

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/18**
Date: **2 December 2024**

PRE-TRIAL CHAMBER I

Before: Judge Nicolas Guillou, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Beti Hohler

SITUATION IN THE STATE OF PALESTINE

Public

Prosecution Response to Israel's "Request for leave to appeal 'Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice'"

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to:

The Office of the Prosecutor

Mr Karim A. A. Khan KC

Mr Andrew Cayley KC

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Office of the Attorney General of Israel

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. On 21 November 2024, Pre-Trial Chamber I dismissed Israel’s request for an order to the Prosecution to give an article 18(1) notice (“Decision”).¹ It also held that its conclusions did not impact on the ability of States, including Israel, to raise issues of admissibility for cases brought by the Prosecution under article 19(2)(b).² On the same day, the Chamber issued three arrest warrants in the *Situation in the State of Palestine*, two of them against Israeli nationals. On 27 November 2024, Israel filed a direct appeal before the Appeals Chamber under article 82(1)(a) of the Statute against the Decision (“Appeal”).³ Simultaneously, “out of an abundance of caution”,⁴ Israel also filed an application for leave to appeal before Pre-Trial Chamber I under article 82(1)(d) of the Statute against the same Decision (“Application for Leave”).⁵ On 29 November 2024, the Prosecution requested the Appeals Chamber to dismiss the Appeal *in limine* because it is inadmissible under article 82(1)(a).⁶

2. The Prosecution respectfully submits that Israel’s Application for Leave should be dismissed because it fails to meet the threshold conditions for granting leave to appeal set forth in article 82(1)(d) of the Statute. None of the three purported issues identified in the Application arises from the Decision, nor do they affect the fair and expeditious conduct of the proceedings, nor would the Appeals Chamber’s intervention materially advance the proceedings. Instead, Israel simply disagrees with the Chamber’s conclusion that the Prosecution did not need to issue a new notice under article 18(1) of the Statute and the Chamber’s assessment of the relevant factors and jurisprudence, and misunderstands the Decision. This does not satisfy the threshold criteria of article 82(1)(d).

II. SUBMISSIONS

3. Article 82(1)(d) requires (i) that the decision involves an issue that would significantly affect both the ‘fair’ and ‘expeditious’ conduct of the proceedings *or* the outcome of the trial; and (ii) that, in the view of the Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.⁷ These requirements are cumulative

¹ [ICC-01/18-375](#) (“Decision”); *see also* [ICC-01/18-355-SECRET-Exp-Anxl-Corr](#) (“Article 18(1) Request”). The Article 18(1) Request has been re-classified to Public.

² [Decision](#), para. 16.

³ [ICC-01/18-385](#) (“Appeal”). In its Appeal, Israel requests that the Appeals Chamber suspend the Pre-Trial Chamber’s arrest warrants against Benjamin Netanyahu and Yoav Gallant pursuant to article 82(3) pending the resolution of the Appeal: [Appeal](#), paras. 30-37.

⁴ [Appeal](#), para. 27.

⁵ [ICC-01/18-387](#) (“Application for Leave” or “Application”).

⁶ [ICC-01/18-391 OA](#).

⁷ [ICC-01/22-111](#), para. 23 (“[Mongolia Decision](#)”); ICC-01/04-168 (“[DRC Extraordinary Review AJ](#)”), paras. 7-19; [ICC-01/05-01/08-75](#), paras. 5-20.

and, therefore, failure to demonstrate one makes it unnecessary for the Chamber to address the others.⁸

4. Chambers have emphasised the “limited nature of the remedy foreseen by article 82(1)(d) of the Statute”, and highlighted that “[i]n the system of the Statute, interlocutory appeals are meant to be admissible only under limited and very specific circumstances”.⁹

5. Furthermore, the Appeals Chamber has held that an “issue” is “an identifiable subject or topic requiring a decision for its resolution”, and the resolution of that issue must be “essential for the determination of matters arising under the judicial cause under examination”.¹⁰ The issue must “aris[e] from the decision”, and not be constituted by “a question over which there is a mere disagreement or conflicting opinion”.¹¹ In addition, “[l]eave to appeal cannot be granted if the party seeking to appeal, instead of identifying appealable issues, seeks leave to litigate *ex novo* before the Appeals Chamber the entire decision”.¹² Moreover, the mere fact that a party disagrees with the interpretation of the law is not, by itself, sufficient to warrant an appeal under article 82(1)(d).¹³ Likewise, “[m]aterially advancing the proceedings does not simply entail having the Appeals Chamber provide its interpretation of the relevant legal provision. If that were the case, all issues would automatically trigger an interlocutory appeal”.¹⁴

6. Israel’s Application for Leave identifies three purported issues.¹⁵ For the reasons provided below, none of them satisfies the threshold for granting leave to appeal under article 82(1)(d) of the Statute. The First and Second Issues are mere disagreements with the Chamber’s conclusion not to order the Prosecution to issue a new article 18(1) notice, and its reasoning, and the Third Issue misunderstands the Decision. Moreover, none of the three purported issues significantly affects the fair and expeditious conduct of the proceedings, nor would their resolution by the Appeals Chamber materially advance the proceedings.

⁸ [Mongolia Decision](#), para. 23; [ICC-01/14-10/18-560](#), para. 55.

⁹ [Mongolia Decision](#), para. 23; [ICC-01/12-01/18-342-Red-tENG](#), para. 25.

¹⁰ See e.g. [DRC Extraordinary Review AJ](#), para. 9.

¹¹ See e.g. ICC-01/04-01/10-487 (“[Mbarushimana Decision](#)”), para. 4.

¹² [ICC-02/11-01/11-307](#), para. 70; [ICC-01/04-02/06-604](#), para. 17 (“the Second Issue appears to merely challenge the entirety of the reasoning in the Impugned Decision and to seek a de novo review of the matter by the Appeals Chamber”).

¹³ [ICC-01/14-01/18-2665](#), para. 7.

¹⁴ [ICC-02/05-01/20-254](#), para. 7.

¹⁵ [Application for Leave](#), paras. 21-28.

A. Israel does not discharge its burden under article 82(1)(d)

7. At the outset, the Prosecution notes that Israel does not discharge its burden to demonstrate that *each* of the purported issues affects *each* of the article 82(1)(d) conditions that it has chosen to address.¹⁶

8. Israel argues that “[p]roceedings undertaken by the ICC without complying with the procedures of complementarity would be unlawful” and that “[u]nlawful proceedings could never be considered fair or expeditious”.¹⁷ Israel does not argue that the issues impact “the outcome of the trial”. With respect to the criterion that resolution by the Appeals Chamber of the issues would materially advance the proceedings, Israel argues that “[t]he earliest possible resolution of these issues is vital to the protection of the integrity of these proceedings and the Court’s processes”.¹⁸ It also refers to the “far-reaching, unpredictable and irreversible” consequences of the arrest warrants and, its view of “the reputational damage to the Court” which might result from the issue of arrest warrants for Mr Netanyahu and Mr Gallant if later established “to have been illegally issued”.¹⁹ Yet, Israel does not establish the necessary link between these general submissions and each of the specific issues proposed for appeal—it thus fails to address the criteria under article 82(1)(d) with the requisite specificity. On this basis alone, Israel’s Application should be dismissed.

9. In any event and as developed below, even if the Chamber decides to assess Israel’s arguments, the Application equally fails. *First*, the First and Second Issues are mere disagreements with the Chamber’s conclusion and reasoning, and the Third Issue misunderstands the Decision. *Second*, Israel has not demonstrated how the three purported issues would significantly affect the fair and expeditious conduct of the proceedings nor how the proceedings would be materially advanced by the Appeals Chamber’s resolution of any of the purported issues at this stage.

B. The three purported issues are mere disagreements and/or misrepresentations

10. The Application should be denied as it does not establish any appealable “issue” which meets the requirements of article 82(1)(d). As noted above, the issues must “arise from the decision”, and must amount to more than “a question over which there is a mere disagreement or conflicting opinion”.²⁰ It thus follows that a party cannot seek leave to appeal a decision in

¹⁶ [ICC-01/05-01/08-3396](#), para. 10.

¹⁷ [Application for Leave](#), para. 30.

¹⁸ [Application for Leave](#), para. 33.

¹⁹ [Application for Leave](#), para. 33.

²⁰ See e.g. [Mbarushimana Decision](#), para. 4.

its generality²¹ nor simply challenge the Chamber's analysis.²² Yet, in effect, this is what Israel does in the Application, whereby it seeks to re-litigate the Chamber's general conclusions before the Appeal Chamber.

- (i) *First Issue: whether the Pre-Trial Chamber erred in finding that no new situation had arisen, and that no substantial change had occurred in the parameters of the investigation into the situation, following 7 October 2023*

11. Israel argues that the Chamber "erred in concluding that there had been 'no substantial change' in 'the parameters' of the Prosecution's investigation".²³ It cites the factors considered by the Chamber ("type of armed conflicts, geography, and parties to the conflict") and argues that the Chamber "misapplied these criteria, and failed to take into consideration other relevant criteria, in reaching this conclusion".²⁴ It also contends that "the Pre-Trial Chamber erroneously relied on a decision rendered by the Appeals Chamber in the *Afghanistan* situation"²⁵ and "hardly addressed at all the relevant Appeals Chamber jurisprudence".²⁶

12. It is apparent from the above that the First Issue is a mere disagreement with the Chamber's factual assessment of the relevant criteria, the jurisprudence it relied upon and its conclusion. Israel does not articulate the nature of any challenge to the Chamber's approach, nor does it identify any factor or criterion that the Chamber failed to consider. In essence, it seeks to re-litigate the same arguments before the Appeals Chamber. Yet, "[a] mere reiteration of prior arguments and an expression of disagreement with the analysis and conclusion made by the Chamber are not sufficient to identify an 'issue'."²⁷ As such, the First Issue is not an appealable issue within the terms of article 82(1)(d). On this basis, the First Issue should be dismissed.

- (ii) *Second Issue: Whether the Pre-Trial Chamber erred in finding that any other approach "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"*

13. In relation to the Second Issue, Israel disagrees with the Chamber's characterisation of Israel's position as "effectively mean[ing] that the Prosecution's investigation in every situation would be limited to the incidents and crimes addressed during the preliminary

²¹ [ICC-01/05-01/13-877](#), para. 7.

²² [ICC-02/11-01/11-350](#), para. 40; [ICC-01/14-01/18-2612](#), para. 10; [ICC-01/14-01/18-2519](#), para. 10.

²³ [Application for Leave](#), para. 21.

²⁴ [Application for Leave](#), para. 21.

²⁵ [Application for Leave](#), para. 21.

²⁶ [Application for Leave](#), para. 22.

²⁷ [ICC-02/11-01/11-350](#), para. 40; [ICC-01/14-01/18-2612](#), para. 10; [ICC-01/14-01/18-2519](#), para. 10.

examination and described in the article 18 notification”.²⁸ The Second Issue is thus no more than a disagreement with the Chamber’s (accurate) observation of the unworkable consequences of Israel’s position. This is not an issue that requires judicial determination within the terms of article 82(1)(d). Nor does Israel explain the nature of error that it contends to have arisen in this respect, or how it materially impacts the outcome of the Decision. On this basis, the Second Issue should be dismissed.

(iii) *Third Issue: Whether the Pre-Trial Chamber erred in law in asserting that any investigation into the events following 7 October 2023 had “substantially advanced” prior to that date*

14. In the Third Issue, Israel partially quotes the Decision and takes issue with the Chamber’s remark that allowing Israel’s Article 18(1) Request at this point would “go[] ‘against the very object and purpose of the statutory complementarity framework’ because the purpose of article 18(2) challenges 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’”.²⁹ Israel argues that the investigations had not substantially advanced by 7 October 2023,³⁰ and then re-argues that the parameters of the situation had changed since then.³¹

15. Yet, Israel appears to misunderstand, or to mischaracterise, the Chamber’s non-dispositive remark with respect to the tardiness of Israel’s Article 18(1) Request.³² In the previous sentence to that (partially) quoted by Israel in the Application, the Chamber had observed that:

In any case, filing of the Request at this point of 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.³³

16. Since Israel had filed its Article 18(1) Request on 20 September 2024—that is, almost four months after the Prosecution had requested arrest warrants in the situation—it was clearly accurate to observe that “the investigation ha[d] substantially advanced” by that time. In any

²⁸ [Decision](#), para. 15.

²⁹ [Application for Leave](#), para. 24, citing [Decision](#), para. 15.

³⁰ [Application for Leave](#), para. 25.

³¹ [Application for Leave](#), para. 26.

³² The jurisprudence indicates that there is not an appealable issue when it is based on a misunderstanding of the decision: *see e.g.* [ICC-01/09-02/11-406](#), para. 46; [ICC-02/11-01/11-350](#), paras. 41-44; [ICC-01/14-01/18-2612](#), para. 10; [ICC-01/14-01/18-2519](#), para. 7; [ICC-01/14-01/21-672](#), paras. 24-27.

³³ [Decision](#), para. 14.

event, the Chamber's remark regarding the tardiness of Israel's Article 18(1) Request was not dispositive, and is not an essential issue requiring judicial determination for the purpose of article 82(1)(d). On this basis, the Third Issue should be dismissed.

C. None of the purported issues significantly affects the fair and expeditious conduct of the proceedings

17. As noted, Israel generally asserts that the purported issues affect the fair and expeditious conduct of the proceedings because, in its view, the Court's complementarity provisions have not been respected and, as a result, the arrest warrants have been unlawfully issued.³⁴ However, these arguments only underscore Israel's mere disagreement with the Chamber's conclusion that the complementarity provisions have *not* been infringed; they do not demonstrate how each of the purported issues significantly affects the fair and expeditious conduct of the proceedings. Rather, Israel improperly seeks to re-litigate the same issues before the Appeals Chamber.

18. With respect to the First Issue, as noted, Israel does not challenge the Chamber's approach nor does it identify a criterion that the Chamber failed to consider. There is none. The Chamber considered the relevant criteria and jurisprudence, and concluded that the events of 7 October 2023 and actions thereafter did not fall outside the parameters of the *Situation in the State of Palestine*. The Chamber's fact-specific assessment was well-reasoned and correct. That Israel disagrees with the Chamber's conclusion does not entail that it significantly affects the fair conduct of the proceedings.

19. The Prosecution recalls that Israel was at all material times aware of the Prosecution's investigation into these events, and of the Prosecution's position that the events fell within the parameters of the ongoing investigation shortly after 7 October.³⁵ At no point did Israel raise such a concern until the filing of the Article 18(1) Request, nor has it made any indication of any relevant domestic proceedings which would suffice for the purpose either of article 18(2) or indeed article 19(2).

20. With respect to the Second Issue and Third Issue, as noted above, the Chamber's approach in these respects was not determinative of its conclusion. In these circumstances, Israel fails to show how these purported issues would significantly affect the fair and expeditious conduct of the proceedings.

³⁴ [Application for Leave](#), paras. 30-31.

³⁵ [Article 18\(1\) Request](#), para. 54; *see also* [Statement of ICC Prosecutor Karim A. A. Khan KC from Cairo on the situation in the State of Palestine and Israel](#), 30 October 2023; [Statement of ICC Prosecutor Karim A. A. Khan KC from Ramallah on the situation in the State of Palestine and Israel](#), 6 December 2023.

21. Finally, and importantly, the Prosecution notes that Israel and the suspects are now entitled to challenge the admissibility of the cases under article 19(2) of the Statute, and thus have a procedural avenue whereby they can raise their complementarity concerns should they choose to do so. By its nature, article 18(2) is a preliminary procedure, and remains without prejudice to a State's subsequent ability to exercise its jurisdiction genuinely over allegations of article 5 crimes arising in the context of a concrete case.

D. Resolution of the purported issues by the Appeals Chamber would not materially advance the proceedings

22. Finally, Israel's general argument does not demonstrate how resolution of any of the purported issues by the Appeals Chamber would materially advance the proceedings.³⁶ Instead Israel, and the suspects, retain a procedural avenue to raise any complementarity objections.

23. In the Decision, the Chamber specifically held that "[t]he Chamber's conclusions do not impact, in any way, on the ability of States, including Israel, to raise issues of admissibility for cases brought by the Prosecution in the context of the investigation. Indeed, article 19(2)(b) of the Statute allows 'a State which has jurisdiction over a case' to challenge the admissibility of such a case, 'on the ground that it is investigating or prosecuting or has investigated or prosecuted' the case."³⁷

24. Given that on 21 November 2024, the Chamber issued arrest warrants against Benjamin Netanyahu and Yoav Gallant, in the view of the Chamber, Israel could *now* challenge the admissibility of those cases. Likewise, the two persons against whom arrest warrants have been issued can also challenge the admissibility of the cases under article 19(2)(a) of the Statute.

25. Accordingly, immediate resolution by the Appeals Chamber of the purported issues, at this stage, would not materially advance the proceedings.

III. RELIEF REQUESTED

26. For these reasons, Israel's Application for Leave should be dismissed.



Karim A.A. Khan KC, Prosecutor

Dated this 2nd day of December 2024
At The Hague, The Netherlands

³⁶ *Contra* [Application for Leave](#), para. 33.

³⁷ [Decision](#), para. 16.