "erred in law and in fact in concluding that there has been no substantial change in the parameters of the Prosecution's investigation".[8] Third, Israel posits that the Chamber "erred in law by providing no reasons and rejecting Israel's submission that a new situation had arisen following the two" referrals made by seven States Party after 7 October 2023.[9]

5. To place the proper emphasis on the *ratio decidendi* of the Decision, and to address the relevant issues in a logical order, the Prosecution has amended the order of its response to the grounds of appeal raised by Israel—thus, it first addresses the Second Ground of Appeal (concerning the Chamber's assessment of whether there had been a substantial change in the parameters of the investigation), and then proceeds to address the Third and First Grounds, respectively. In the Prosecution's view, this re-ordering will facilitate the correct understanding of the issues in the Appeal, and allow the Prosecution's submissions to be presented with greater economy and clarity.

6. The Appeal should be dismissed because it demonstrates no error in the Chamber's approach or in the Decision. There is none. In deciding on Israel's Abridged Request, the Chamber followed the correct approach, relied on apposite jurisprudence, and considered relevant criteria to conclude that no new situation had arisen as a result of the events of 7 October 2023 requiring the Prosecution to issue new article 18 notification letters. Indeed, the cases arising from the Prosecution's Article 58 Applications fall squarely within the parameters of *Situation in the State of Palestine* and are in any event sufficiently linked to it. Israel not only misrepresents the Decision and the Court's jurisprudence but also fundamentally misunderstands the scope of the situation under investigation.

7. Likewise, the Appeals Chamber should also dismiss Israel's request to suspend the warrants of arrest issued on the basis of the Chamber's article 58 decisions. Neither those

[7] Appeal, paras. 15-21.
[8] Appeal, paras. 22-52.
[9] Appeal, paras. 53-61.

decisions nor the warrants are subject to this appeal nor in any event has Israel demonstrated that the validity and enforceability of the warrants, pending resolution of the Appeal, would create an irreversible situation, lead to irreversible consequences, or defeat the purpose of the Appeal.

B.1. The Chamber correctly found that there had been no substantial change in the parameters of the Prosecution's investigation (Second Ground of Appeal)

8. In its Second Ground, Israel raises three sub-grounds. First, Israel argues that the Chamber misapprehended Israel's submissions by taking them to mean that "'[…] the Prosecution's investigation in every situation would be limited to the incidents and crimes addressed during the preliminary examination and described in the article 18 notification'".[10] Second, Israel argues that "[t]he Chamber erred in law by conflating the standards applicable to the scope of a judicially-authorised investigation with the different standards applicable for an article 18 notification".[11] Third, Israel posits that the Chamber "failed to provide any reasoning at all, otherwise ignored, or failed to properly appreciate, the factors and circumstances showing that"—in Israel's view—"the defining parameters of the Prosecution['s] investigation have changed".[12]

9. For the reasons developed below, none of Israel's sub-grounds have merit. Israel mischaracterises the Decision and misunderstands the Court's jurisprudence.

B.1.a. The Chamber did not err in its assessment of Israel's submissions

10. In this first sub-ground, Israel's challenges the Chamber's passing remark that:

> [...] Israel's position would effectively mean that the Prosecution's investigation in every situation would be limited to the incidents and crimes addressed during the preliminary examination and described in the article 18 notification. Such interpretation has already been rejected by the Appeals Chamber.[13]

11. This sub-ground should be dismissed because Israel not only mischaracterises the Decision but, in any event, the Chamber's observation was correct. Moreover, even if it is

[10] Appeal, paras. 23-29.
[11] Appeal, paras. 30-40.
[12] Appeal, paras. 41-52.
[13] Decision, para. 15.

assumed *arguendo* that the Chamber had erred in its appreciation of Israel's position (which it did not), this would not have materially impacted the Decision.

12. First, Israel argues that "[t]he PTC's statement is a legal pronouncement as it refers to the effects that a legal standard would have in 'every situation'."[14] This is incorrect. The Chamber's observation was made with respect to the position adopted in the Abridged Request. This was therefore a case-specific assessment in light of Israel's arguments, and not a "legal standard" applicable to each situation.

13. Second, Israel argues that "[t]he PTC […] erred in asserting that [the *Venezuela* and *Philippines*] jurisprudence, relied upon by Israel, is tantamount to requiring a new notification in respect of any 'incident and crime[]' not expressly described in the article 18(1) notification".[15] This is also incorrect. The Chamber's observation was again made with respect to Israel's submissions in the Abridged Request and not with respect to the Court's jurisprudence.

14. In any event, the Chamber was correct in its appreciation of Israel's position. Even if Israel disputes this,[16] it remains the effect of its position as objectively understood.[17] Indeed, Israel argued that the cases described in the Article 58 Applications do not fall within the *Situation in the State of Palestine* because the Article 18 Notification does not refer to the same crimes[18] and the same incidents,[19] nor exactly match the perpetrators with the crimes,[20] nor mention crimes against humanity.[21] In effect, therefore, Israel's position does limit the Prosecution's investigation to the incidents, crimes, and persons described in the Article 18 Notification. If this were correct, the Court would be required to open a new investigation each time the Prosecution seeks to investigate incidents, crimes, and actors beyond those specifically identified in article 18 notifications.[22] As the Pre-Trial Chamber correctly noted,[23] the Appeals

[14] Appeal, para. 23.
[15] Appeal, para. 29.
[16] *Contra* Abridged Request, para. 44 (Israel argues that the Prosecution's submission that article 18(1) does not require the Prosecutor to enumerate every act that it will investigate "does not reflect Israel's position and is a red herring").
[17] *See* Abridged Request, paras. 37-40.
[18] *Contra* Abridged Request, para. 37.
[19] *Contra* Abridged Request, para. 38.
[20] *Contra* Abridged Request, para. 39.
[21] *Contra* Abridged Request, para. 37.
[22] Specifically, the Prosecution would need another referral, or be required to seek authorisation from the Pre-Trial Chamber under article 15 of the Statute.
[23] Decision, para. 15.

Chamber has already rejected this unworkable approach, albeit in a different but related context.[24]

15. Finally and in any event, even if it is assumed that the Chamber did err in describing Israel's position (which it did not), this did not materially impact the Decision. As explained further below,[25] the Chamber concluded that "no substantial change has occurred to the parameters of the investigation into the situation" on the basis of its assessment of other relevant criteria.[26]

B.1.b. The Chamber did not conflate "the standards applicable to the scope" of a judicially-authorised investigation, with "the different standards" for an article 18 notification

16. In the second sub-ground, Israel challenges the Chamber's reference to paragraphs 63 and 64 of the *Afghanistan* Appeal Judgment—regarding the authorised scope of an investigation arising from an article 15 decision—to support its observation regarding Israel's position.[27] Again, this mischaracterises the Decision, and should be dismissed.

17. First, Israel argues that the Chamber applied "without modification or explanation, the *Afghanistan* article 15 standard" instead of "[t]he standards enunciated in respect of an article 18(1) notification".[28] This is incorrect. The Chamber did not apply 'an article 15 standard' instead of 'an article 18 standard' in describing Israel's position. The Chamber simply—and correctly—described the effect of Israel's position (as explained above),[29] and in doing so it referred to relevant reasoning in the *Afghanistan* Appeal Judgment.[30] The Chamber's approach was correct and fell squarely within its prerogative to rely on apposite sources to bolster its conclusion.

18. Second, and moreover, the *Afghanistan* precedent was precisely on point due to the similarity between Israel's narrow interpretation of the scope of the Prosecution's authorised investigation in this situation and the *Afghanistan* Pre-Trial Chamber's view of the scope of an authorised investigation arising from an article 15 decision.

[24] ICC-02/17-138 OA4 ("Afghanistan Appeal Judgment"), para. 63.
[25] *See below* paras. 24-47.
[26] Decision, para. 15.
[27] Appeal, para. 31, referring to Decision, para. 15, fn. 27.
[28] Appeal, para. 33.
[29] *See above* para. 14.
[30] Decision, para. 15, fn. 27.

19. In *Afghanistan*, Pre-Trial Chamber II held that, if it were to authorise an investigation, "the Prosecutor can only investigate the incidents that are specifically mentioned in the Request and are authorised by the Chamber, as well as those comprised within the authorisation's geographical, temporal, and contextual scope, or closely linked to it".[31] The Appeals Chamber overturned this finding because it deemed this approach "unworkable in practice in the context of an investigation into large-scale crimes of the type proposed by the Prosecutor".[32] The Appeals Chamber reasoned that "it would be impossible for the Prosecutor to determine in the course of investigating, which incidents could safely be regarded as 'closely linked' to those authorised and which would require the submission of a new request for authorisation[] [and a]s a result, the Prosecutor would be required to submit repeated and sometimes unnecessary requests for authorisation of investigation as new facts are uncovered".[33] Significantly, the Appeals Chamber also found that this approach would effectively restrict the Prosecution's investigation to the factual information obtained during the preliminary examination and would erroneously inhibit the Prosecution's truth-seeking function under article 54(1), which requires it to carry out an investigation into a situation *as a whole* in order to obtain a full picture of the relevant facts, their potential legal characterisation as specific crimes and the responsibility of the various actors involved.[34]

20. In this situation, Israel argued before the Chamber that the Prosecution's Article 18 Notification identified "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."[35] It considered that the "areas of investigation [in the article 18(1) notification] do not encompass the 'defining parameters' of the investigation now being

[31] ICC-02/17-33 ("Afghanistan Article 15 Decision"), para. 40.
[32] *Afghanistan* Appeal Judgment, para. 63.
[33] *Afghanistan* Appeal Judgment, para. 63. It further highlighted "the [unclear] implications [] for the questioning of witnesses and collection of evidence [such as] […] whether the Prosecutor would be expected to refrain from collecting information and evidence on other incidents that are not closely linked to those authorised pending the grant of a new authorisation", thus having a significant detrimental effect on the conduct of investigations".
[34] *Afghanistan* Appeal Judgment, para. 60-61; *see also* *Afghanistan* Second Appeal Judgment, paras, 57-59.
[35] Abridged Request, para. 35. Israel however fails to mention the Prosecutor's assessment with respect to war crimes committed by members of Hamas and other Palestinian Armed Groups ("PAGs") in the context of the 2014 hostilities. *See* Article 18(1) notification, 9 Mar. 2021, Summary of Preliminary Examination Findings, Annex A.

undertaken by the Prosecution"[36] because "the crimes and the categories of crimes are different",[37] "the underlying acts are fundamentally different",[38] "the potential perpetrators […] are substantially different",[39] and "the Article 18(1) Notification sets out time periods in relation to Gaza that are finite".[40] From the foregoing, it is reasonable to conclude that Israel would limit the scope of the Prosecution's investigation to the same crimes or category of crimes, fundamentally the same underlying acts and substantially the same potential perpetrators as those described in the Article 18 Notification.

21. Considering that the Prosecution issues an article 18(1) notification promptly when it opens an investigation (irrespective of whether it results from a State referral or an article 15 decision), the import of Israel's position would be at least very similar, if not identical, to the harm which concerned the Appeals Chamber. It would mean that the Prosecution could only investigate fundamentally the same crimes, incidents and perpetrators identified in the article 18(1) notification prior to the opening of the investigation. As the *Afghanistan* Appeals Chamber rightly concluded, this would improperly inhibit the Prosecution's investigative powers under article 54 of the Statute with respect to the situation as a whole. It would also be unworkable in practice since it would require the Prosecution to pause before pursuing investigative leads which may lead to crimes or perpetrators not listed in the article 18(1) notification, even if they would obviously fall within the parameters of the situation under investigation and/or be sufficiently linked to it.

22. In conclusion, the Chamber correctly relied on the *Afghanistan* Appeal Judgment to support its description of Israel's position, and to demonstrate that it was incorrect. Israel shows no error in this.

23. Further, and in any event, even if the Chamber had erred in relying on the *Afghanistan* Appeal Judgment (which it did not), this again did not materially affect the Decision. As explained further below, the Chamber relied on other relevant criteria to reach its conclusion that "no substantial change has occurred to the parameters of the investigation into the situation".[41]

[36] Abridged Request, para. 36.
[37] Abridged Request, para. 37.
[38] Abridged Request, para. 38.
[39] Abridged Request, para. 39.
[40] Abridged Request, para. 40.
[41] Decision, para. 15.

B.1.c. The Chamber's conclusion that the defining parameters of the investigation had not substantially changed was correct and adequately reasoned

24. In the third sub-ground, Israel challenges the Chamber's determination that "no substantial change has occurred to the parameters of the investigation into the situation".[42] In seeming contradiction, Israel argues that the Chamber "failed to provide any reasoning at all" while at the same time disagrees with the reasoning that it plainly did provide.[43] In that respect it argues that the Chamber erred in applying "the criteria"[44] or "standard"[45] of the *Afghanistan* Appeals Chamber concerning article 15, rather than the criteria which it considered were applied by the Appeals Chamber in the *Venezuela* and *Philippines* situations concerning article 18.[46]

25. According to Israel, and with reference to the *Venezuela* and *Philippines* Appeal Judgments, the Chamber disregarded the following criteria: (i) "the crime types and 'patterns and forms of criminality'";[47] (ii) the "'groups or categories of individuals'" allegedly involved "including their hierarchical 'level'";[48] and (iii) the factual context of the criminality.[49] Israel also notes that the Prosecution's Article 18(1) Notification is restricted to war crimes (although it criticises that the notification does not expressly refer to an armed conflict),[50] and that the "groups or categories of individuals" listed therein are "mainly those making operational-level decisions, in respect of two specific sets of incidents" which do not suggest "a degree of systematicity suggesting high-level involvement" and are "limited in temporal scope and scale".[51] Israel considers that the Article 18(1) Notification was "not 'representative' of the [scope of] the criminality that the [Prosecution] has been investigating since 7 October 2023."[52] Finally, Israel argues that the 2023 and 2024 referrals resulted from "a radical change in circumstances on the ground" which "describe an entirely new situation of crisis focused not

[42] Decision, para. 15.
[43] Appeal, para. 5.
[44] Appeal, para. 43.
[45] Appeal, para. 50.
[46] Appeal, para. 43.
[47] Appeal, para. 43 citing ICC-02/18-89 OA ("*Venezuela* Article 18(2) AJ"), paras. 110, 182, 220 and ICC-01/21-77 OA ("Philippines Article 18(2) AJ"), para. 106.
[48] Appeal, para. 43 (citing *Venezuela* Article 18(2) AJ, paras. 246, 348-349 and *Philippines* Article 18 AJ, para. 109).
[49] Appeal, para. 43 (citing *Venezuela* Article 18(2) AJ, para. 277).
[50] Appeal, paras. 44, 48.
[51] Appeal, para. 47.
[52] Appeal, paras. 43, 52.

on so-called 'settlement-related' crimes, but rather on an intense and unique armed conflict involving the systematic commission of conduct of hostilities crimes".[53]

26. In a nutshell, Israel disagrees with, and challenges, the Chamber's finding that a new situation did not arise as a result of the 7 October 2023 events and that the Prosecution was under no obligation to issue new article 18 notification letters.[54] For the reasons explained below Israel's submissions lack merit. Far from erring, the Chamber followed the right approach, relied on apposite jurisprudence, considered relevant criteria and reached the correct conclusion. Indeed, the events arising from 7 October 2023, which form part of the Article 58 Applications, fall within the parameters of the ongoing investigation in the situation. In its arguments, Israel mischaracterises the Decision, and misunderstands the Court's jurisprudence.

27. First, Israel does not substantiate its assertion (in a heading) that the Chamber "failed to provide any reasoning at all".[55] To the contrary, the Chamber indicated with sufficient clarity the grounds on which it based its Decision.[56] Indeed, the Chamber considered *both* the Prosecution's Article 18 Notification *and* the Prosecution's Article 58 Applications (and related public statement).[57] Thus:

- With respect to the Notification, the Chamber observed that "the investigation concerned alleged crimes in the context of an international armed conflict, Israel's alleged conduct in the context of an occupation, and a non-international armed conflict between Hamas and Israel".[58]

- With respect to the Applications (and related public statement), the Chamber observed that "the Prosecution alleges conduct committed in the context of the same type of armed conflicts, concerning the same territories, with the same alleged parties to these conflicts".[59]

[53] Appeal, para. 51.
[54] Decision, para. 15.
[55] Appeal, paras. 5, 42-43.
[56] *See* ICC-01/04-01/06-773 OA5 ("*Lubanga* First Rule 81 AJ"), para. 20; ICC-01/04-01/06-774 OA6 ("*Lubanga* Second Rule 81 AJ"), para. 30 where the Appeals Chamber held that "[t]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion." *See also* ICC-02/05-01/20-236, para. 14.
[57] Decision, para. 15.
[58] Decision, para. 15.
[59] Decision, para. 15.

28. Accordingly, the Chamber concluded that "no substantial change has occurred to the parameters of the investigation into the situation" and "[t]here was, and is, therefore, no obligation for the Prosecution to provide a new notification to the relevant States pursuant to article 18(1) of the Statute, and as such to provide a new one-month timeline for requests for deferral".[60] The Chamber thus clearly explained the basis of its conclusion. It outlined the process and the criteria it relied upon. The Chamber's reasoning was wholly adequate according to the established jurisprudence of the Appeals Chamber.[61]

29. Second, to the extent that Israel now raises on appeal the purported lack of specificity of the Prosecution's Article 18 Notification,[62] these submissions should be summarily dismissed. They are not part of the grounds of appeal for which the Appeal has been filed nor are they inextricably linked to them. In any event, as the Chamber correctly found, the Article 18 Notification was sufficiently specific.[63] As the Chamber found, the Notification complied with the *Venezuela* Appeals Judgment requiring "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 Prosecution intends to investigate".[64] The Chamber specifically noted that "the Notification included the types of alleged crimes, potential alleged perpetrators, the starting point of the relevant timeframe, as well as a reference to further relevant information, including the summary of the Prosecution's preliminary examination findings".[65]

30. Third, in concluding that no new article 18 notification was required, the Chamber did not err in its approach nor in the criteria that it considered. The Chamber did not apply an 'article 15 standard' instead of an 'article 18 standard'.[66] Rather, Israel conflates the determination of whether a notification under article 18(1) by the Prosecution is sufficiently specific for a State to request deferral effectively with the (separate) determination of whether a case falls within the parameters of an ongoing investigation, or is sufficiently linked to it. These are different. While in *Philippines* and in *Venezuela* the Court was called to determine

[60] Decision, para. 15.
[61] *See* *Lubanga* First Rule 81 AJ, para. 20; *Lubanga* Second Rule 81 AJ, para. 30; ICC-02/05-01/20-236, para. 14.
[62] *See e.g.* Appeal, para 52 ("the article 18(1) notice was clearly not 'representative of the scope of criminality' under investigation"); *see also* paras. 48, 50 (arguing that the Notification does not expressly refer to an armed conflict).
[63] Decision, para. 11.
[64] Decision, para. 11 (citing *Venezuela* Article 18(2) AJ, paras. 110, 114, 116).
[65] Decision, para. 11.
[66] *Contra* Appeal, para.50.

the former,[67] the Chamber was called in the present situation to determine the latter in order to address Israel's submissions that "a new situation has arisen" and that an "investigation with new 'defining parameters' has been taking place since 7 October 2023".[68]

31. Israel's mistaken position is further compounded by its narrow (and contradictory) reading of the scope of the situation, as evidenced in the Third Ground of Appeal.[69]

32. Determining whether relevant factual allegations amount to a new situation before the Court, or whether they fall within the parameters of a pre-existing investigation, and/or are sufficiently linked to it, is a case-specific and fact-dependent determination. As Israel concedes, there is no fixed set of factors that a Chamber must invariably consider.[70] In this instance, the Chamber correctly and reasonably considered the Prosecution's Notification and the Article 58 Applications, and assessed that the alleged conduct described in the Applications was committed in the context of the same type of armed conflicts, concerning the same territories and with the same alleged parties to the conflict.[71] Given the backdrop of this situation as described below, Israel shows no error in the Chamber's approach or its ultimate conclusion.

33. On 3 March 2021, the Prosecution opened its investigation into this situation within the geographical and temporal parameters described in Palestine's 2018 referral (the oPt since 13 June 2014).[72] It referred to the ongoing Israeli occupation, the expansion of settlements and alleged violations of fundamental rights throughout the territory, including Gaza.[73] The Prosecutor's public announcement, as well as the Article 18 Notification (including the document setting out the Prosecution's summary findings of the preliminary examination),[74] likewise referred to the Israeli occupation and described a sample of the relevant criminality (war crimes) allegedly affecting the West Bank and Gaza, as well as Israel, in the context of international and non-international armed conflicts. These included the war crime of transfer of population from the occupying power into occupied territory, war crimes arising from the 2014 Gaza hostilities, as well as in the use of force in the context of demonstrations in March

[67] *See e.g.* *Venezuela* Article 18(2) AJ, paras. 105-110; *Philippines* Article 18 AJ, paras. 191-193.
[68] Abridged Request, paras. 2, 19-58.
[69] *See below* para. 52.
[70] *See* Appeal, para. 43 ("While the exact formulation of these criteria may vary, and while no single criterion may be decisive, they cumulatively provide the defining parameters of the investigation.").
[71] Decision, para. 15.
[72] Palestine Article 14 Referral, para. 9, fn. 4.
[73] Palestine Article 14 Referral, paras. 3, 12, 16 (listing a non-exhaustive sample of alleged war crimes and crimes against humanity, including murder, unlawful attacks on civilians, and persecution.).
[74] Article 18(1) notification, 9 Mar. 2021, Summary of Preliminary Examination Findings. *See* Annex A. *See also* Prosecutor Statement, 3 Mar. 2021.

2018 near the border fence in Gaza.[75] It identified various categories of alleged perpetrators (including the IDF, Israeli authorities, and members of Hamas and other PAGs).

34. The Prosecution also expressly recalled the Court's jurisprudence that preliminary examination findings are made only for the purpose of article 53(1) and are without prejudice to the conduct of the future investigation—which could therefore encompass the identified acts or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as the cases identified for prosecution are sufficiently linked to the situation.[76] In this regard, it again expressly noted that crimes allegedly continued to be committed in the situation.[77]

35. The Applications filed on 20 May 2024 concerned the alleged conduct of two senior Israeli leaders and three senior Hamas leaders. They related to events arising from the escalation of hostilities since the 7 October 2023 attack by Hamas and other PAGs, as well as to subsequent Israeli actions and policies affecting the civilian population in Gaza. These events, and the relevant allegations underlying the criminality, related to the same ongoing crisis, the same or very similar conflicts between the same parties in the same territories, and indeed reproduced many of the same patterns observed in previous escalation of hostilities, even if with much greater intensity and scale. The Prosecutor thus alleged the criminal

[75] The Office found that there is a reasonable basis to believe that, in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes under article 8(2)(b)(viii) in relation, inter alia, to the transfer of Israeli civilians into the West Bank since 13 June 2014. In addition, the Office found that there is a reasonable basis to believe that, in the context of the 2014 hostilities in Gaza, members of the IDF committed the war crimes of: intentionally launching disproportionate attacks in relation to at least three incidents which the Office has focussed on (article 8(2)(b)(iv)); wilful killing and wilfully causing serious injury to body or health (articles 8(2)(a)(i) and 8(2)(a)(iii), or article 8(2)(c)(i)); and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Conventions (article 8(2)(b)(xxiv), or 8(2)(e)(ii)). The Office also found that there is a reasonable basis to believe that members of Hamas and Palestinian armed groups ("PAGs") committed the war crimes of: intentionally directing attacks against civilians and civilian objects (articles 8(2)(b)(i)-(ii), or 8(2)(e)(i)); using protected persons as shields (article 8(2)(b)(xxiii)); wilfully depriving protected persons of the rights of fair and regular trial (articles 8(2)(a)(vi) or 8(2)(c)(iv)) and wilful killing (articles 8(2)(a)(i), or 8(2)(c)(i)); and torture or inhuman treatment (article 8(2)(a)(ii), or 8(2)(c)(i)) and/or outrages upon personal dignity (articles 8(2)(b)(xxi), or 8(2)(c)(ii)). The Prosecution further considered that the scope of the situation encompasses an investigation into crimes allegedly committed in relation to the use by members of the IDF of nonlethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel.

[76] Article 18(1) notification, 9 Mar. 2021, Summary of Preliminary Examination Findings, paras. 7-8. *See* Annex A.

[77] Article 18(1) notification, 9 Mar. 2021, Summary of Preliminary Examination Findings, para. 9. *See* Annex A.

responsibility of some of the suspects for some of the very same war crimes described in the Notification, but also for additional war crimes and for crimes against humanity.[78]

36. Against this backdrop, and in responding to Israel's submissions that "a new situation has arisen" and that an "investigation with new 'defining parameters' has been taking place since 7 October 2023",[79] the Chamber correctly concluded that "no substantial change has occurred to the parameters of the investigation into the situation".[80] Instead, for the reasons provided by the Chamber, the conduct described in the Applications falls squarely within the parameters of the situation, and in any event is sufficiently linked to the situation of crisis ongoing at the time of the referral.[81]

37. First, as the Chamber noted, the alleged "conduct [was] committed in the context of the same type of armed conflicts, concerning the same territories".[82] Indeed, the crimes took place 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. As held by the ICJ, Israel has occupied the West Bank and Gaza since 1967 (notwithstanding its disengagement from Gaza in September 2005) and has annexed East Jerusalem.[83] Moreover, Israel and Hamas have been parties to a

[78] The Prosecution alleged the criminal responsibility of NETANYAHU and GALLANT for (i) starvation under art. 8(2)(b)(xxv); (ii) wilfully causing great suffering, or serious injury to body or health under art. 8(2)(a)(iii), or cruel treatment under art. 8(2)(c)(i); (iii) wilful killing under art. 8(2)(a)(i), or murder under art. 8(2)(c)(i); (iv) intentionally directing attacks against a civilian population under arts 8(2)(b)(i), or 8(2)(e)(i); and the crimes against humanity of (v) extermination and/or murder under arts 7(1)(b) and 7(1)(a); (vi) persecution under art. 7(1)(h); and (vii) other inhumane acts under art. 7(1)(k). The Prosecution alleged the criminal responsibility of HANIYEH, SINWAR and DEIF for the war crimes of murder under art. 8(2)(c)(i); taking of hostages under art. 8(2)(c)(iii), rape and other forms of sexual violence under art. 8(2)(e)(vi), torture and cruel treatment under art. 8(2)(c)(i), outrages upon personal dignity under art. 8(2)(c)(ii) in the context of captivity; the crimes against humanity of extermination under art. 7(1)(b); murder under art. 7(1)(a); rape and other forms of sexual violence under art. 7(1)(g), torture under art. 7(1)(f), and other inhumane acts under art. 7(1)(k) in the context of captivity. *See* Prosecutor's Public Statement, 20 May 2024.
[79] Abridged Request, paras. 2, 19-58.
[80] Decision, para. 15.
[81] ICC-01/04-01/10-451 ("Mbarushimana Jurisdiction Decision"), para. 16 (observing that a situation can include crimes committed at the time of the referral and subsequent crimes that were sufficiently linked to the situation of crisis which was ongoing at the time of the referral); *see* ICC-02/05-01/20-391 ("Abd-Al-Rahman Jurisdiction Decision"), para. 25 (quoting ICC-01/04-101-tEN-Corr, para. 65 (A situation is "generally defined in terms of temporal, territorial and in some cases personal parameters")). *See also* Marchesi, A. and Chaitidou, E., "Article 14: referral of a situation by a State Party" in Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Marchesi and Chaitidou"), p. 718 (nm. 27: explaining this definition: "[t]he territorial and personal parameters are in the alternative. The territorial parameter enquires whether the crime occurred on the territory of a State Party pursuant to article 12(2)(a) […] or of a State which lodged an *ad hoc* declaration under article 12(3). The personal parameter pertains to the perpetrator of the crime(s) who is a national of a State Party (article 12(2)(b)) or a non-State Party which lodged an article 12(3) declaration"); *see also* p. 717 (nm. 25: "the concept of a situation must be understood in a generic and broad fashion: a description of facts, defined by space and time, which circumscribe the prevailing circumstances at the time ('conflict scenario')").
[82] Decision, para. 15.
[83] ICJ Advisory Opinion, paras. 78, 104, 138, 170, 179.

non-international armed conflict since at least 2008, one that has involved confrontations such as Operation Cast Lead in 2008-2009,[84] Operation Pillar of Defence in 2012,[85] Operation Protective Edge in 2014 (which was analysed during the preliminary examination),[86] Operation Guardian of the Walls in 2021,[87] and most recently the 2023-2024 Operation Iron Swords. Between these major operations, extensive airstrikes continued to be carried out by Israel in Gaza[88] and repeated rocket attacks against Israel were carried out by Hamas.[89]

38. Israel's criticism that the Article 18 Notification "does not expressly refer to an armed conflict as a defining characteristic of the Prosecution's intended investigation" lacks merit since the Prosecution referred to war crimes arising in the context of international and non-international armed conflicts as well as Israel's long-standing occupation.[90] So too did Palestine's 2018 Referral, which highlighted a sample of war crimes but did not intend to limit the investigation to that sample.[91]

39. Second, as the Chamber noted, the alleged "conduct [was] committed […] with the same alleged parties to these conflicts".[92] Indeed, the crimes alleged in the Applications involve conduct by the same groups or categories of perpetrators allegedly responsible for the crimes at the time of the referral and opening of the investigation: Israeli authorities and the IDF as well as Hamas and other PAGs. The victims were also the same: the Palestinian civilian population in Gaza and civilian and non-civilian victims (for hostage-taking) in Israel.

40. That the Article 18 Notification did not refer to the Prime Minister and Minister of Defence of Israel, against whom the Prosecutor has requested arrest warrants, does not mean that the Prosecution could not investigate them if the evidence pointed to their criminal responsibility.[93] As the Appeals Chamber has confirmed, "the obligation to provide sufficiently specific information in an article 18 notification does not limit in any way the Prosecutor's future investigation".[94] In addition, such a narrow approach would violate the Prosecution's obligations under article 42 and 54 of the Statute to investigate independently and objectively

[84] IDF, 30 Oct. 2017; UN Ind. Com. Rep., 18 Mar. 2019, para. 220; UN Fact-Finding Rep., 25 Sept. 2009, para. 29.
[85] IDF, 30 Oct. 2017; UN Ind. Com. Rep., 18 Mar. 2019, para. 220; UNHCHR Rep., 4 Jul. 2023, paras. 4-8.
[86] IDF, 30 Oct. 2017; UN Ind. Com. Rep., 18 Mar. 2019, para. 220; UN Com. Inq. Rep., 24 June 2015, para. 19.
[87] IDF, 14 June 2021; UN Ind. Com. Rep., 5 Sept. 2023, paras. 13, 22, 54.
[88] UN Ind. Com. Rep., 5 Sept. 2023, paras. 48, 58; UN Ind. Com. Rep., 18 Mar. 2019, para. 221.
[89] UN Ind. Com. Rep., 5 Sept. 2023, para. 51; UN Ind. Com. Rep., 18 Mar. 2019, para. 221.
[90] *Contra* Appeal, para. 48. *See above* fn. 75.
[91] Palestine Article 14 Referral, paras. 3-4, 12.
[92] Decision, para. 15.
[93] *Contra* Appeal, para. 47.
[94] *Venezuela* Article 18(2) AJ, para. 230; ICC-02/18-45 ("Venezuela Article 18(2) Decision"), para. 76.

into a situation as a whole. Nor is it correct to argue that the criminality described in the Notification related to "mainly those making operational-level decisions".[95] This was not a feature in the Notification, and indeed disregards the characteristics of the situation as stated therein and in the attached Summary of Findings.

41. In addition, the conduct alleged in the Applications is consistent with, and reflects a continuation of, the criminality identified at the time of the referral and the opening of the Prosecution's investigation,[96] which was taken into account solely for the limited purpose of opening the investigation. As noted, Israel has occupied the oPt since 1967 and has established, maintained and expanded illegal settlements.[97] In addition, Israel and Hamas have been engaged in ongoing hostilities since the Court began to exercise its jurisdiction, causing serious harm to civilians from both sides and resulting in potential war crimes and crimes against humanity similar to those described in the Applications. Since its founding, Hamas has committed acts of violence against military and also civilian targets, including bombings, rocket and mortar attacks,[98] shootings,[99] as well as hostage-taking.[100] Israeli military operations in Gaza have resulted in extensive death and harm to Palestinian civilians and caused widespread destruction.[101] In particular, the population of Gaza was already in a precarious situation prior to 7 October 2023 as a result of continuous restrictions to the products allowed in through the border crossings controlled by Israel.[102]

42. The fact that the Prosecution assessed the existence of some concrete incidents of war crimes during the preliminary examination, in order to determine whether the opening of an investigation was warranted, did not limit the subsequent investigation either to those incidents or to those legal qualifications. The Prosecution is not required to identify every single fact, incident and crime in the situation at the preliminary examination stage, nor would this even be possible given its limited powers and the possibility that crimes may be ongoing and new crimes may be committed. Indeed, article 53(1)(a) only requires the Prosecution to provide "a reasonable basis to believe that *a crime* within the jurisdiction of the Court has been or is being committed" (emphasis added). The Prosecution clearly explained as much in its Summary of

[95] *Contra* Appeal, para. 47.
[96] *Contra* Appeal, paras. 44-46.
[97] ICJ Advisory Opinion, paras. 104, 155-156.
[98] UN Ind. Com. Rep., 5 Sep. 2023, para. 51; UN Ind. Com. Rep., 18 Mar. 2019, paras. 220-222.
[99] U.S. Department of State Country Reports on Terrorism, 2022, p. 274.
[100] U.S. Department of State Country Reports on Terrorism, 2022, p. 274.
[101] OCHA Humanitarian Overview, Dec. 2021, pp. 13-12; UN Ind. Com. Rep., 18 Mar. 2019, paras. 153, 220.
[102] OCHA Humanitarian Impact, Jun. 2022, p. 1.

Findings attached to the Notification.[103] Nor is the Prosecution barred from investigating events post-dating the Notification. The Appeals Chamber has repeatedly rejected this approach,[104] as have various Pre-Trial Chambers in defining the parameters of the authorised situations in their article 15(4) decisions.[105]

43. Accordingly, the fact that the Applications included additional war crimes and crimes against humanity with respect to incidents and events in 2023 and 2024, rather than war crimes allegedly committed in 2014 and 2018 (assessed during the preliminary examination), does not mean that "the scope and focus of the defining parameters of the Prosecution's investigation" has evolved or expanded so that there is a "new" situation as of 7 October 2023.[106] It simply means that the Prosecution reacted in a timely fashion to ongoing criminality, and investigated (and brought for prosecution) contemporaneous events falling within a pre-existing situation. Accordingly, the Chamber correctly dismissed Israel's submissions that a new situation had arisen and that a new article 18 notification was therefore required.

44. This is further confirmed by the Chamber's approach in dismissing Israel's submissions against the purported lack of specificity of the Article 18 Notification.[107] In that context and as explained above,[108] the Chamber correctly relied on the *Venezuela* Appeal Judgment, that Israel now seeks to apply for a different purpose.

45. In any event, even assuming *arguendo* that the Chamber erred in the criteria it relied upon (which it did not), it would still have reached the same conclusion even if it had considered Israel's preferred "criteria". Indeed, for the reasons explained above,[109] had it considered the "crime types and 'patterns and forms of criminality'", "the 'groups or categories of individuals'" and "the factual context of the criminality",[110] the Chamber would have

[103] Article 18(1) notification, 9 March 2021, Summary of Preliminary Examination Findings, paras. 7-9*; see* Annex A.
[104] *Afghanistan* AJ, paras. 2, 61; *Afghanistan* Second AJ, paras, 57-59; *Venezuela* Article 18(2) AJ, para. 230.
[105] *See e.g. Bangladesh/Myanmar* Article 15(4) Decision, para. 133 ("the Chamber finds that any crimes committed after the issuance of this decision remain within the temporal scope of the authorised investigation, as long as such crimes are sufficiently linked to the situation identified in the present decision"); ICC-02/11-14-Corr ("Côte d'Ivoire Article 15(4) Decision"), para. 179 ("Bearing in mind the volatile environment in Côte d'Ivoire, the Chamber finds it necessary to ensure that any grant of authorisation covers investigations into 'continuing crimes' – those whose commission extends past the date of the application. Thus, crimes that may be committed after the date of the Prosecutor's application will be covered by any authorisation, insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011").
[106] *Contra* Appeal paras. 44-46, 48.
[107] Decision, para. 13. *See above* para. 29.
[108] *See above* para. 29.
[109] *See above* paras. 32-43.
[110] Appeal, para. 43.

similarly concluded that "no substantial change has occurred to the parameters of the investigation into the situation".[111] Accordingly, any purported error in the Chamber's criteria would have not materially affected the Decision.

46. Finally, and as explained further below,[112] the 2023 referrals of South Africa, Bangladesh, Bolivia, Comoros and Djibouti,[113] and the 2024 referrals of México and Chile,[114] relied upon the same parameters described in Palestine's 2018 referral (conduct in the oPt since 13 June 2014) and did not purport to trigger a new investigation. Rather, these States described the current events as an "escalation of violence" in the context of the alleged ongoing commission of crimes within the Court's jurisdiction.[115] The additional referrals sought to emphasise the importance of the Court's *existing* investigation, rather than to suggest that a new investigation needed to be opened. This practice is not exceptional—for example, more recently, a referral was received concerning the *Situation in Afghanistan*, which was specifically framed and understood to reflect the relevant States Parties' determination to express concern with regard to particular allegations emerging in the context of the ongoing investigation.[116]

47. For all the foregoing reasons, the Second Ground of Appeal should be dismissed.

B.2. The Chamber did not "err[] in law by providing no reasons and rejecting Israel's submission that a new situation had arisen following two post-7 October 2023 referrals made by seven States Party pursuant to article 14 of the Statute" (Third Ground of Appeal)

48. In its Third Ground, Israel argues that the Prosecution did not comply with regulation 45 of the Regulations of the Court because it did not inform the Presidency of the 2023 and 2024 referrals.[117] It submits that article 18 provides no relevant discretion and "[e]ven assuming that the requirement of article 18(1) applies only in respect of referrals of situations that are materially distinct from those previously referred, that is undoubtedly the case here".[118] Israel contends that Palestine's 2018 referral concerned only "settlement-related crimes" because there is no reference to an "armed conflict" between Israel and Hamas, and that the 2023 and

[111] Decision, para. 15.
[112] *See below* Third Ground, paras. 48-54.
[113] South Africa et al. Article 14 Referral, 17 Nov. 2023.
[114] Chile and Mexico Article 14 Referral, 18 Jan. 2024.
[115] South Africa et al. Article 14 Referral, 17 Nov. 2023, p. 3; Chile and Mexico Article 14 Referral, 18 Jan. 2024, p. 2, para. 2.
[116] *See e.g.* Prosecutor's Statement, 29 Nov. 2024.
[117] Appeal, paras. 53-56.
[118] Appeal, para. 57.

2024 referrals relate to "crimes allegedly committed in relation to the intense and sust[ained] hostilities that began on 7 October 2023".[119] It also submits that the Chamber did not explain the definition of "situation" that it applied and failed to address and assess the significance of the 2023 and 2024 referrals.[120] However, these submissions lack merit and should be dismissed. Israel misunderstands the import of the 2023-2024 State referrals and the scope of the investigation into this situation.

49. First, the Prosecution did not inform the Presidency of the new 2023 and 2024 referrals because the referrals related to events falling within a situation already under investigation.[121] Shortly after the 7 October events the Prosecutor already stated that these events fell within the parameters of this Situation.[122] The Prosecution has acted in a similar fashion in *Afghanistan*[123] and in *Venezuela*,[124] where it has received referrals in 2024 with respect to events falling within the ongoing investigations into these situations. In *DRC II*, the Prosecution informed the Presidency of the second DRC referral but with the caveat that it required assessment of whether an investigation into a new situation was warranted.[125] More recently, the Prosecution confirmed to the Pre-Trial Chamber that the events described in the second DRC referral fall within the parameters of the pre-existing investigation in the *Situation in the DRC* and do not amount to a new situation requiring a new investigation.[126] The Prosecution's position in this situation is therefore consistent with its practice in other situations.

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[119] Appeal, paras. 57-60.
[120] Appeal, paras. 53, 61.
[121] Up until now all notifications to the Presidency under regulation 45 of the RoC entail the formal and automatic creation of a "new" situation before a separate Pre-Trial Chamber.
[122] *See* Reuters, *Exclusive: Hamas attack, Israeli response fall under ICC jurisdiction, prosecutor says*, 13 Oct. 2023; Prosecutor's Public Statement, 30 Oct. 2023; *see also* Prosecutor's Public Statement, 6 Dec. 2023.
[123] Prosecutor's Public Statement, 29 Nov. 2024 (noting that, in the 28 November 2024 referral from Chile, Costa Rica, Spain, France, Luxembourg, and Mexico, the States Parties expressed their concern about the severe deterioration of the human rights situation in Afghanistan, especially for women and girls and requested the Office to consider the crimes committed against women and girls after the Taliban takeover in 2021 within its ongoing investigation in the Situation in Afghanistan).
[124] On 6 September 2024, the Uruguay additionally submitted a referral of the Situation in *Venezuela I* to the Office of the Prosecutor. *Venezuela I*; *see* Uruguay referral.
[125] Prosecutor's Public Statement, 15 Jun. 2023 (noting that "[I] intend to conduct a preliminary examination promptly in order to assess, as a preliminary matter, whether the scope of the two situations referred by the DRC Government are sufficiently linked to constitute a single situation").
[126] ICC-01/23-4-Red, para. 2 ("Having evaluated the information available, the Prosecution has concluded that any alleged Rome Statute crimes committed in North Kivu since 1 January 2022 would fall within the parameters of, and are in any event sufficiently linked to, the situation under investigation resulting from the DRC's referral of March 2004. In light of this, the Prosecution does not consider it necessary to open a new investigation. Rather, it will investigate alleged crimes committed in North Kivu since 1 January 2022 within the existing situation in the Democratic Republic of the Congo […]"); *see* Prosecutor's Public Statement, 14 Oct. 2024.

50. Second, Israel misunderstands the import of State (or Security Council) referrals. A referral does not entail the automatic opening of an investigation and the issuance of article 18 notifications, and thus the triggering of a one-month deadline for States to request deferrals under article 18(2). Instead, after receiving a referral, the Prosecution needs to first determine whether the requirements under article 53(1) are met in order to open an investigation.[127] Only when it concludes that the threshold is met and an investigation is warranted, the Prosecution will issue article 18(1) letters and the one-month deadline is triggered.

51. Third, that the 2023 and 2024 referrals referred to the events arising from 7 October 2023, and to "additional crimes" such as starvation or genocide, does not entail that a new situation has arisen or that those States requested the Office to open a new investigation.[128] As noted, the 2023 referral of South Africa, Bangladesh, Bolivia, Comoros and Djibouti,[129] and the 2024 referral of México and Chile,[130] referred to and relied upon the same parameters described in Palestine's 2018 referral (concerning conduct in the oPt since 13 June 2014) and did not purport to trigger a new investigation. Rather, these States described the current events as an "escalation of violence" in the context of the *ongoing* situation of criminality[131] and sought to emphasise the need for the Office to devote efforts to the Court's *existing* investigation.

52. Further, Israel misunderstands the scope of the investigation into this situation, which goes beyond "settlement-related crimes".[132] While in the Second Ground it seems to acknowledge that the situation encompasses crimes related to the 2014 conduct of hostilities, in the Third Ground it seems to argue that the Situation is limited only to "settlement-related crimes" because Palestine's 2018 referral placed emphasis on the occupation and on the maintenance and expansion of settlements and did not refer to any armed conflict between Israel and Hamas.[133] Both positions are incorrect. As already explained, the investigation in this situation encompasses the situation of crisis ongoing at the time of the referral arising from Israel's long-standing occupation (including crimes occurring in the context of conduct of hostilities) and goes beyond the specific crimes and perpetrators mentioned therein. All Palestinian territory, including Gaza, has been under occupation for an exceptionally lengthy period, and this has given rise to wide-ranging allegations of article 5 crimes by different actors

[127] *Venezuela* Article 18(2) AJ, para. 219.
[128] *Contra* Appeal, para. 58.
[129] South Africa et al. Article 14 Referral, 17 Nov. 2023.
[130] Chile and Mexico Article 14 Referral, 18 Jan. 2024.
[131] South Africa et al. Article 14 Referral, p. 3; Chile and Mexico Article 14 Referral, p. 2, para. 2.
[132] *Contra* Appeal, para. 57.
[133] *Compare* Appeal, paras. 48 and 57.

supporting or opposing Israel's practices and policies. Nor could the Prosecution necessarily have conducted an investigation only into "settlement-related crimes" even if this had been requested by Palestine. This would potentially be contrary to the Prosecution's statutory obligations under articles 42 and 54 of the Statute requiring it to conduct an investigation into a situation as whole. For the same reasons, the Prosecution cannot be precluded from investigating crimes committed during the conduct of hostilities even if not explicitly mentioned in the Referral.[134] Tellingly, Israel itself engaged in discussions and sharing of information regarding the 2014 wave of hostilities during the preliminary examination.

53. Finally, there is no basis to consider that the Chamber's reasoning was legally inadequate.[135] A Chamber does not need to "necessarily [] recit[e] each and every factor that was before [it] to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion".[136] Nor was the Chamber required to provide its definition of the "situation" when this was not at issue.[137] As explained above, whether a new situation has arisen is a case-specific and fact-dependent determination and the Chamber conducted the correct analysis and considered the relevant criteria.[138] Likewise, the Chamber was clearly aware of the 2023 and 2024 referrals (since it mentioned them in the "Procedural History") but it did not consider them relevant to its fact-specific assessment. In any event, the Chamber did consider the events described therein, which were also described in the Article 58 Applications (and related public statement).

54. Because of the foregoing, Israel's Third Ground of Appeal should be dismissed.

B.3. The timing of Israel's request was contrary to the "very object and purpose of the complementarity framework" (First Ground of Appeal)

55. Israel argues that the Chamber erred when it made the following remark (in italics) in paragraph 14 of the Decision:

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[134] *Contra* Appeal, para. 57.
[135] *Contra* Appeal, para. 61.
[136] *See* *Lubanga* First Rule 81 AJ, para. 20; *Lubanga* Second Rule 81 AJ, para. 30 where the Appeals Chamber held that "[t]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion."
[137] *Contra* Appeal, para. 59, 61; *see* ICC-02/04-01/15-2022-Red ("Ongwen AJ"), para. 346 (recalling that "as a matter of law, there is no rule in the Court's legal framework requiring a trial chamber to pronounce on its interpretation of the law at a specific point during the proceedings").
[138] *See above* para. 32.

> In any case, filing of the Request at this point in time – namely after the Prosecution announced it had filed applications for warrants of arrest and three years after the passing of the statutory time limit – appears to go against the very object and purpose of the statutory complementarity framework. *The purpose of Article 18(2) proceedings is to allow for complementarity-related admissibility challenges to be brought at the initial stage of the investigation and not at a point in time when the investigation has substantially advanced.* Where a State is given the opportunity to assert its right to exercise jurisdiction, but it has declined, failed or neglected to do so, the investigation may proceed.[139]

56. Israel posits that the Chamber, in making such a remark, erroneously took "the start of the relevant investigation as being March 2021".[140] According to Israel, had the Chamber found that "a second situation" or "an investigation with new defining parameters [] within an existing situation" had arisen on 7 October 2023, the Abridged Request would have been timely.[141] Thus, it submits that the Chamber "put the cart before the horse" in making this remark in paragraph 14 prior to assessing the merits of the Request (in paragraph 15 of the Decision)—and, as a result, this "could not have failed to impact [the Chamber's] subsequent reasoning".[142]

57. Israel's First Ground of Appeal should be dismissed. As explained above in response to Israel's Second Ground of Appeal, the Chamber correctly considered March 2021 as the start of the investigation since no "new" situation had arisen as a result of the 7 October 2023 events.[143] Moreover, even if it is assumed that the Chamber did err in its remark in paragraph 14 (which it did not), this did not materially affect the Decision. This is for two reasons.

58. First, even if the Chamber had taken 7 October 2023 as its starting point—when, according to Israel, a new situation or new parameters arose—the Abridged Request would still have been belatedly filed. Israel only filed the Abridged Request on 23 September 2024—that is, almost four months after the Prosecution had made the Article 58 Applications (and the Prosecutor had made his public statement), and more than 11 months after 7 October 2023. It

[139] Decision, para. 14.
[140] Appeal, para. 15.
[141] Appeal, para. 20.
[142] Appeal, para. 21.
[143] *See above* paras. 32-43.

was thus clearly accurate to observe that "the investigation ha[d] substantially advanced" by that time.[144]

59. Indeed, shortly after 7 October 2023, Israel was on notice that the Prosecutor considered the recent events as falling within the scope of the pre-existing investigation into the situation.[145] Although it has conceded being aware of the Prosecution's position,[146] Israel took no action to raise its concerns regarding article 18—neither after the Prosecutor's statements in 2023, nor during its engagements with the Office in 2024.[147] Even in the 1 May 2024 letter, in which the Israeli ambassador purportedly requested "the Prosecutor [to] defer any investigation it may be conducting",[148] Israel did not invoke article 18 of the Statute nor attach any of the supporting material required by article 18.[149] Only after the Prosecution stated in response—on 7 May 2024[150]—that the statutory deadline for article 18 deferral requests had elapsed in April 2021, did Israel seek to argue that the Prosecution should have opened a new investigation and issued a new article 18(1) notification.

60. Second, and in any event, the Chamber's remark regarding the untimeliness of Abridged Request was not dispositive of its Decision. Rather, as explained above in response to Israel's Second Ground, the Chamber concluded that "no substantial change has occurred to the parameters of the investigation into the situation" on the basis of its assessment of *other* relevant criteria, which were unrelated to the untimeliness of the Abridged Request.[151] Accordingly, the Chamber's conclusion did not depend on its remark regarding Israel's belated Request. To the extent that Israel suggests that the Chamber's subsequent reasoning in paragraph 15 was negatively influenced (or contaminated) by its previous remark in paragraph 14, this assertion is speculative and lacks any support.

61. In conclusion, Israel's First Ground thus lacks merit and should be dismissed.

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[144] Decision, para. 14.
[145] *See* Reuters, *Exclusive: Hamas attack, Israeli response fall under ICC jurisdiction, prosecutor says*, 13 Oct. 2023; Prosecutor's Public Statement, 30 Oct. 2023; *see also* Prosecutor's Public Statement, 6 Dec. 2023.
[146] Abridged Request, para. 54.
[147] Abridged Request, para. 53.
[148] ICC-01/18-355-SECRET-Exp-AnxF, Letter from Israel to OTP, 1 May 2024, p. 3; ICC-01/18-346-Conf-AnxB, para. 2; *see also* Annex B.
[149] *Contra* Abridged Request, para. 55.
[150] ICC-01/18-355-SECRET-Exp-AnxG, Letter from OPT to Israel, 7 May 2024, p. 2; ICC-01/18-187-SECRET-Exp-AnxIII; *see also* Annex B.
[151] Decision, para. 15.

B.4. Suspensive effect is not warranted

62. Finally, the Appeals Chamber should reject Israel's request to suspend the warrants of arrest, which are not subject to appeal in these proceedings.[152] Israel has failed to demonstrate that any suspensive effect is warranted on the basis of the present appeal.

63. First, Israel cannot use the Appeal to request suspension of decisions to which it is not a party, such as the Article 58 Decisions and ensuing warrants of arrest. Israel argues that these proceedings and their outcome are inextricably connected,[153] because reversal of the Decision on appeal will establish that the warrants were "invalidly issued" and that "[s]uspensive effect of the Impugned Decision would be rendered essentially meaningless unless it extends to an arrest warrant whose validity depends on the Impugned Decision".[154] Yet this is not a foregone conclusion, since in the first instance the remedy granted by the Appeals Chamber in the event of an error in the Decision may be remand back to Pre-Trial Chamber I.

64. Moreover, articles 19(7)[155] and 95[156] already provide safeguards if admissibility is challenged.[157] The clear implication is at least that no *broader* form of interim relief was contemplated by the drafters. This is further confirmed by article 19(9), which states in plain terms that "[t]he making of a challenge shall not affect the validity of […] any order or warrant issued by the Court prior to the making of the challenge."

65. Second, and in any event, Israel has failed to demonstrate that suspensive effect is warranted at all. The Appeals Chamber has consistently held that "[s]uspensive effect is the exception, not the rule".[158] In exercising its discretion to decide on applications for suspensive effect,[159] the Appeals Chamber will consider "the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances".[160] In

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[152] ICC-01/18-385 OA ("Notice"), paras. 30-37.
[153] Notice, para. 34.
[154] Notice, para. 34.
[155] Statute, art. 19(7) ("[i]f a challenge is made by a State referred to in paragraph 2(b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17").
[156] Statute, art. 95 ("[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19").
[157] *See e.g.* Statute, art. 19(7) (referring to articles 17 and 19(2)(b)).
[158] ICC-01/09-01/11-1370 OA7 OA8 ("*Ruto* Suspensive Effect Decision"), para. 10.
[159] *See e.g.* ICC-01/04-01/06-1347 OA9 OA10 ("*Lubanga* (Victims' Participation) Suspensive Effect Decision"), para. 10; ICC-01/04-01/06-1290 OA11 ("*Lubanga* (Oral Decision) Suspensive Effect Decision"), para. 7.
[160] *Lubanga* (Victims' Participation) Suspensive Effect Decision, para. 10. *See also* *Lubanga* (Oral Decision) Suspensive Effect Decision, para. 7; ICC-01/11-01/11-387 OA4 ("*Gaddafi and Al-Senussi* Suspensive Effect Decision"), para. 22.

so doing, the Appeals Chamber has considered whether the implementation of the decision under appeal: "(i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the appeal'".[161] None of these conditions is met in this case.

66. In order to justify its Request, Israel refers to: (i) "the reputational damage to the Court that would arise from calling for the arrest of a democratically elected leader of a country fighting a war not of its own choosing", (ii) "the extent [to which] [] the arrest warrants purport to create obstacles to travel to States Party who may believe that they are bound to give effect to these arrest warrants" or (iii) "that they are used as an excuse to cut off diplomatic communications".[162] Israel also refers to the "facially cursory reasoning and manifest indications of error" of the Decision.[163]

67. Israel nevertheless fails to show that the validity and enforceability of the warrants pending resolution of the Appeal actually would create an irreversible situation, lead to irreversible consequences, or defeat the purpose of the Appeal. Israel's arguments regarding the purported cursory or erroneous nature of the Decision—in addition to being incorrect—simply relate to the merits and cannot justify the suspension of the Decision. Furthermore, Israel's arguments only appear to relate to the warrant against Mr Netanyahu, as the "democratically elected leader of a country",[164] and would not concern Mr Gallant, who held the position of Minister of Defence until 5 November 2024.

68. In any event, there is no "reputational damage" from the validity and enforceability of the warrants, within the framework of the Court's established procedures and consistent with the applicable law. Whether one or both suspects fear arrest during their travels is not an irreversible situation, nor would it lead to irreversible consequences or defeat the purpose of the Appeal, which relates to different matters. Israel's submissions regarding a possible "cut off" of diplomatic communications are likewise speculative and non-substantiated.

[161] *See e.g.* ICC-01/05-01/08-817 OA3 ("*Bemba* Suspensive Effect Decision"), para. 11; *Gaddafi and Al-Senussi* Suspensive Effect Decision, para. 22.
[162] Notice, para. 35.
[163] Notice, para. 36.
[164] Notice, para. 35.

C. CONCLUSION

69. For all the reasons above, Israel's Appeal should be dismissed *in limine* as inadmissible under article 82(1)(a), or in any event dismissed on its substantive merits and Israel's request for suspensive effect should be rejected.

Karim A.A. Khan KC, Prosecutor

Dated this 13th day of January 2025
At The Hague, The Netherlands