Cour
Pénale
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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 challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute' (ICC-01/18-374)" 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 respectfully requests leave to reply to two specific issues raised in the "Prosecution response to Israel's 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)".[1] Neither of the two issues could have been reasonably anticipated and addressed in the appeal itself.[2] First, the Prosecution misapplies the provisions of the Vienna Convention on the Law of Treaties ("VCLT") regarding ordinary meaning, context, object and purpose and supplementary means of interpretation to article 19(2)(c), in a misconceived effort to justify the Chamber's erroneous findings as to prematurity and standing, the latter of which the Prosecution also mischarecterises as *obiter dictum*. Second, the Prosecution recasts wholesale the Pre-Trial Chamber's ruling as to *res judicata* and mischaracterises the Decision by inferring that this issue was hypothetical and therefore *obiter dictum*.

2. A reply in respect of each of these unanticipated issues is necessary for the adjudication of the Appeal and / or is otherwise in the interests of justice bearing in mind the principle of equality of arms.

3. The Prosecution's submissions[3] 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 its 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 otherwise permitted by the Chamber, a reply must be limited to new

[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"); *see* also Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute, ICC-01/18-374, 21 November 2024 ("Decision").
[3] Response, paras 59-65.

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.[4]

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"[5] or "explain why a reply to the aforementioned issues is otherwise warranted" because it is "necessary for the adjudication of the appeal".[6]

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

8. In relation to appeal proceedings arising out of article 19(2) decisions specifically, the Appeals Chamber has also previously found it appropriate, pursuant to regulation 28 of the Regulations of Court, to authorise at least one State to file further submissions seeking to clarify issues arising out of responses to an appeal, on the basis that such further submissions are "necessary for the proper disposal of the appeal" … "bearing in mind the principle of equality of arms".[8]

III. Submissions

9. Israel requests leave to reply on the following new issues and arguments that could not reasonably have been anticipated, and in respect of which a reply is otherwise necessary for the adjudication of Israel's appeal. The fact that leave to reply is sought in respect of two issues

[4] *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).
[5] *Prosecutor v. Ntaganda*, Decision on Mr. Ntaganda's request for leave to reply, ICC-01/04-02/06-1994, 17 July 2017, para. 13.
[6] *Id.*, para. 14.
[7] *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.
[8] *Prosecutor v. Gaddafi*, Decision on the Libyan Government's request to file further submissions, ICC-01/11-01/11-442, 12 September 2013, paras 12-13.

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 misapplies the provisions of the VCLT regarding ordinary meaning, context, object and purpose and supplementary means of interpretation to article 19(2)(c) in a misconceived effort to justify the Chamber's erroneous findings as to prematurity and standing.

10. The Prosecution Response cites Articles 31 and 32 of the VCLT[9] but misapplies these provisions, which are reflective of customary international law,[10] in a plethora of ways. These include: (a) deriving the ordinary meaning of article 19(2) and 19(2)(c) by effectively importing into them extra-statutory language pertaining to a "case" [for article 19(2)(c)] and jurisdiction "in relation to a case" [for the introductory paragraph of article 19(2)] due to its assertion that article 19 provides for a unitary scheme for jurisdictional challenges, allowing exceptionality only for the Prosecution under article 19(3);[11] and (b) adopting the facially incorrect assertion that the interpretation of article 19(2)(c) is "clear" such there was no requirement to take into account the drafting history of article 19.[12]

11. The Prosecution's misapplication of the VCLT's interpretative guidance is relevant both to the Chamber's erroneous holding that Israel's Article 19(2)(c) challenge was premature, and to its erroneous interpretation of Article 19(2)(c)'s standing requirements. Indeed, the Pre-Trial Chamber's interpretation of article 19(2)(c), which is argued by the Prosecution to be underpinned by the Prosecution's notion of a unitary scheme to article 19 (with exceptionality only for the Prosecution pursuant to article 19(3)), results in an asymmetric regime which unduly impacts on State's sovereign rights, and does not accord with the ordinary meaning, object and purpose, or context of these provisions. Likewise, the Pre-Trial Chamber's lack of consideration of the *travaux preparatoire* to article 19(2)(c) when determining standing has resulted in a procedural bar on a non-party State of the nationality of a person subject to an article 58 application being permitted to raise jurisdictional concerns via article 19(2)(c). This situation was not envisaged by the drafters of the Rome Statute. Moreover, despite the fact that Israel had expressly filed its jurisdictional challenge pursuant to article 19(2)(c), the Prosecution

[9] Response, paras 11, 29, 46.
[10] ICJ, *Guinea-Bissau v. Senegal*, Arbitral Award of 31 July 1989, ICJ Reports 1991, pp. 69-70, para. 48.
[11] Response, paras 14-15, 17, 29, 31.
[12] Response, para. 47.

wrongly asserts that the Chamber's plainly dispositive holdings on Israel's standing under this provision were *obiter*,[13] and therefore the Decision was not materially affected by any error in this regard.[14]

12. The Prosecution's misapplication of the VCLT's interpretative guidance is both startling and novel and could not reasonably have been anticipated by Israel in its Appeal. Indeed, consideration of the VCLT as a means of interpreting article 19(2)(c) when considering prematurity and standing was not previously raised in the first instance Article 19(2) proceedings or in the Decision. Although limited submissions as to the "object and purpose" of article 19(2) for the purposes of standing formed part of Israel's Appeal,[15] the Prosecution's detailed analysis of article 19(2)(c) pursuant to the VCLT interpretative framework for determining both prematurity and standing is a new issue.

13. The mere fact that there have been differing judicial views as to the meaning of article 19(2) in respect of ripeness and standing, let alone varying positions on these issues between the Prosecution and Israel in these very proceedings, indicates that the interpretation of article 19(2)(c) in accordance with article 31 VCLT could be described as "leav[ing] the meaning ambiguous or obscure" (article 32(a) VCLT) and/or leads to a result which is "manifestly absurd or unreasonable" (article 32(b) VCLT). As such, the interpretation of article 19(2)(c) is not "clear" for VCLT purposes,[16] indicating the appropriateness of recourse to supplementary means of interpretation, including, *inter alia*, the *travaux preparatoires* of the Statute in accordance with article 32 VCLT. The Prosecution's submission to the contrary appears to be a misconceived attempt to persuade the Appeals Chamber to disregard the drafting history of this provision. This is perplexing as recourse to the *travaux preparatoires* may be had to "confirm the meaning resulting from the application of article 31" in any event. Consequently, the *travaux preparatoire* should have been considered by the Pre-Trial Chamber if only to confirm its interpretation of Article 19(2).[17]

14. Indeed, the Prosecution's own submissions appear to accept that, if the Chamber's decision is correct, only the State which has already accepted the Court's jurisdiction will then have

[13] Response, para. 47.
[14] Response, para. 48.
[15] Appeal, paras 34-39.
[16] Response, para. 47.
[17] ICJ, *Jadhav (India v. Pakistan)*, Judgment of 17 July 2019, ICJ Reports 2019, p. 438, para. 71.

standing under article 19(2)(c) to challenge jurisdiction where the Court cannot maintain its jurisdiction on an alternative basis.[18] This is a manifestly absurd or unreasonable interpretation of article 19(2)(c) thus also indicating the appropriateness of recourse to *travaux preparatoire* as an interpretative aid.

15. Neither the Prosecution's misapplication of the VCLT by inserting extra-statutory language to derive "ordinary meaning", nor its misconceived assertion that the interpretation of article 19(2)(c) is "clear" such that the Chamber need not consider the *travaux preparatoires*, nor its mischaracterisation of the Chamber's disposition, as mere *obiter*, in relation to Israel's standing under article 19(2)(c), could have been reasonably anticipated in the Appeal.

16. The proper interpretation of Article 19(2)(c), and the need to correctly apply the VCLT's interpretative principles – including providing limited further analysis of the *travaux preparatoires* in order to avoid oversimplification of one of the most sensitive and delicately drafted aspects of the Rome Statute[19] – will be determinative of the dispute between the parties both with respect to the Chamber's erroneous holding on whether Israel's Article 19(2)(c) challenge was premature, as well as its erroneous interpretation of Article 19(2)(c)'s standing requirements. These are matters vital to Appeals Chamber's adjudication of the Appeal and in relation to which Israel should be granted leave to reply to the Prosecution's submissions.

B. Second New Issue: The Prosecution recasts wholesale the Pre-Trial Chamber's ruling as to *res judicata* and mischaracterises the Decision by inferring that this issue was hypothetical and therefore *obiter dictum*.

17. The Prosecution argues that the Pre-Trial Chamber "correctly concluded that the Article 19(3) Decision was *res judicata* for the purpose of the article 58 proceedings which, like the article 19(3) proceedings were *ex parte*." It further asserts that the Chamber's Decision on Israel's article 19(2)(c) jurisdictional challenge was "ancillary" to the article 58 proceedings.[20] The Prosecution goes on to suggest that Israel wrongly assumed "that the proceedings which the Chamber considered to be affected by the doctrine of *res judicata* were proceedings in which it was a party"[21] but "since the Chamber found Israel's jurisdictional challenge to be

[18] Response, para. 44.
[19] *Cf.* Response, para. 47.
[20] Response, paras 51, 53.
[21] Response, para. 52.

premature because a case before the Court had not yet been initiated, its consideration of its potential standing under article 19(2)(c) was essentially hypothetical and an *obiter dictum*".[22]

18. In fact, the Pre-Trial Chamber made no such finding that the Article 19(3) Decision was *res judicata* "for the purpose of the article 58 proceedings". To the contrary, the Pre-Trial Chamber stated:

> First, the Chamber rejects Israel's argument that merely because it *claims* that Palestine could not have delegated jurisdiction to the Court, the Chamber would have to ignore its previous decision … which has become *res judicata*. Indeed, there is a fundamental difference between granting a State standing on the presumptive validity of its claim to have jurisdiction over a situation or a case and granting it standing on the basis of an argument – which was already ruled upon – that a particular State Party does not have jurisdiction.[23]

19. The plain language of the Pre-Trial Chamber's ruling is abundantly clear that the proceedings for which it considered the Article 19(3) Decision *res judicata* were the article 19(2)(c) jurisdiction challenge proceedings brought by Israel. This is apparent from the Chamber's references to "Israel's argument that … Palestine could not have delegated jurisdiction to the Court" and that the Chamber should "grant[…] a State standing on the basis of an argument that a particular State Party does not have jurisdiction". These are summarised versions of submissions made by Israel in its article 19(2)(c) jurisdiction challenge. Indeed, such submissions could not have been made by Israel in the article 58 proceedings as those are *ex parte* proceedings with only the Prosecution as a party. Nowhere did the Chamber hold that the Article 19(2)(c) challenge is "ancillary" to the Article 58 proceedings.

20. The Prosecution further mischaracterises the Pre-Trial Chamber's conclusion on *res judicata* as "essentially hypothetical and an *obiter dictum*",[24] rather than as a key part of the Chamber's *ratio*. As a corollary, the Prosecution then incorrectly argues that the Decision was not materially affected by any legal or factual error in its classification of the Article 19(3) Decision as *res judicata*. The Prosecution's contentions that the Pre-Trial Chamber held, by way of *obiter*, that the Article 19(3) Decision was *res judicata* "for the purpose of the Article 58 proceedings" does not derive in any respect from the Decision and is completely new. It

[22] Response, para. 53.
[23] Decision, para. 15.
[24] Response, para. 53.

amounts to a total recasting of the Pre-Trial Chamber's findings on *res judicata* which could not have been reasonably anticipated by Israel in its Appeal.

21. Granting Israel leave to reply to the Prosecution's submissions on *res judicata* is necessary for the proper determination of the Appeal in order to clearly explain why the Prosecution's rationalisation of the Decision's holding on *res judicata* is flawed in fact and law in a multiplicity of ways. This is an issue of critical importance for the adjudication of the Appeal not least because Israel seeks to ensure that the Pre-Trial Chamber's erroneous reliance on the principle of *res judicata* to bar Israel's jurisdictional challenge, without any substantive consideration on the merits, is not upheld by the Appeals Chamber. Israel should therefore be permitted to file a reply on this issue.

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

22. 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.[25] Israel did so.[26]

23. 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

[25] *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.

[26] 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.

of the Appeals and/or Israel's Suspension Request, the Prosecution stands ready to provide them."[27]

24. 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 further submissions concerning suspensive effect contained in the response to Israel's appeal brief, which in no way raised the issue of suspensive effect, must be rejected *in limine* as they are 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

25. In light of the foregoing submissions, Israel respectfully requests leave to reply to the two issues identified above. Such leave is necessary for the adjudication of the present appeal, concerns issues or information that could not reasonably have been anticipated, and / or is otherwise in the interests of justice bearing in mind the principle of equality of arms. A full presentation of the issues is particularly important given the broader significance of this Appeal in relation to the legitimacy of the Court's exercise of jurisdiction in the present Situation.

Respectfully submitted:

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

Dated 17 January 2025, at Jerusalem, Israel.

[27] Response, paras 11-12.