

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/18**  
Date: **22 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**

**Prosecution response to Israel's "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:** Office of the Prosecutor

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## I. Introduction

1. Israel's request for leave to reply to the Prosecution's response to its appeal of the "Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute" ("Request for Leave to Reply")<sup>1</sup> should be rejected. Neither of the issues that Israeli identifies is a new issue arising from the Prosecution's response that would merit a reply, let alone one that Israel could not reasonably have anticipated. Israel instead seeks to utilise a reply to supplement and elaborate on certain arguments that were already raised in its appeal. These are not grounds to justify a reply. Moreover, the proposed reply is not necessary for the Appeals Chamber's adjudication of the matters before it in the present appeal.

2. Israel's request to dismiss the Prosecution's submissions on suspensive effect *in limine* should also be rejected.

## II. Submissions

3. The Appeals Chamber has granted leave to reply in circumstances where the reply addresses new issues that could not reasonably have been anticipated, or that the Appeals Chamber considered otherwise necessary for the adjudication of the matter before it.<sup>2</sup> The ordering of a reply lies within the Appeals Chamber's discretion.<sup>3</sup> In line with these principles, an appellant should not be permitted to utilise a reply to strengthen arguments previously advanced,<sup>4</sup> or to repeat submissions already made in the appeal brief.<sup>5</sup>

4. Israel seeks leave to reply on the following two issues:

- a. The methodology required under the Vienna Convention on the Law of Treaties ("VCLT") for the purpose of interpreting article 19(2)(c) of the Statute ("First Issue");<sup>6</sup> and

<sup>1</sup> [ICC-01/18-408 OA2](#) ("Request for Leave to Reply").

<sup>2</sup> See e.g. [ICC-02/18-66](#) ("Venezuela Leave to Reply Decision"), paras. 10-11; [ICC-01/21-72](#) ("Philippines Leave to Reply Decision"), paras. 6-7; [ICC-02/17-206](#) ("Afghanistan Leave to Reply Decision"), paras. 7-8; [ICC-01/04-02/06-1994](#) ("Ntaganda July 2017 Leave to Reply Decision"), para. 9.

<sup>3</sup> [ICC-01/14-01/18-799](#) ("Yekatom Leave to Reply Decision"), para. 8; [Ntaganda July 2017 Leave to Reply Decision](#), para. 9; [ICC-01/04-02/06-1813](#) ("Ntaganda March 2017 Leave to Reply Decision"), para. 8.

<sup>4</sup> [ICC-01/04-02/12-296-tENG](#) ("Ngudjolo Leave to Reply Decision"), para. 7.

<sup>5</sup> [ICC-01/04-02/06-2488](#) ("Ntaganda March 2020 Leave to Reply Decision"), para. 8.

<sup>6</sup> [Request for Leave to Reply](#), paras. 1, 10.

b. The characterisation of the Pre-Trial Chamber’s ruling on *res judicata* (“Second Issue”).<sup>7</sup>

5. Neither of these issues is new, nor beyond what Israel could reasonably have anticipated.<sup>8</sup> Nor is the proposed reply necessary for the Appeals Chamber’s adjudication of the matter before it in this appeal.<sup>9</sup> The Request should be rejected for the reasons elaborated below.

**a. Israel could reasonably have anticipated the First Issue, which was not new**

6. Israel could reasonably have anticipated that the Prosecution would apply the VCLT methodology to the interpretation of the Statute.<sup>10</sup> Israel had argued that the Chamber had misinterpreted article 19(2) of the Statute in various aspects of the Decision,<sup>11</sup> and that its view of the correct interpretation of article 19(2)(c) in particular was supported by “the object and purpose of article 19(2).”<sup>12</sup> In this context, it was foreseeable that the Prosecution would consider whether these submissions were consistent with the VCLT.<sup>13</sup> Israel’s view whether the Prosecution was correct or incorrect in its response does not amount to an issue that could not reasonably have been anticipated<sup>14</sup>—to the contrary, Israel’s own view of these matters is already clear from its appeal brief,<sup>15</sup> and need not be set out again. For this same reason, a reply on the First Issue is not otherwise necessary for the adjudication of the matter on appeal, and will not assist the Appeals Chamber.

**b. Israel could reasonably have anticipated the Second Issue, which was not new**

7. Israel could reasonably have anticipated that the Prosecution would address the significance in the Decision of the Chamber’s reference to *res judicata*.<sup>16</sup> Israel had argued that, in its view, the Chamber had erred by relying on this doctrine to reject Israel’s claim of standing under article 19(2) of the Statute.<sup>17</sup> In this context, it was foreseeable that the Prosecution would consider whether the Chamber had reasoned in the manner claimed by

<sup>7</sup> [Request for Leave to Reply](#), paras. 1, 17.

<sup>8</sup> *Contra* [Request for Leave to Reply](#), para. 9.

<sup>9</sup> *Contra* [Request for Leave to Reply](#), para. 9. See [ICC-01/18-386 OA2](#) (“Article 19 Notice of Appeal”); [ICC-01/18-402 OA2](#) (“Article 19 Appeal”). See also [ICC-01/18-374](#) (“Decision”).

<sup>10</sup> *Contra* [Request for Leave to Reply](#), paras. 10-16.

<sup>11</sup> [Decision](#), paras. 12-13, 15-17. See e.g. [Article 19 Appeal](#), paras. 24-27, 34-39, 55-57, 60-61.

<sup>12</sup> [Article 19 Appeal](#), paras. 34-39. See also [Request for Leave to Reply](#), para. 12.

<sup>13</sup> See [ICC-01/18-406 OA2](#) (“Prosecution Response to Article 19 Appeal”), paras. 11-17, 21, 28-31, 37-41, 43, 46.

<sup>14</sup> *Contra* [Request for Leave to Reply](#), paras. 10-16.

<sup>15</sup> See e.g. [Article 19 Appeal](#), paras. 24-27, 34-39, 55-57, 60-61.

<sup>16</sup> *Contra* [Request for Leave to Reply](#), paras. 17-21.

<sup>17</sup> [Decision](#), para. 15. See e.g. [Article 19 Appeal](#), paras. 40-49.

Israel.<sup>18</sup> Israel’s view whether this constituted the correct interpretation of the Decision does not amount to an issue that could not reasonably have been anticipated<sup>19</sup>—and, again, Israel’s own view of this matter is already clear and need not be set out again.<sup>20</sup> For this same reason, a reply on the Second Issue is not otherwise necessary for the adjudication of the matter on appeal, and will not assist the Appeals Chamber.

**c. Israel’s request to dismiss the Prosecution’s submissions on suspensive effect should be rejected**

8. Israel submits that the “only proper vehicle” for the Prosecution to respond to Israel’s request for suspensive effect of the impugned Decision was a response to Israel’s notice of appeal—in which Israel made its request for suspensive effect<sup>21</sup>—and not the Prosecution’s response to Israel’s appeal brief.<sup>22</sup> As such, Israel requests that the Prosecution’s submissions on this matter are dismissed *in limine*.<sup>23</sup> This request should be rejected.

9. The Appeals Chamber’s general preference, as a matter of practice, that suspensive effect is raised in the notice of appeal and expeditiously decided does not entail that the Prosecution’s response in this case was out of time or procedurally improper.<sup>24</sup> The Court’s legal texts do not set a specific or shorter deadline for such responses. In any event, the Prosecution at all times acted expeditiously and in accordance with the Court’s procedure.<sup>25</sup> The Prosecution squarely opposed suspensive effect when it first requested the Appeals Chamber to dismiss Israel’s notice of appeal *in limine*,<sup>26</sup> and further explained that it nonetheless remained ready to provide further submissions if required.<sup>27</sup> Since the Appeals Chamber did not issue further instructions on the matter, and the appeal proceedings continued without resolution of the question, the Prosecution duly provided further submissions in response to Israel’s appeal brief.<sup>28</sup>

<sup>18</sup> See [Prosecution Response to Article 19 Appeal](#), paras. 50-54, 56-58.

<sup>19</sup> *Contra* [Request for Leave to Reply](#), paras. 17-21.

<sup>20</sup> See e.g. [Article 19 Appeal](#), paras. 40-49.

<sup>21</sup> [Article 19 Notice of Appeal](#), paras. 29-36.

<sup>22</sup> [Request for Leave to Reply](#), para. 24. See [Prosecution Response to Article 19 Appeal](#), paras. 59-65.

<sup>23</sup> [Request for Leave to Reply](#), para. 24.

<sup>24</sup> *Contra* [Request for Leave to Reply](#), para. 22. See e.g. [ICC-01/05-01/08-499 OA2](#) (“*Bemba* Suspensive Effect Decision”), paras. 9-10; [ICC-01/11-01/11-387 OA4](#) (“*Gaddafi and Al-Senussi* Suspensive Effect Decision”), para. 13.

<sup>25</sup> *Contra* [Request for Leave to Reply](#), para. 24.

<sup>26</sup> [ICC-01/18-392 OA2](#) (“Prosecution Request to Dismiss Article 19 Notice of Appeal”), paras. 1, 9-11.

<sup>27</sup> [Prosecution Request to Dismiss Article 19 Notice of Appeal](#), para. 10.

<sup>28</sup> See [Prosecution Response to Article 19 Appeal](#), paras. 59-65. See also [ICC-01/18-403 OA OA2](#) (“Extension of Time Decision”).

### III. Conclusion

10. For all the reasons above, Israel's Request for Leave to Reply should be dismissed in its entirety.



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**Karim A. A. Khan KC, Prosecutor**

Dated this 22<sup>nd</sup> day of January 2025

At The Hague, The Netherlands