

Annex

‘Provision of Information Concerning Previous
Employment with the Office of the Prosecutor’

Provision of Information Concerning Previous Employment with the Office of the Prosecutor

Background

1. On 5 December 2023, I was elected a Judge of the International Criminal Court by the Assembly of States Parties of the International Criminal Court.
2. On 8 March 2024 I took my oath as a Judge of the International Criminal Court. On 11 March 2024 I provided to the Presidency detailed information about my work and activities during my employment with the Office of the Prosecutor (OTP) between 2015-2024, in order to avoid any conflict of interest in assignments to cases and situations. The Presidency subsequently assigned me to serve in the Trial Division of the Court. My full time service at the Court commenced on 10 June 2024.
3. On 25 October 2024, the Presidency appointed me to serve as a Judge of Pre-Trial Chamber I ('The Chamber') in the Situation in the State of Palestine ('Palestine Situation').
4. On 12 November 2024, the State of Israel filed before the Chamber its 'Request for Information from Judge Beti Hohler Concerning Prior Activities with the Office of the Prosecutor.'¹ ('Request for Information').
5. With this memorandum, I hereby provide the information requested by the State of Israel for the case record.

Provision of Requested Information

6. I agree with the State of Israel that a judge has an obligation to provide clarifying information about his/her previous employment, activities and/or affiliations sought by a party or participant to the proceedings before him/her. Independence and impartiality of judges are the cornerstone of fair proceedings, and parties and participants have the right to receive the information they deem necessary in order to

¹ ICC-01/18-371.

form their own opinion about a judge's impartiality. I therefore consider it proper and necessary to expeditiously answer the questions raised by the State of Israel.

7. I provide the below information to the best of my recollection. Upon resignation I did not keep any information or correspondence concerning my work with the OTP.

Specific questions

8. The State of Israel has formulated the following five specific questions in its Request for Information: *"a. whether Judge Hohler worked directly on the Palestine situation; b. whether Judge Hohler participated in any communications or consultations, in a leadership role or otherwise, that included discussion of confidential information, evidence, strategy or legal positions in the Palestine situation; c. whether Judge Hohler otherwise accessed or became aware of confidential information, evidence, strategy or legal positions concerning the Palestine situation, including but not limited to her role as a member of the ICC Appeals Board; d. whether Judge Hohler was involved in formulating the Office of the Prosecutor's interpretation of article 18 of the ICC Statute, in particular as advanced in litigation in The Philippines situation, or was involved in developing legal interpretations within the OTP concerning the Court's jurisdictional standards as relevant to the Palestine situation; e. whether there was a vetting procedure carried out by the Presidency as to the scope of her previous role in the OTP prior to her assignment to the Palestine situation."*

9. I will address the five questions in turn.

Question (a): Whether Judge Hohler worked directly on the Palestine situation.

10. I was never assigned any duties with regard to the Palestine Situation whilst I was a staff member of the OTP. I have never worked, directly or indirectly, on this situation whilst I was a staff member of the OTP.

Question (b): Whether Judge Hohler participated in any communications or consultations, in a leadership role or otherwise, that included discussion of confidential information, evidence, strategy or legal positions in the Palestine situation.

11. I did not participate in any communications or consultations that included discussions of confidential information, evidence, strategy or legal positions related to the Palestine Situation whilst I was a staff member of the OTP. In line with my staffing level (Associate Trial Lawyer, Trial Lawyer), I did not participate in any high-level meetings where the situation would have been discussed.

Question (c): Whether Judge Hohler otherwise accessed or became aware of confidential information, evidence, strategy or legal positions concerning the Palestine situation, including but not limited to her role as a member of the ICC Appeals Board.

12. I did not access or was otherwise made aware of confidential information, evidence, strategy or legal positions of the OTP concerning the Palestine Situation during my employment with the OTP.

13. I did not participate in any high level meetings during which activities or positions of the OTP in the Palestine Situation were discussed. The State of Israel refers to submissions made by the OTP about the role and responsibilities of Senior Trial Lawyers. I wish to clarify that I never held the position of a Senior Trial Lawyer and did not attend Prosecution Division's senior staff meetings, referenced in the 2011 OTP submission, cited by the State of Israel with regard to responsibilities of Senior Trial Lawyers.²

14. I have never served in the immediate office of the Prosecutor or the Deputy Prosecutor(s) or any other unit or section of the OTP with responsibilities across multiple/all situations and cases (such as, for example, the Appeals and Prosecution Legal Coordination Section or Information, Knowledge and Evidence Management Section).

² Request for Information, para. 20.

15. I was not part of any OTP internal organ/constellation entrusted with making strategic decisions across situations and cases at any time during my employment with the OTP which would have made me privy to discussions about the Palestine Situation. My involvement in evidentiary, factual, and strategic issues was limited to the specific situations and cases to which I was assigned.
16. As a member of the ICC Appeals Board, I dealt with administrative legal matters raised by ICC staff in the course of internal administrative proceedings. These included appeals regarding contract extension, benefit entitlements, authorisations for working from home (during the Covid-19 pandemic) and assessment of qualifications for salary determination. I was nominated to the Appeals Board by the Staff Union Council and appointed by the Registrar. I was one of 15 members of the Appeals Board, and sat on an average of two panels per year (in different compositions) in the period 2019-2023.
17. In my role as a member of the ICC Appeals Board, I was never exposed and did not consider any substantial or confidential issues related to the evidence, law or strategy pertaining to any case or situation before the ICC. This type of information is not presented in the internal staff proceedings that deal purely with administrative issues, not least because Appeals Board panels are composed of staff from different organs of the Court (i.e. Chambers, OTP, Presidency and Registry). In the course of preparing these answers, I requested information from the Appeals Board about the affiliation of staff members whose appeals I was assigned to and was informed that two appeals were brought by staff members of the OTP and the rest by staff members of the Registry. This accords with my own recollection.
18. In a similar vein, I note that as member of the Staff Union Council, I also did not come into contact with any case or situation specific information in the course of my activities.
19. With regard to interactions with staff members within the OTP, I wish to additionally clarify that as a staff member of the OTP I would have interacted with OTP staff members that were assigned to other teams, including the Palestine

Situation. As a staff member of the Court I would have also interacted with staff members of the Registry, Defence Teams, Chambers. During any such interactions, however, I never discussed confidential information, evidence, strategy or legal positions regarding the Palestine Situation.

Question (d): Whether Judge Hohler was involved in formulating the Office of the Prosecutor's interpretation of article 18 of the ICC Statute, in particular as advanced in litigation in The Philippines situation, or was involved in developing legal interpretations within the OTP concerning the Court's jurisdictional standards as relevant to the Palestine situation?

20. I was not involved, in any capacity whatsoever, in developing legal interpretations within the OTP concerning the Court's jurisdictional standards in the Palestine Situation. Moreover, I was not involved in any internal OTP discussions developing interpretations of the Rome Statute in relation to the Palestine Situation.

21. With regard to my assignment to the Situation in the Republic of the Philippines ('Philippines Situation'): I was assigned to this situation in 2019-2022. Initially my involvement was sporadic and I was providing legal advice on specific activities during the preliminary examination. After the opening of the investigation in 2021, I was the longest serving Trial Lawyer on the team assigned to the Philippines Situation, after the Head of Unified Team. Hence the (informal) title 'lead lawyer'. I provided legal advice to the Head of Unified Team, drafted and reviewed filings and analysed information submitted or collected. In addition to team-wide meetings, I participated in the meetings of the Unified Team Leadership, composed of the Head of the Unified Team, Senior Investigator, Lead Analyst, International Cooperation Adviser and myself. The discussions during these meetings only involved operational and legal matters related specifically to the Philippines Situation.

22. I participated in the review of the Article 18(1) Notification Letter for the Philippines Situation in October 2021, drafted by other members of the Team and the Head of Unified Team. I was not in any way involved in the drafting of the Article 18(1)

Notification Letter in the Palestine Situation or any other correspondence in the latter situation.

23. I do not recall any consultations taking place between the Heads of Unified Teams for Palestine and Philippines situations whilst I was a member of the Philippines Unified Team. If any such consultations did take place, I was not involved in them.

24. My primary area of responsibility during my assignment to the Philippines Situation after the opening of the investigation was the analysis of the material submitted by the Philippines in support of its deferral request. I note that immediately after the Philippines filed its request for deferral, the OTP temporarily suspended its investigative activities while assessing the scope and effect of the deferral request, and requested additional information from the Philippines under Rule 53 of the Rules of Procedure and Evidence.³ It was the analysis of this information that was my preoccupation during the relevant time. The analysis was situation-specific and entailed reviewing the information about investigations, court proceedings and other domestic procedures in the Philippines. The key issue in the subsequent litigation before the respective Pre-Trial Chamber pursuant to Article 18 of the Statute was whether the information presented by the Philippines about the existence of domestic proceedings would justify a deferral of the Court's investigation pursuant to article 18(2) of the Statute.⁴

25. I participated in the coordination, drafting and the review of the 'Request for resumption of the investigation in the Situation in the Philippines' (ICC-01/21-46), in particular the part setting out the analysis of the domestic proceedings in the Philippines. The primary responsibility for developing the submissions on the applicable law in the context of the Request for resumption of the investigation lay with the OTP's Appeals and Prosecution Legal Coordination Section (APLCS) as the section responsible for consistent application of the law across cases and

³ See Notification of the Republic of the Philippines' deferral request under article 18(2), 18 November 2021, ICC-01/21-14.

⁴ See Public Redacted Version of "Authorisation pursuant to article 18(2) of the Statute to resume the investigation", ICC-01/21-56-Red, 26 January 2023, para. 28 et seq.

situations in the OTP. The legal interpretations advanced were coordinated, to the best of my recollection, at the level of the Deputy Prosecutor. I was not actively involved in subsequent appellate litigation in the Situation in the Philippines. *First*, because, in accordance with the distribution of responsibilities in the OTP, appellate proceedings on behalf of the OTP are conducted by the APLCS, and *second*, because I had by that time assumed responsibilities in another Unified Team – as Acting Head of a Unified Team in the Situation in Uganda (from July 2022 onward).

Question (e): Whether there was a vetting procedure carried out by the Presidency as to the scope of [Judge Hohler's] previous role in the OTP prior to her assignment to the Palestine situation.

26. This question concerns actions of the Presidency and should therefore be addressed to the Presidency. I can, however, confirm that immediately prior to appointing me to the Chamber, the Presidency inquired whether I worked on Palestine Situation in my previous capacity as a staff member of the OTP. I informed the Presidency that I did not.

Concluding Remarks

27. I firmly believe that any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw in order to ensure public confidence in the Court. I take the need to safeguard the integrity of proceedings of the Court very seriously and I am conscious of my positive duty under Rule 35 of the Rules of Procedure and Evidence, and the ICC Code of Judicial Ethics, to request to be excused in circumstances, where I believe my impartiality might reasonably be doubted on any ground. I have undertaken this responsibility and have carefully reflected on whether my prior work might reasonably raise such a doubt.

28. It is widely accepted that a high threshold must be satisfied in order to rebut the presumption of impartiality attached to judicial office. I accept that a judge who has previously served as an advocate before the same court will be subject to particular scrutiny. Even in such circumstances, however, impartiality is approached from the

perspective of the fair-minded and informed observer, founded firmly on facts. In this regard, I appreciate the opportunity to provide the factual information requested about my prior employment with the OTP. I also invite the Office of the Prosecutor, should it identify any relevant information in its possession, to communicate it into the case record.



Judge Beti Hohler

The Hague, 19 November 2024