

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/18**

Date: **17 January 2025**

THE APPEALS CHAMBER

Before:

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

SITUATION IN THE STATE OF PALESTINE

Public

Request for leave to reply to 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)" and to reject the Prosecution's submissions concerning suspensive effect *in limine*

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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I. INTRODUCTION

1. Israel requests leave to reply to three specific issues raised in the “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).”¹ None of the three issues could have been reasonably anticipated and addressed in the appeal itself.² First, the Prosecution cites recent State referral practice of which Israel could not reasonably have been aware as of the date of the Appeal, and that had not occurred as of the date of the Impugned Decision; second, the Prosecution cites information about a series of Israeli military operations prior to October 2023 that were never mentioned in the article 18(1) notification or any related materials, or in any subsequent submissions in this litigation; and third, the Prosecution attempts to insert arguments concerning timeliness that were not adopted by, and are irrelevant to, the Pre-Trial Chamber’s reasoning concerning timeliness. As explained below, none of these arguments or information could have been reasonably anticipated and addressed in the Appeal.

2. A reply in respect of each of these unanticipated issues will assist the Appeals Chamber in its determination of this Appeal. Indeed, as the Prosecution itself submits, the scope of an article 18(1) notification and of a situation is “case-specific and fact-dependent.”³ The record should be clear as to what is contained in the article 18(1) notification to determine whether it is “representative enough” of the Prosecution’s post-7 October investigations.

3. The Prosecution’s submissions⁴ concerning suspensive effect should be rejected *in limine*. The appropriate vehicle for such submissions was its response to the Notice of Appeal. The Prosecution’s attempt to insert these submissions into the response to the appeal itself – which did not address suspensive effect – is improper and untimely.

II. STANDARD APPLICABLE TO REQUESTS FOR LEAVE TO REPLY

4. Regulation 24(5) of the Regulations of Court provides that:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless

¹ [Prosecution response to the “Appeal of ‘Decision on Israel’s Challenge to the Jurisdiction of the Court pursuant to article 19\(2\) of the Rome Statute’ \(ICC-01/18-374\)”](#), ICC-01/18-406, 13 January 2025 (“Response”). This filing is without prejudice to Israel’s position regarding the Court’s lack of jurisdiction in respect of the above-captioned Situation, or to Israel’s status as a State not Party to the Rome Statute.

² [Appeal of “Decision on Israel’s challenge to the jurisdiction of the Court pursuant to article 19\(2\) of the Rome Statute” \(ICC-01/18-374\)](#), ICC-01/18-402, 12 December 2024 (“Appeal”).

³ Response, paras 32, 53.

⁴ Response, paras 62-68.

otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

5. The Appeals Chamber may grant a request for leave to reply if these conditions are met, or if it considers that a reply would otherwise be necessary for the adjudication of the appeal.⁵

6. The Appeals Chamber has held that a party seeking leave to reply must do more than “point [...] to issues” to which it wishes to reply, but must rather “demonstrate [...] why they are new and could not reasonably have been anticipated”⁶ or “explain why a reply to the aforementioned issues is otherwise warranted” because it is “necessary for the adjudication of the appeal”.⁷

7. The Appeals Chamber has also taken into consideration whether the proposed reply “would assist it in its determination of [the] matter.”⁸

III. SUBMISSIONS

8. Israel requests leave to reply on the following new issues and arguments that could not reasonably have been anticipated, and in respect of which additional submissions will assist the Appeals Chamber. The fact that leave to reply is sought in respect of three issues only, should not be taken as reflecting any agreement with the other mischaracterisations of Israel’s Appeal, or misstatements of law, contained in the Response and which are already addressed in the Appeal.

A. First New Issue: The Prosecution cites practice subsequent to the 2023 and 2024 State referrals of the *Palestine* situation that could not reasonably have been anticipated

⁵ *Situation in the Bolivarian Republic of Venezuela I*, [Decision on the Arcadia Foundation’s request for leave to reply to the “Prosecutor’s Submissions on the Request for Recusal of the Prosecutor”](#), ICC-02/18-102, 12 December 2024, para. 9. See *Situation in the Republic of the Philippines*, [Decision on the Republic of the Philippines’ request for leave to reply to the “Prosecution’s response to the Philippine Government’s Appeal Brief against ‘Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation’ \(ICC-01/21-65 OA\)”](#), ICC-01/21-72, 2 May 2023, para. 9 (granting leave to reply in respect of issues where it “would assist in its determination of the appeal”); *Situation in the Islamic Republic of Afghanistan*, [Decision on the Prosecutor’s request for leave to reply](#), ICC-02/17-206, 23 December 2022, paras 8-9 (granting the Prosecution leave to reply in respect of new issues raised by victims).

⁶ *Prosecutor v. Ntaganda*, [Decision on Mr. Ntaganda’s request for leave to reply](#), ICC-01/04-02/06-1994, 17 July 2017, para. 13.

⁷ *Id.*, para. 14.

⁸ *Situation in the Bolivarian Republic of Venezuela I*, [Decision on the Arcadia Foundation’s request for leave to reply to the “Prosecutor’s Submissions on the Request for Recusal of the Prosecutor”](#), ICC-02/18-102, 12 December 2024, para. 11.

9. The Response cites information and interpretations concerning referrals by States Party under article 14 of the Statute in other situations that were not available to Israel when the present litigation began, and that were not addressed in the Impugned Decision. In particular, the Prosecution relies on a State referral in the *Afghanistan* situation dated 28 November 2024,⁹ and State referrals in the *Venezuela* situations from September 2024 and January 2025, respectively.¹⁰ The Prosecution purports to rely on these referrals to: (i) illustrate occasions when a referral of a situation neither indicates that the parameters of an existing investigation have changed, nor that a new situation has arisen;¹¹ and (ii) justify its non-compliance with regulation 45 of the Regulations of Court.¹²

10. This information, and these arguments, could not have been reasonably anticipated and addressed in Israel's appeal. Two of these referrals post-date the Impugned Decision and could not have been, practicably, addressed in the appeal. Furthermore, these examples were not (and could not have been) addressed in the Prosecution's response to the Article 18 Request, which was itself filed on 27 September 2024. In fact, that response addresses only "past practice" of such State referrals without, however, citing a single example of that "past practice" of not notifying the Presidency of a referral.¹³ Accordingly, this purported recent practice is both novel, and addresses an issue of relevance to the important question of how State referrals that may overlap with existing situations must be dealt with in accordance with the Court's statutory framework.

11. The Prosecution's submissions pertain to the significance of the 2023 and 2024 State referrals in the Palestine situation. In particular, Israel seeks to offer submissions demonstrating that the Prosecution's arguments in respect of the November 2024 referral in the *Afghanistan* situation is misplaced. The content of that referral could, arguably, extend beyond the scope of the existing situation and/or the article 18(1) notification. This is necessarily a fact-specific inquiry, but the Prosecution's failure to even notify the Presidency – as expressly required by regulation 45 – impedes the ability of an interested party to raise a potentially controversial issue before the judges. This recent referral is also significant given the precedential weight that

⁹ Response, paras 46, 49.

¹⁰ Response, para. 49; *id.*, fn. 124: "see *Situation in the Bolivarian Republic of Venezuela I*, [Uruguay referral](#), 6 September 2024" - [<https://www.icc-cpi.int/venezuela-i> (web page last accessed 17 January 2025)].

¹¹ Response, para. 46.

¹² Response, para. 49.

¹³ [Prosecution's Response to Israel's "Abridged Request for an Order Requiring an Article 18\(1\) Notice, and Staying Proceedings Pending Such a Notice" - ICC-01/18-355SECRET-Exp-AnxI-Corr](#), ICC-01/18-360, 27 September 2024, fn. 29 ("[t]his is consistent with the past practice of the Prosecution").

the Impugned Decision places on the *Afghanistan* situation.¹⁴ Contrary to the Prosecution's submissions,¹⁵ this new referral underscores the importance of not permitting the Prosecution to choose whether or not to comply with regulation 45.

12. Submissions by way of reply will assist the Chamber's adjudication of the appeal. Israel should have the opportunity to show that the Prosecution's reliance on these examples of State referrals is misplaced; that these referrals should have been notified to the Presidency as required by regulation 45; and that these referrals may be indicative of circumstances requiring a new article 18(1) notification.

B. Second New Issue: In order to re-define the scope of its intended investigation, the Prosecution cites information that was not part of the article 18 notification (or any previous submissions), and could not reasonably have been anticipated

13. The Prosecution Response refers to a series of Israeli military operations between 2008 and 2021¹⁶ to support the argument that Israel's military operations following 7 October 2023 are merely a further example of a long succession of military operations that defines the scope of the Prosecution investigation as communicated to Israel in the article 18(1) notification of 9 March 2021.¹⁷

14. This information and these events, however, were not part of the article 18(1) notification. On the contrary, the article 18(1) notification refers to a single set of "hostilities" during a discrete time period in 2014. No attempt is made, unlike the *Afghanistan* situation, to characterize these "hostilities" as being an example of crimes being committed in "armed conflict," let alone as being just one example of a series of hostilities defining the scope of the investigation or the situation of crisis.

15. This purported pattern of successive Israeli military operations, now introduced for the first time, is also based on open source reports not previously cited or referred to in this litigation, and that were not relied upon by the Pre-Trial Chamber in the Impugned Decision.¹⁸ Accordingly, neither the information nor the argument could have been anticipated.

¹⁴ Appeal, para. 49.

¹⁵ Response, para. 49.

¹⁶ Response, para. 37.

¹⁷ Response, para. 41.

¹⁸ Response, para. 37, fns 84-89.

16. Additional submissions on this new information and argumentation will assist the Appeals Chamber. The Prosecution seeks to inject additional elements into the article 18(1) notification which demonstrates its own awareness that that notification is not representative of the post-7 October alleged criminality now under investigation.¹⁹ Furthermore, it also goes to the issue of the scope of the situation of crisis purportedly referred, and whether a new situation was referred by virtue of the 2023 and 2024 State party referrals.²⁰ These are matters vital to the determination of the current appeal. The fair adjudication of this appeal will be assisted by a reply on the Second New Issue.

C. Third New Issue: The Prosecution unforeseeably attempts to enhance the Pre-Trial Chamber’s reasoning concerning timeliness

17. The Prosecution argues in its Response that the Pre-Trial Chamber’s statement that the timing of Israel’s request for an article 18(1) notification “go[es] against the very object and purpose of the statutory complementarity framework”²¹ did not materially impact its reasoning. This argument is predicated on two sub-arguments: (i) Israel’s request was untimely even assuming that a new investigation did commence on 7 October 2023;²² and (ii) the Pre-Trial Chamber’s statement that Israel’s application was contrary to “the very object and purpose of the statutory complementarity framework” did not impact its reasoning in the following paragraph concerning the scope of the article 18(1) notification from March 2021.²³

18. Neither argument could have been reasonably anticipated. The Pre-Trial Chamber made no suggestion that there was any untimeliness in the purported lapse of time between 7 October 2023 and, for example, Israel’s 1 May 2024 letter to the Prosecutor. The lack of any such discussion in the Impugned Decision is significant given that the Prosecution had attempted to raise this issue before the Pre-Trial Chamber.²⁴ The Prosecution’s attempt to now indirectly re-inject this argument, on the pretext that it renders any error by the Pre-Trial Chamber immaterial, was not foreseeable.

19. The Appeals Chamber will be assisted by further submissions on this issue to show that the Pre-Trial Chamber’s erroneous statement was not rendered immaterial by the different

¹⁹ Appeal, paras 25, 48-51 (Second Ground of Appeal).

²⁰ Response, para. 38.

²¹ Impugned Decision, para. 14.

²² Response, paras 58-59.

²³ Response, para. 60.

²⁴ Prosecution Response of 27 September 2024, paras 19-20.

imputation now raised by the Prosecution. The Appeals Chamber will be assisted by arguments explaining the wrong and dangerous implications of this approach. Paragraphs 14 and 15 of the Impugned Decision, furthermore, are integrally inter-connected: the Pre-Trial Chamber was “also not persuaded”²⁵ by Israel’s submissions concerning the extent to which the Prosecution’s investigation had shifted, which implies that it considered its conclusions concerning purported untimeliness to be equally or independently dispositive of Israel’s request.

IV. THE PROSECUTION’S SUBMISSIONS CONCERNING SUSPENSIVE EFFECT ARE UNTIMELY AND IMPROPER, AND SHOULD BE REJECTED IN LIMINE

20. Israel filed its notice of appeal, as required by the applicable time limits on 27 November 2024. The established caselaw of the Appeals Chamber confirms that rule 156(5) requires an appellant to present any request for suspensive effect and supporting argumentation in the notice of appeal, and not in the subsequent appeal submissions.²⁶ Israel did so.²⁷

21. On 29 November 2024, the Prosecution responded to Israel’s Notice of Appeal. In addition to arguing that the appeal was inadmissible, the Prosecution offered the following submissions concerning suspensive effect: “Israel’s Suspension Request should thus also be rejected *in limine*. In any event, there is no legal basis to suspect the arrest warrants issued by the Pre-Trial Chamber. Should the Appeals Chamber wish to receive further submissions on the admissibility of the Appeals and/or Israel’s Suspension Request, the Prosecution stands ready to provide them.”²⁸

22. The only proper vehicle for the Prosecution’s submissions opposing suspensive effect was its response to the document in which the request for suspensive effect was (and had to be) made. The Prosecution chose to make only cursory submissions when it had the opportunity to do so. The Prosecution’s submissions concerning suspensive effect in the response to Israel’s

²⁵ Impugned Decision, para. 15.

²⁶ *Prosecutor v. Bemba*, [Decision on the Request of the Prosecutor for Suspensive Effect](#), ICC-01/05-01/08-499, 3 September 2009, para. 10; *Prosecutor v. Bemba*, [Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the “Decision on the Admissibility and Abuse of Process Challenges”](#), ICC-01/05-01/08-817, 9 July 2010, paras 8-9; *Prosecutor v. Ntaganda*, [Decision on the Defence request for suspensive effect](#), ICC-01/04-02/06-2691, 2 July 2021, paras 11-14; *Prosecutor v. Ntaganda*, [Decision on the requests for suspensive effect and other procedural issues](#), ICC-01/04-02/06-2892, 5 February 2024, para. 20.

²⁷ [Notice of Appeal of “Decision on Israel’s request for an order to the Prosecution to give an Article 18\(1\) notice” \(ICC-01/18-375\)](#), ICC-01/18-385, 27 November 2024, paras 30-37; [Notice of Appeal of “Decision on Israel’s challenge to the jurisdiction of the Court pursuant to article 19\(2\) of the Rome Statute” \(ICC-01/18-374\)](#), ICC-01/18-386, 27 November 2024, paras 29-36.

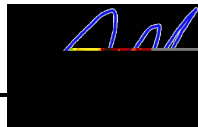
²⁸ Response, paras 11-12.

appeal brief, which in no way raised the issue of suspensive effect, must be rejected *in limine* as out of time and procedurally improper. Indeed, the time limit for responding to the Notice of Appeal, pursuant to regulation 34(b) of the Regulations of Court, is ten days. This time limit has long expired, as has the Prosecution's opportunity to offer submissions in opposition to the request for suspensive effect.

V. CONCLUSION AND RELIEF SOUGHT

23. In light of the foregoing submissions, Israel respectfully requests leave to reply to the three issues identified above. Such leave will assist the adjudication of the present appeal, concerning issues or information that could not reasonably have been anticipated. A full presentation of the issues and facts is particularly important given the broader significance of this Appeal to the principle of complementarity and the Court's relations with States.

Respectfully submitted:



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

Dated 17 January 2025, at Jerusalem, Israel.