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THE APPEALS CHAMBER

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

SITUATION IN THE STATE OF PALESTINE

Public with Public Annex A

Appeal of "Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice" (ICC-01/18-375)

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. The issue arising in this appeal is the degree of change in the scope of a Prosecution investigation, or in the circumstances of a situation, that triggers anew the Prosecution's obligation, under article 18 of the Statute and rule 52(1) of the Rules, to notify a State of "**the acts that may constitute crimes**" that it intends to investigate.[1] This issue is of central importance to the operation and proper interpretation of the principle of complementarity, and ensuring that States – including States that are not party to the Rome Statute and object to its jurisdiction – have a reasonable and fair opportunity to demonstrate that they are exercising their own jurisdiction to the exclusion of that of the ICC.

2. In the Decision on Israel's request for an order to the Prosecution to give an Article 18(1) Notice, the Pre-Trial Chamber ("PTC") tacitly accepted that a Prosecution investigation could change to such a degree that a new article 18(1) notification is required, but found that this threshold had not been met because "**no substantial change** has occurred to the parameters of the investigation" and, thus, accordingly, there was "no obligation for the Prosecution to provide a new notification."[2]

3. Israel respectfully submits that this conclusion was erroneous. The purpose of article 18(1) is to give States a fair and reasonable opportunity to know the scope of the Prosecution investigation that they are expected to "sufficiently mirror."[3] This requires, as the Appeals Chamber has held, an article 18(1) notification that is "sufficiently specific,"[4] not only in relation to the intended investigation by the Prosecution at the time of the notice, but also as it relates to the investigation as it may subsequently be modified or expanded. The appropriate threshold of modification for triggering such a new notification, as established by recent Appeals Chamber caselaw, is whether the "defining parameters"[5] of the investigation have changed from what was communicated to the State in the previous article 18(1) notice. Those parameters did change in this situation following the events of the morning of 7 October 2023, including as reflected in: the crime types and "patterns and forms of criminality";[6] the "groups

[1] This filing is without prejudice to Israel's position regarding the Court's lack of jurisdiction in respect to the above-captioned Situation, or to Israel's status as a State not Party to the Rome Statute.
[2] Decision, para. 15.
[3] *Venezuela* AD, paras 10, 182, 281, 348; *Philippines* AD, para. 106.
[4] *Venezuela* AD, paras 3, 110; *Philippines* AD, para. 107.
[5] *Venezuela* AD, paras 110, 182, 220; *Philippines* AD, para. 106.
[6] *Venezuela* AD, paras 4, 8, 247, 257, 276, *Philippines* AD, para. 106.

or categories"[7] of alleged perpetrators, including their hierarchical "level";[8] the underlying context of the criminality suspected, including the purported nature or existence of a "State policy" to commit the alleged criminality; and two new State referrals that expressly call for the investigation of new forms of alleged criminality and referring a new and distinct situation of crisis. As a result of these changes, the 2021 article 18(1) notice was no longer "representative"[9] of the alleged criminality being investigated by the Prosecution, including as reflected in the two arrest warrants that it has sought, and that were issued by the PTC.

4. The errors in the Decision are reflected in three grounds of appeal. First, the PTC erred in law in presupposing that Israel's challenge was untimely, despite nonetheless deciding the request, whereas the legal and factual basis of the request arose no earlier than 7 October 2023. The Prosecution's article 18(1) obligation is not static: it arises anew if, by virtue of a change in the investigation's defining parameters, the prior notice no longer "furnish[es] the relevant States of information specific enough to give effect to their right under article 18(2) of the Statute to seek the deferral."[10]

5. Second, the PTC erred in law and in fact in concluding that there has been no substantial change in the parameters of the Prosecution's investigation. This ground comprises three sub-errors: first, the PTC erred in law in asserting that the "defining parameters" standard entails limiting the OTP's investigations to the "incidents and crimes addressed during the preliminary examination and described in the article 18 notification"; second, the PTC erred in law by conflating the standards applicable to the scope of investigations judicially authorized under article 15, with the scope of adequate notice required under article 18, which serves a fundamentally different purpose; third, the PTC failed to provide any reasoning at all, otherwise ignored, or failed to properly appreciate,[11] the factors and circumstances showing that the defining parameters of the Prosecution investigation have changed.

6. Third, the PTC erred in law by providing no reasons for rejecting Israel's argument that a new situation had arisen following two new State referrals, submitted to the Prosecutor by a total of seven states after the events of 7 October 2023, and in failing to find that such a new

[7] *Venezuela* AD, para. 246; *Philippines* AD, para. 109.
[8] *Venezuela* AD, paras 348-349.
[9] *Venezuela* PTD, para. 77.
[10] *Venezuela* PTD, para. 78 (approved by *Venezuela* AD, para. 114).
[11] *Katanga* Interim Release Appeal para. 25 "The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into accounts facts extraneous"; *Gbagbo* Detention Review Detention, para. 16.

situation had arisen following these referrals.

7. In light of the materiality of these errors the appropriate remedy is to **reverse** the Decision; **declare** the arrest warrants issued by the PTC null and void; and **remand** the matter for further deliberations or, alternatively, **require** the OTP to provide an adequate article 18(1) notice.

II. PROCEDURAL HISTORY AND RELEVANT EVENTS

8. On the morning of 7 October 2023, thousands of Hamas and other militants invaded Israeli territory and killed more than a thousand men, women and children in cold blood; committed widespread rape, sexual violence, torture, and other inhumane acts inside Israel; took 251 hostages, committing murder, torture, rape and other forms of sexual violence against them inside Gaza; continue to hold hostages to this day, of whom 100 remain unaccounted for; and have continued in the course of the hostilities to direct attacks against civilians inside Israel. Since that time, Israel has been fighting a war not of its own choosing to ensure that Hamas and other armed groups can never again launch such an attack, and that they are no longer able to subjugate, terrorize and use the population of Gaza as human shields for future and ongoing attacks targeting Israeli civilians, and the very existence of Israel.

9. Following these events, the Prosecutor announced to the media that his Office intended to investigate "these types of crimes," as well as Israel's conduct in the intense and sustained hostitlites following these attacks, including issues in relation to humanitarian access and the provision of relief supplies to Gaza.[12] Despite numerous statements to the media concerning the scope of his intended investigations, the Prosecution never provided Israel with any article 18(1) notification setting out the intended scope of its post-7 October investigations.

10. On 17 November 2023, South Africa, the People's Republic of Bangladesh, the Plurinational State Bolivia, the Union of Comoros and the Republic Djibouti sent a "State Party referral in accordance with Article 14 of the Rome Statute of the International Criminal Court."[13] On the same day the Prosecutor issued a statement asserting that his previous investigation, which had "commenced on 3 March 2021", was "ongoing and extends to the escalation of hostilities and violence since the attacks that took place on 7 October 2003."[14]

11. On 18 January 2024, Mexico and Chile wrote to the Prosecutor, "under the provisions of

[12] OTP Statement 30 October 2024.
[13] South Africa *et al*. Referral, p. 3.
[14] Statement of the OTP Statement 17 November 2023.

Article 14, paragraph 1 of the Rome Statute," to "refer for your investigation regarding the situation in the State of Palestine."[15] This referral, unlike any previous referral, specifically encompasses "the attack of 7 October 2023 conducted by Hamas militants."[16]

12. On 1 May 2024, following a period of intensive engagement by Israel with the Office of the Prosecutor – which included requests by Israel for information concerning the scope of the Prosecution's investigations – Israel wrote to the Prosecutor as follows:

> in accordance with the principle of complementarity by which the Court is bound, I write on behalf of the State of Israel to request that the Office of the Prosecutor defer any investigation it may be conducting in relation to any alleged criminal acts attributed to Israeli nationals or others within Israel's jurisdiction, in favour of Israel's processes for review, examination, investigation and proceedings under its national legal system, as further explained below.[17]

The letter invites the Prosecutor to bring to Israel's attention any alleged crimes attributed to Israeli nationals or others within its jurisdiction so that "relevant Israeli authorities can examine and investigate those allegations with a view to ensuring accountability in line with the applicable law."[18]

13. Instead of providing Israel such a notification in respect of its post-7 October investigations, the Prosecution responded on 7 May 2024 by referring to its article 18(1) notification from three years before, asserting: "Having expressly declined to make an application for deferral of the investigation within the prescribed time limit, Israel has no standing now, under the Statute, to make such an application."[19] This earlier notification, dated 9 March 2021, makes no reference to any ongoing armed conflict, to any alleged crimes against humanity, to any State policy to commit any crimes of violence against civilians, or to any of the core allegations or circumstances that define the scope of the Prosecution's post-7 October 2023 investigations as reflected in the warrants that it has sought, and which were granted, for the arrest of Israel's Prime Minister and its former Minister of Defence.

14. On 23 September 2024, Israel filed its Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice.[20] The Prosecution responded on 27 September 2024.[21]

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[15] Chile and Mexico Referral.
[16] *Id.*, p. 2.
[17] Letter from Israel to OTP, 1 May 2024, p. 2.
[18] *Id.*
[19] Letter from OTP to Israel, 7 May 2024. *See* Article 18(1) Notification.
[20] Article 18 Request.
[21] OTP Response to Abridged Request, 27 September 2024.

III. SUBMISSIONS

A. First Ground of Appeal: The PTC erred in law in asserting that the timing of Israel's request was contrary to the "very object and purpose of the complementarity framework"

15. The PTC asserted that "[t]he purpose of Article 18(2) proceedings 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." Taking the start of the relevant investigation as being March 2021, the PTC started its analysis with the pronouncement that the timing of Israel's application "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."[22]

16. This assertion begged the very question that had to be determined by the PTC, namely, when had the relevant investigation started? Paradoxically, the PTC went on to purport to apply the correct standard for making that determination, namely whether "an 'investigation with new "defining parameters" has been taking place since 7 October 2023.'"[23] In so doing, the PTC should have understood that if that threshold is met, then it is the Prosecution, not Israel, that failed to act in a timely manner.

17. Article 18(1) provides that:

> When a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation […] the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.

18. Rule 52(1) requires that:

> Subject to the limitations provided for in article 18, paragraph 1, the notification shall contain information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2.

19. One of the key reasons for the introduction of article 18 was to provide a judicial "check on the Prosecutor's powers" and to ensure compliance with the principle of complementarity. States supported the provision "stressing complementarity and the article's utility as a check on the Prosecutor's *proprio motu* powers."[24] This check would easily be circumvented if a

[22] Decision, para. 14.
[23] Decision, para. 15.
[24] *See* Morten Bergsmo in Ambos, p. 885, mn. 1983 "It is true that the Pre-Trial Chamber review is not the only check on prosecutorial discretion provided in the Statute. Other safeguards against potential abuse of power may

Prosecutor could give notice of an investigation with one set of defining parameters, let a month expire, and then modify or expand the investigation in some substantial manner. Of course, there must be a standard for determining whether such a substantial change has occurred – which is discussed under the second ground; but the very object and purpose of article 18(1) would be undermined if, as the PTC stated in this case, there is a presumption of untimeliness merely because of a previous article 18(1) notification in respect of a pre-existing investigation.

20. The request will, on the contrary, be timely where, as here, a second situation has arisen or, alternatively, an investigation with new defining parameters has emerged within an existing situation. The OTP was then obliged to provide a new article 18(1) notification. Had it done so in a timely manner, complementarity would have been respected and addressed expeditiously, based on a sufficiently specific notice regarding the parameters of the intended post-7 October 2023 investigation. Indeed, one of the principal drafters of article 18 considered it obvious that this should have already happened: "Khan may have acted already in this respect, but just to check the box: Pursuant to Article 18 of the Rome Statute, the Prosecutor presumably has notified Israel, in particular, of the investigation now underway regarding the Israel-Hamas situation."[25] This view is also shared by the United States, one of the principal drafters of article 18 of the Statute, and of Germany, one of the strongest supporters of the Court, in *amicus curiae* submissions to the PTC that were entirely ignored in the Decision.[26]

21. Despite subsequently purporting to analyse the merits of the request, the PTC erred in law in asserting that the timing of Israel's request was contrary to the purpose of complementarity. No implication of untimeliness could have been made without first assessing whether a new situation or, alternatively, an investigation with new defining parameters, had arisen. The PTC put the cart before the horse in a way that could not have failed to impact its subsequent reasoning, as reflected in its cursory reasoning and additional legal errors. This error manifestly distorted the legal standards applied by the Chamber and, viewed individually or cumulatively

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be found, for example, in the admissibility provisions, in the thresholds on definitions of crimes within the Court's jurisdiction, and in the criteria laid down for the election of the Prosecutor."

[25] Three Challenging Policy Issues.

[26] Germany Observations, paras 14, 17 "the attack by Hamas brought about such a fundamental change in the situation that a new notification was required, which would have given the State concerned the procedural opportunity to request that the Prosecutor defer to the State's investigation […] the Prosecutor should notify the States Parties and States concerned as set out in Article 18 of the Statute, thus preserving the careful balance put in place by the States Parties under said provision"; US Observations, para. 19 "[t]he areas of focus in the 2021 notification were not representative of the scope of criminality that is the focus of the allegations in the Applications […] [a] subsequent article 18 notification, informing relevant States of the new focus of the investigation and providing 'detail with respect to the groups or categories of individuals in relation to the relevant criminality,' was necessary to protect the interests article 18 enshrines."

with the second and third grounds of appeal, requires reversal of the Decision.

B. Second Ground of Appeal: the PTC erred in law and in fact in concluding that there has been no substantial change in the parameters of the Prosecution's investigation

22. The PTC purported to evaluate whether "'a new situation has arisen,' or an 'investigation with new "defining parameters" has been taking place since 7 October 2023'".[27] However, the PTC committed two inter-related legal errors, which manifestly impacted upon its cursory evaluation of relevant factors, and its outright disregard of other relevant factors.

i. The PTC erred in asserting that the "defining parameters" standard 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"

23. The PTC's statement is a legal pronouncement as it refers to the effects that a legal standard would have in "every situation." The statement demonstrates that the PTC applied an incorrect standard materially affecting its analysis of whether an investigation with new defining parameters had been taking place since 7 October 2023.

24. First, Israel adhered strictly in its submissions before the PTC to the standards set out by the Appeals Chamber in the *Venezuela* and *Philippines* situations, which do not require notification of every new incident and crime that the Prosecution may decide to investigate. As stated by the *Venezuela* Appeals Chamber, which was quoted to the PTC:[28]

> the Prosecutor's article 18(1) notification must be sufficiently specific, providing the general parameters of the situation and sufficient detail with respect to the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality that the Prosecution intends to investigate.[29]

On multiple occasions, the Appeals Chamber in both the *Venezuela* and *Philippines* situations refers to these as the "defining parameters" of the investigation.[30]

25. The required degree of specificity of these defining parameters is not assessed in the abstract, but in relation to the scope and focus of the Prosecution's intended investigation. The question is whether the notification is specific enough to place the State in a position to demonstrate that its own investigations sufficiently mirror those of the Prosecution: "it is upon the Prosecution to provide information that is specific enough for the relevant States to exercise its right under article 18(2) of the Statue and **representative enough** of the scope of criminality

[27] Decision, para. 15.
[28] Article 18(1) Request, para. 32.
[29] *Venezuela* AD, para. 8.
[30] *Venezuela* AD, paras 110, 182, 220; *Philippines* AD, para. 106.

that it intends to investigate **in any future case(s)**."[31]

26. This jurisprudence constituted a rejection of the Prosecution's position in those cases that the article 18(1) notification should be interpreted as encompassing "the sum of potential cases within the parameters of the authorised situation which could be pursued by the Prosecutor in the exercise of his broad discretion under article 53, 54 and 58."[32] As stated by the *Venezuela* PTC: "The approach proposed by the Prosecution […] would effectively make it impossible for States to ever be able to successfully seek a deferral pursuant to article 18(2) of the Statute, thereby rendering this provision meaningless."[33]

27. The jurisprudence developed by the Appeals Chamber is balanced. On the one hand, the Prosecution could not be expected to enumerate every incident that it may wish to investigate as part of a situation; on the other hand, the article 18(1) notification must be specific enough in relation to the intended investigation to give the State a reasonable opportunity to show that its own investigations sufficiently mirror those of the Prosecution. Without such a reference point, States would be unable to do so, judges would be unable to exercise their oversight function over the Prosecution, and article 18 itself would be rendered "meaningless."

28. The "defining parameters" of an investigation as elaborated by the Appeals Chamber involves various factors, including: (i) the crime types and "patterns and forms of criminality";[34] (ii) the "groups or categories of individuals"[35] allegedly involved, including their hierarchical "level" and whether the crimes were committed as part of a "State policy";[36] and (iii) the factual context of the criminality.[37]

29. The PTC therefore erred in asserting that this jurisprudence, relied upon by Israel, is tantamount to requiring a new notification in respect of any "incident and crime[]" not expressly described in the article 18(1) notification.[38] The PTC's misunderstanding of the standard advanced was an error of law, which is also manifest from sub-ground 3.

ii. The Chamber erred in law by conflating the standards applicable to the scope of a judicially-authorised investigation, with the different standards applicable for an article 18

[31] *Venezuela* PTD, para. 77 (emphasis added).
[32] *Philippines* OTP Request, para. 62. *See also* *Venezuela* OTP Request, paras 57, 63.
[33] *Venezuela* PTD, para. 77 (emphasis added).
[34] *Venezuela* AD, paras 4, 8, 247, 257, 276; *Philippines* AD, para. 106.
[35] *Venezuela* AD, para. 246; *Philippines* AD, para. 109.
[36] *Venezuela* AD, paras 348-349.
[37] *Venezuela* AD, para. 277.
[38] Decision, para. 15.

notification

30. The PTC's second sub-error is its conflation of the standards applicable in respect of notification of a State under article 18(1), and the scope of judicial authorization of an investigation under article 15. This had two aspects: (i) transposing the law applicable to the scope of authorized investigations under article 15 onto the standard for providing notice under article 18(1); and (ii) assuming that an article 18(1) notification means limiting the scope of the Prosecution's investigation.

31. The PTC, claiming that Israel's position would require notification of any new "incidents and crimes" not described in the article 18(1) notification, asserted that this "has already been rejected by the Appeals Chamber."[39] The PTC then cites to the Appeals Chamber decision in the *Afghanistan* situation, concerning the scope of a judicially-authorized investigation under article 15. The PTC also cites this decision in support of its ultimate conclusion that "no substantial change has occurred in the parameters of the investigation into the situation."[40]

32. The *Afghanistan* decision is inapposite. That decision concerned the scope of authorization under article 15 of a proposed *proprio motu* Prosecution investigation, requested with reference to a wide-ranging sustained nationwide armed conflict.[41] The PTC, despite or perhaps because of the breadth of the proposed investigation, expressed concern that its authorization should not be turned into "a blank cheque"[42] for the Prosecution, thus abdicating the judges' "filtering"[43] role to "restrain the discretion of the Prosecution acting *proprio motu*, in order to avoid manifestly unfounded investigations."[44] The Appeals Chamber reversed, not on the basis that these concerns were unfounded, but rather that the standard enunciated was "unworkable in practice," would require "continuous monitoring," and would be "cumbersome and unwieldy" in a manner that would "have a significant detrimental effect on the conduct of investigations."[45] On this basis, the Appeals Chamber held that the "PTC erred in finding that the scope of any authorisation granted would be limited to the incidents mentioned in the Request and those closely linked thereto."[46]

33. The PTC erred in applying, without modification or explanation, the *Afghanistan* article 15

[39] Decision, para. 15.
[40] Decision, para. 15 (but without referring to any specific paragraph of the Appeals Chamber's decision).
[41] *Afghanistan Authorisation Request*, paras 1, 2, 13, 32, 49, 61, 74, 127, 129-137, 186, 270, 361, 376.
[42] *Afghanistan Authorisation* PTD, para. 42.
[43] *Id.*, paras 30, 33, 41.
[44] *Id.*, para. 32.
[45] *Afghanistan* Authorisation *AD*, para. 63.
[46] *Id*. para. 64.

standard. The Appeals Chamber has developed distinct jurisprudence concerning article 18(1) since 2020. The standards enunciated in respect of an article 18(1) notification clearly differ from those established for article 15 – and for good reason. Judicial oversight of prosecutorial discretion under article 15 ensures that the OTP does not embark on frivolous and factually unfounded investigations,[47] whereas that under Article 18 is designed to ensure compliance with the principle of complementarity. Article 15 concerns the Court's internal procedures for launching and defining the scope of proposed *proprio motu* investigations, whereas article 18(1) concerns the Court's external relations with States, and ensuring respect for their primary jurisdiction. Article 15 contains no statutory specifity requirement, whereas rule 52(1) as requires that an article 18(1) notification "shall contain information about the acts" notified.[48] Article 15 defines the extent of an authorised investigation beyond which the Prosecutor may not go, whereas article 18 involves notification and potential judicial review of whether to proceed. Hence, there is no incompatibility between the Prosecutor's latitude under article 15 to pursue an investigation into all matters that are "sufficiently linked to the situation,"[49] while at the same time requiring a notification to States where the "defining parameters" of an investigation within that situation have changed.

34. Indeed, this compatibility was recognized by the *Venezuela* PTC when insisting on the requirement to provide "sufficiently specific" notification, but also recognizing that this "does not in any way limit the Prosecution's future investigations":

> Providing the relevant States with information sufficiently specific to enable them to exercise the right to seek a deferral pursuant to article 18 of the Statute is necessary to give effect to this provision. As this obligation merely concerns article 18 proceedings, this does not limit in any way the Prosecution's future investigations in these proceedings, if the [Prosecution's Request to renew investigations] is granted. The approach proposed by the Prosecution that 'the definition of the investigation for the purposes of article 18(2) should not be limited to potential cases which were already expressly identified by the Prosecutor for the purpose of the preliminary examination' would effectively make it impossible for States to ever be able to successfully seek a deferral pursuant to article 18(2) of the Statute, thereby rendering this provision meaningless.[50]

35. The *Venezuela* Appeals Chamber concurred, while also clearly distinguishing between the standards under article 15 and article 18:

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[47] Bergsmo in Ambos, p. 891, mn. 1998 (the judicial oversight prescribed by article 15(3) "aims in part at protecting the Court from frivolous or politically motivated charges"); *id*., 889-890 "States negotiating Article 15 shared the concern that a prosecutorial power to initiate investigations *proprio motu* must not be allowed to lead to frivolous or politically motivated charges".
[48] *See* Lee, p. 339 "The addition of the term 'acts' indicates that the Prosecutor must do more than just inform a State that an investigation is being contemplated. The notice should include specific information, again subject to the article 18 limitations, on the acts to be examined, their location and possible suspects."
[49] *Afghanistan* Authorisation AD, para. 79.
[50] *Venezuela* PTD, paras 76-77.

> Additionally, the Appeals Chamber does not see the relevance of the *Afghanistan* OA4 Article 15 Judgment […] [which] concern[s] the scope of the Prosecutor's investigation *after* its commencement, confirming that the Prosecutor's investigation is not limited to crimes pre-dating the referral, and that, as correctly noted by the PTC, the obligation to provide sufficiently specific information in an article 18 notification does not limit in any way the Prosecutor's future investigations.[51]

36. The PTC misreads these passages as meaning that the "defining parameters" standard is inapplicable, or subsumed by, the article 15 standard. On the contrary, their ordinary meaning is that the standards enunciated by the Appeals Chamber in respect of article 18 co-exist with those concerning the scope of a judicially-authorised investigation. This compatibility is simply achieved by requiring, as appropriate, a second article 18(1) notification *within* the scope of an ongoing situation or judicially-authorized investigation.

37. Article 18 protects interests that have particular need of judicial supervision and scrutiny. As stated by the Appeals Chamber in *Yekatom*, expressing a concern that applies with equal force at the opening of an investigation:

> The central premise of the Court's exercise of jurisdiction is its contingency upon the failure of States to genuinely investigate and, where warranted, prosecute those that are suspected of having committed or having been complicit in crimes listed in the Statute. […] As long as States comply with that responsibility, the Court will not intervene…. no State should have to face the prospect of being found wanting in this regard without at least being given an opportunity to explain itself. This is why articles 18 and 19 of the Statute provide several procedural avenues for States to correct the Prosecutor's assessment of their domestic efforts ty o pursue criminal investigations and/or prosecutions.[52]

38. Israel, to be sure, has not been given an opportunity to "explain itself" in respect of the Prosecution's investigation that has now led it to the allegations against Israel's Prime Minister and former Minister of Defence.

39. The Article 18(1) mechanism, and the standards triggering notification, are also not "unworkable in practice," which had been fatal to the incident-based approach rejected in the *Afghanistan* situation in relation to article 15. First, the notification requirement is not triggered by the investigation of every new incident, but only where there is a change in the "defining parameters" of the investigation. Second, previous adjudications under article 18(2) have been conducted relatively expeditiously – 235 days and 216 days in the *Venezuela* and *Philippines*

[51] *Venezuela* AD, para. 230.
[52] *Yekatom* Admissibility AD, para. 42. The Appeals Chamber also noted, at paragraph 43, that it was entitled to presume that the Prosecutor has made "an earnest and objective assessment" of complementarity, but only "unless the admissibility of a case is challenged by a State." In the context of an ongoing investigation at the situation, the State's capacity to do so depends on having adequate notification when the defining parameters of an investigation change.

situations, respectively. Any challenge by the Prosecutor to an Israeli notification under article 18(2) could, accordingly, have been resovled by July 2024, if the Prosecutor had provided a timely article 18(1) notification. More expeditious still, of course, would have been the dynamic of complementarity that would have been created by moving forward in this manner, within the a framework of complementarity, to ensure a full and proper investigation of the alleged criminality. Third, any adjudication under article 18(2) would not significantly negatively impact the OTP's information gathering. Nothing in the statutory framework of the Court precludes the OTP from gathering information prior to a formal investigation, including open-source information, conducting informal voluntary interviews, or reviewing any information that may be received by the Prosecution, including through its publicly accessible online portal designed for that purpose.[53] Furthermore, more formal investigative steps can be authorised by the PTC pursuant to article 18(6). Accordingly, any delay occasioned by judicial review under article 18(2) is modest, and more than justified by the importance of the interests concerned. Accordingly, requiring a new article 18(1) notification is not unworkable; on the contrary, it provides an appropriate standard for judicial oversight when the Prosecution's investigation is modified beyond the defining parameters that had been previously notified to the State.

40. Accordingly, the PTC erred by: (i) applying the article 15 authorisation standard to the different issue of article 18 notification; and (ii) failing to apprehend that the article 18 notification requirements are compatible with scope of investigations set out in by the *Afghanistan* Appeals Chamber, as expressly recognized by the *Venezuela* Pre-Trial and Appeals Chamber decisions. This error was material, as it directly impacted on the analysis of the circumstances relevant for making the ultimate determination as to whether there had been a change in the defining parameters of the investigation. If it had applied the correct standard, it would have properly assessed those factors, and arrived at a different conclusion.

iii. The PTC failed to provide any reasoning at all, otherwise ignored, or failed to properly appreciate, the factors and circumstances showing that the defining parameters of the Prosecution investigation have changed

41. The Appeals Chamber, in respect of "errors of fact", may interfere where the Chamber below "misappreciated the facts, took into account relevant facts or failed to take into account relevant facts."[54] In light of the foregoing legal errors, and given the legal nature of the relevant

[53] ICC OTP Statement 24 May 2024 (encouraging submissions by "witnesses" and others who wish to submit "evidence in real-time").
[54] *Gbagbo* Detention Decision, para. 16; *Yekatom* Prior Recorded Testimonies, para. 35; *Mokom* Legal Representation Decision, para. 81.

facts, the errors addressed in this sub-ground are mixed errors of law and fact.

42. The PTC concluded that no "substantial change has occurred to the parameters of the investigation into the situation" on the basis that:

> [T]he Notification indicated that the investigation concerned alleged crimes in the context of an international armed conflict, Israel's alleged conduct in the context of an occupation, and a non-international armed conflict between Hamas and Israel. In the applications for warrants of arrest, as also explained by the Prosecutor in his public statement at the time of filing the applications, the Prosecution alleges conduct committed in the context of the same type of armed conflicts, concerning the same territories, with the same alleged parties to these conflicts.[55]

43. This reasoning reflects the criteria applied by the *Afghanistan* Appeals Chamber concerning article 15, rather than those applied by the Appeals Chamber in the *Venezuela* and *Philippines* situations concerning article 18. In particular, the PTC disregarded the following criteria for evaluating whether the defining parameters of the investigation had changed in way that required a new article 18(1) notification: (i) the crime types and "patterns and forms of criminality";[56] (ii) the "groups or categories of individuals"[57] allegedly involved, including their hierarchical "level" and whether the crimes were committed as part of a "State policy";[58] and (iii) the factual context of the criminality.[59] While the exact formulation of these criteria may vary, and while no single criterion may be decisive, they cumulatively provide the defining parameters of the investigation. When these factors are applied in this case, especially in light of the additional State referrals that are indicative of changed "defining parameters" of investigation, there can be no doubt that the OTP's 2021 article 18(1) notification is not "**representative"** [60] of the criminality that the OTP has been investigating since 7 October 2023.

44. The Prosecution's 2021 Article 18(1) notification is restricted to war crimes. There is no reference to any crime[61] against humanity, or to the existence of a widespread or systematic attack against a civilian population. By contrast, the arrest warrants sought by the Prosecutor in respect of the post-7 October 2023 events allege crimes against humanity, including murder, extermination, persecution and other inhumane acts.[62] By definition, these crimes entail a

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[55] Decision, para. 15.
[56] *Venezuela* AD, paras 110, 182, 220; *Philippines* AD, para. 106.
[57] *Venezuela* AD, para. 246; *Philippines* AD, para. 109.
[58] *Venezuela* AD, paras 348-349.
[59] *Venezuela* AD, para. 277: "The Prosecutor's notification must thus contain sufficiently specific information about the facts and circumstances underpinning the alleged criminal acts within the court's jurisdiction that he or she intends to investigate."
[60] *Venezuela* PTD, para. 77 (emphasis added).
[61] Reference to "crime" should be understood as referring to the legal characterization as it may be applied in general, not to "a crime" in the sense of a specific incident.
[62] ICC November Press Release.

substantial broadening of the scope of the investigation, including to establish: the existence of "a State or organizational policy to commit such attack";[63] an intent (for extermination) to destroy a part of the targeted population; an intent (for persecution) to deprive individuals of their fundamental human rights with the special intent of doing so "by reason of the identity of a group or collectivity";[64] and an intent (for murder and other inhumane acts) to kill and otherwise cause great suffering, all as part of a State organizational policy or plan.

45. The Prosecution also alleges that Israeli officials were responsible for the war crime of starvation, committed as part of "a common plan to use starvation and other acts of violence against the Gazan civilian population."[65] The manner of alleged commission and the identity of those named in the arrest warrant requests demonstrates a substantial expansion and modification of the scope of the investigation as compared to what was notified in 2021.

46. These additional crimes, allegedly committed by Israel's top leadership as part of a State policy, reflects a substantial expansion in the scope and focus of the defining parameters of the Prosecution's investigation. They also attest to the unprecedented change in circumstances that arose following 7 October 2023, involving a conflict of previously unimaginable intensity, and that could not – and was not – reflected in the Prosecution's Article 18(1) notification.

47. The "groups or categories of individuals" suspected of responsibility for the commission of crimes of violence against civilians appears from the 2021 article 18(1) notification to be mainly those making operational-level decisions, in respect of two specific sets of incidents only: (1) alleged war crimes committed by "*members of the Israeli Defence Forces*" in relation to "at least three incidents" in the context of the "2014 hostilities in Gaza"; and (2) allegations of crimes by "*members of the IDF*" related to the "use of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel."[66] These crimes in no way suggest a degree of systematicity suggesting high-level involvement, let alone a State policy that these crimes should have been committed.[67] The only crime alleged to have involved "Israeli authorities" more broadly is the "transfer of Israeli civilians into the West Bank since 13 June 2014,"[68] which is substantially

[63] Elements of Crimes, p. 3 (Article 7, Introduction); Expert Panel Report, para. 30.
[64] Elements of Crimes, p. 4 (Article 7(1)(h), Element 2).
[65] Expert Panel Report, paras 23, 29, 31; OTP Statement 20 May 2024; ICC November Press Release; Expert Panel Report, para. 23.
[66] Article 18(1) Notification, p. 2 (emphasis added).
[67] *Cf.* Report of the Panel of Experts in International Law, para. 33 "systematic nature of the crime, and the involvement of the suspects at the apex of the Israeli governmental apparatus".
[68] Article 18(1) Notification, p. 2.

different from the crimes of violence against civilians that is now part of the Prosecution's investigation. Furthermore, the crimes of violence are limited in temporal scope and scale. Accordingly, there has been a substantial shift in the level of perpetrators, systematicity, and scope of alleged crimes of violence within the scope of the investigation, as well as whether they were committed as part of a State policy.

48. The Prosecution's article 18(1) notification does not expressly refer to an armed conflict as a defining characteristic of the Prosecution's intended investigation. Instead, it merely refers to two definite periods during which alleged war crimes were committed: the "2014 hostilities in Gaza"; and the use by the IDF of "non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel." In the former case, the number of instances of "launching disproportionate attacks" is indicated to be as little as "three incidents".[69] In fact, even though an allegation of war crimes under article 8 of the Statute necessarily implies the existence of an armed conflict, there is no express reference to "armed conflict" at all in the article 18(1) notification, nor any description thereof that could assist in giving notice of the scope of the intended investigation.

49. This differs sharply from the *Afghanistan* Situation, where the Prosecution referred repeatedly to the "armed conflict," and to "alleged crimes that have a nexus to the armed conflict," as defining the scope of its intended investigation.[70] The Appeals Chamber accepted these submissions, setting the contours of the situation as being crimes that "have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation."[71] This was because the Prosecution had "presented information regarding the alleged large scale commission of multiple crimes against humanity and war crimes by various armed groups and actors involved in the conflict which began prior to the entry into force of the Rome Statute on 17 July 2002 and continues to the present day."[72] This was decisive in the because the Prosecution had made clear that this was a defining characteristic of the investigation.

50. This contrasts with the 2018 Referral[73] and the 2021 Article 18(1) notification, neither of which refer expressly to an armed conflict. Yet the PTC mechanically applied the outcome of the *Afghanistan* situation without considering the specificity of the article 18(1) notification in

[69] *Id*.
[70] *Afghanistan Authorisation Request*, paras 1, 2, 13, 32, 49, 61, 74, 127, 129-137, 186, 270, 361, 376.
[71] *Afghanistan* Authorisation AD, p. 3, para. 79. The article 18(1) refers expressly to the Appeals Chamber decision in the article 18(1) notification.
[72] *Id.*, para. 62.
[73] 2018 Referral.

this case. The PTC's mechanical application of this factor was not only an application of the wrong standard, but also a failure to take into account all the relevant factors.

51. The existence of two referrals submitted by seven States in response to a radical change in circumstances on the ground indicates of a new investigative scope, especially when compared with the 2018 Palestinian referral. The 2023 Referral, in addition to referring to "escalating" violence, and to "continuing commission of the crimes," mentioned in the 2018 Referral, also avers that "**additional** crimes appear to have been committed within the jurisdictional scope of the Court".[74] These "additional crimes" are said to include genocide and the war crime of starvation. The States then categorically "refer[] the Situation in Palestine to the Prosecutor of the Court, requesting the Prosecutor to investigate the Situation."[75] The 2024 Referral is the first to encompass crimes by Hamas,[76] even though the Prosecution had purported to do so in its article 18(1) notification.[77] In fact, as discussed below, the 2023 and 2024 referrals describe an entirely new situation of crisis focused not on so-called "settlement-related" crimes,[78] but rather on an intense and unique armed conflict involving the systematic commission of conduct of hostilities crimes.

52. As this review shows, the article 18(1) notice was clearly not "representative of the scope of criminality"[79] under investigation now, reflecting new defining parameters of investigation. The three inter-related sub-errors within this ground of appeal materially affected the Decision. Despite purporting to examine whether an investigation with new "defining parameters" had arisen, the PTC actually adopted the different legal standard applicable to the judicial authorisation of a *proprio motu* investigation. As a result of applying the wrong legal approach, the PTC disregarded the most relevant factors for determining whether the focus of the Prosecution's investigation in this situation had changed in a way that requires a new article 18(1) notification. If the PTC had considered those factors, in accordance with the appropriate standard, it would have found that a new article 18(1) notice was required, reflecting the new defining parameters of the Prosecution's investigation following 7 October 2023.

C. Third Ground of Appeal: the PTC erred in law by providing no reasons and rejecting Israel's submission that a new situation had arisen following two post-7 October

[74] South Africa *et al*. Referral, para. 2.3 (emphasis added).
[75] *Id*., para. 2.1, 2.3, p. 5.
[76] Chile and Mexico Referral, p. 2.
[77] Article 18(1) Notification.
[78] 2018 Referral, para. 8.
[79] *Venezuela* PTD, para. 77.

2023 referrals made by seven States Party pursuant to article 14 of the Statute

53. The Decision announces that the Chamber "is also not persuaded by Israel's submissions that a new situation has arisen,"[80] but provides no reasoning explaining this rejection. In fact, the Decision omits, except in the procedural history section, any reference to the existence of two new State Party referrals under article 14 of the Statute. This was a failure to provide a reasoned opinion.[81] In the absence of any explanation, Israel can only infer that the PTC meant to rely on the same reasoning in paragraph 15 to reject both the claim that a new situation had arisen, and that the defining parameters of the Prosecution's investigation had changed.

54. This was erroneous, as different considerations apply. Article 18(1) states that:

> **When a situation has been referred to the Court pursuant to article 13(a)** and the Prosecutor has determined that there would be a reasonable basis to commence an investigate […] the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.

A situation was referred to the Court following the events of 7 October 2023 not once, but twice, by a total of seven States Parties.

55. The pathway to adjudication by a State under article 18(2) begins with regulation 45 of the Regulations of Court, which provides:

> The Prosecutor **shall** inform the Presidency in writing as soon as a situation has been referred to the Prosecutor by a State Party under article 14 or by the Security Council under article 13, sub-paragraph (b).

56. The Prosecutor did not comply with this provision following the 2023 and 2024 referrals. Before the PTC, the Prosecutor purported to excuse this unprecedented[82] failure on the basis that "there was a pre-existing situation already assigned to this Chamber encompassing the most recent events cited in those State referrals."[83] With respect, article 18 does not grant the Prosecutor a discretion to make this determination; the only discretion conferred on the Prosecutor by article 18 following a State referral is to make a determination "that there would be a reasonable basis to commence an investigation." Once that determination is made, the

[80] Decision, para. 15.
[81] *Abd-Al-Rahman* Oral Decision, para. 14 "Chambers of the Court must indicate with sufficient clarity the grounds on which they base their decisions".
[82] See *e.g.* *DRC II Assignment*, p. 3; *Gabon Assignment*, p.3; *CAR II Assignment*, p. 3.
[83] OTP Consolidated Response, fn. 29. The Prosecution asserted that its "past practice" was only to notify the Presidency "when there was *not* a situation that encompassed the events referred." However, the Prosecution failed to cite a single example of where it has not notified the Presidency of a State referral on the basis of its own determination that there was an overlap with an existing situation, and even if such a "past practice" were to exist, it would merely constitute a further example of the Prosecution contravening the express language of article 18(1).

Prosecutor is expressly required by article 18(1) to give the article 18(1) notification.

57. Even assuming that the requirement of article 18(1) applies only in respect of referrals of situations that are materially distinct from those previously referred, that is undoubtedly the case here. The focus of the 2018 referral is the "Israeli settlement regime"[84] and Israeli "settlement-related crimes."[85] Allegations of war crimes are made in relation to the "settlement regime", but there is not a single reference to any "armed conflict" between Israel and any armed group, including Hamas. The only reference to any crimes that could be interpreted as falling within the rubric of the conduct of hostilities is in the alleged context of the suppression of protests in the Gaza Strip from March to May 2018.[86]

58. The focus of the 2023 and 2024 referrals, by contrast, is substantially different and purport to describe crimes allegedly committed in relation to the intense and sustanined hostilities that began on 7 October 2023. The 2023 Referral, which was expressly filed "pursuant to Article 13(a) and Article 14(1)" and made in full knowledge of the 2018 Referral, indicates that the referring States Party "[d]ecide to refer the Situation in Palestine to the Prosecutor with a view to requesting the Prosecutor to vigorously investigate crimes under the jurisdiction of the Court."[87] The crimes include not only those previously referred, but also the "additional crimes" "of genocide as provided for in Article 6(a), (b) and (c) of the Rome Statute," as well as the war crime of starvation, in the context of "the conduct of hostilities" in the Gaza strip.[88] The States making the 2024 Referral likewise formally "refer for your investigation regarding the situation in the State of Palestine, under the provisions of Article 14, paragraph 1" of the Statute. This referral expressly encompassed the attack "by Hamas militants" on Israeli territory, and crimes purportedly committed in the context of "hostilities in occupied Palestinian Territory, including indiscriminate and disproportionate military operations of Israel against civilians in Gaza."[89]

59. Although the notion of "situation" is not defined in the Statute, the concept was adopted in contradistinction to the word "case," to ensure that States could not instrumentalize the Court's

[84] 2018 Referral, paras 2, 11 "the circumstances relevant to the present referral include but are not limited to, *all matters related to the Israeli settlement regime* outlined in earlier communications, monthly reports and submissions by the Government of Palestine, confidentially filed with or conveyed to the Office of the Prosecutor. In particular, the present referral incorporates as matters to be subject to investigation, any conduct, policies, laws, official decisions and practices that underlie, promote, encourage or otherwise make a contribution *to the commission of these crimes* in accordance with the terms of the Statute."
[85] *Id*. para. 8.
[86] *Id*., para. 16(c).
[87] South Africa *et al*. Referral, p. 3.
[88] *Id.*, paras 2.1, 2.3, 2.4.
[89] Chile and Mexico Referral, p. 2.

jurisdiction by targeting specific individuals.[90] The term has been interpreted in the limited jurisprudence on the issue as referring to a "situation of crisis";[91] a "situation of crisis or armed conflict";[92] or as a "set of events in respect of which credible allegations of crimes are made".[93] The core definition of the "situation" is important as it sets the reference point to which any particular case must be "sufficiently linked" in order to fall within the scope of the situation.[94]

60. The defining characteristic of the situation as described in the 2023 and 2024 referrals is not "settlement-related policies" involving alleged sporadic crimes of violence, but rather an earth-shattering and unique armed conflict, in which a wide range of crimes are alleged but all related to the conduct of hostilities, even if they are characterized as alleged "genocide" and crimes against humanity. The core and scope of the two situations is qualitatively different, as are the outer limits of the cases that could potentially be "sufficiently linked" thereto. Accordingly, the referrals reflect two distinct situations.

61. The PTC's failure to expressly address the issue of the creation of a new situation is an error of law that materially affected its determination. An appellant cannot be required to guess at reasoning that has not been provided. The PTC failed to explain the definition it applied of a "situation"; failed to assess the legal significance of the two State Party referrals post-dating 7 October 2023; failed to address the content of those referrals in relation to the 2018 Referral, which describe a new and distinct "situation of crisis"; and ultimately erred, therefore, in failing to find that a new situation had arisen from the 2023 and 2024 referrals.

IV. CONCLUSION AND RELIEF SOUGHT

62. In light of the foregoing material errors, the appropriate remedy is to **reverse** the Decision; and **remand** the matter to the PTC for deliberations in accordance with the Appeals Chamber's instructions as to the law or, in the alternative, **order** the Prosecution to provide an adequate article 18(1) notice.

63. The Appeals Chamber is also requested to declare, as a corollary of the reversal of the Decision, that the arrest warrants issued by the PTC are null and void. The arrest warrants would

[90] Pecorella in Ambos, pp. 837, 871.
[91] Mbarushimana Arrest Warrant Decision, para. 6.
[92] *Abd-Al-Rahman Exception d'incompétence*, para. 25.
[93] *Id.*, paras 25-26 (noting the possibility of "several situations within the territorial boundaries of one and the same State.")
[94] *Mbarushimana* Jurisdiction Decision, para. 16; *Id.*, para. 25 "it is instrumental in determining the scope of any investigation".

not have been issued but for the rejection of the Article 18 Request, as the PTC itself acknowledged.[95] Such a declaration merely gives effect to the reversal of the decision and, accordingly, falls within the scope of Rule 158.

64. Israel, which is not a Party to the Rome Statute, nevertheless actively engaged on a voluntary basis with the ICC Office of the Prosecutor since the horrifying events of 7 October 2023 in a spirit of complementarity and cooperation, even in the midst of intense armed conflicts against enemies who openly call for the destruction of Israel and the Jewish people. Israel shared information on a voluntary basis and expressed its willingness to investigate any matters that may be within the scope of the Prosecution's intended investigation. Despite this engagement, including a scheduled meeting with OTP officials in Israel on 20 May 2024 that was canceled by the OTP that very day and replaced with the announcement of arrest warrants, the Prosecutor has embarked on a course of action that undermines this foundational pillar of the Court's architecture. The intervention of the Appeals Chamber is urgently required to restore that architecture, and to open the pathway for complementarity to function as it should, especially in respect of a country which has a strongly independent judiciary and a fierce commitment to the rule of law – including, if not especially – in times of war.

Respectfully submitted:

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

Dated 13 December 2024, at Jerusalem, Israel.

[95] ICC November Press Release (emphasis added) "Further, the Chamber considered that the parameters of the investigation in the situation have remained the same and, as a consequence, no new notification to the State of Israel was required. *In light of this*, the judges found that there was no reason to halt the consideration of the applications for warrants of arrest."