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THE APPEALS CHAMBER

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

SITUATION IN THE STATE OF PALESTINE

Public
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

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I. INTRODUCTION

1. On 21 November 2024, Pre-Trial Chamber I (the “PTC”) rejected Israel’s request that it order the Prosecution to issue an article 18(1) notification concerning its ongoing investigation into events in and around the Gaza Strip from 7 October 2023 onwards. The PTC rejected that request on the basis that it was “not persuaded by Israel’s submissions that ‘a new situation has arisen’, or an ‘investigation with new “defining parameters” has been taking place since 7 October 2023.’”¹ The PTC thereby accepted that a new notification would be required if a new situation had arisen or if an investigation with new defining parameters had been taking place since 7 October 2023, but rejected that this was the case. The PTC’s conclusion is based on three inter-related errors, corresponding to the grounds set out below.

2. First, the PTC erred in asserting that a defining parameter of the Prosecution’s investigation, either on the basis of the 2018 Palestinian referral² or the Prosecution’s 2021 Article 18(1) Notification,³ was an “armed conflict.”⁴ The phrase is absent from both the Notification and the Referral, and there is no description of any armed conflict. Instead, the Referral expressly frames the situation referred as being in relation to an Israeli “settlement policy”.⁵ The allegation in the Referral – which Israel firmly rejects – is that this policy goes beyond physical settlements and encompasses “a multi-layered system of violence against the Palestinian population.”⁶ Incidents of suppression of demonstrations in Gaza in 2018 are included as part of these allegations, and repeated in the 2021 Notification, without any suggestion that they relate to an “armed conflict”. The 2021 Notification goes beyond the Referral by referring to one additional episode occurring in the context of “hostilities” in Gaza in 2014, which is temporally circumscribed and not framed as part of any broader pattern of hostilities, let alone an ongoing armed conflict. This single reference to “hostilities,” which in any event exceeds the scope of the Referral, does not define an open-ended investigation in relation to an ongoing armed conflict, let alone one that could be interpreted as encompassing the cataclysmic events that started on 7 October 2023. This contrasts with the *Afghanistan* Situation where the Prosecution’s request to open an investigation was expressly framed as relating to a well-defined and ongoing “armed conflict”. Simply put, Israel has never been notified of the scope of the Prosecution’s post-7 October 2023 investigations, which is the essential precondition for upholding the principle of complementarity by giving a State a

¹ [Impugned Decision](#), para. 15.

² [Referral](#).

³ Article 18(1) Notification.

⁴ [Impugned Decision](#), para. 15.

⁵ [Referral](#), paras 2, 3, 8, 11, 13, 18(c).

⁶ [Referral](#), para. 3.

reasonable and fair opportunity to show that its own investigations “sufficiently mirror”⁷ those of the ICC.

3. Second, the PTC completely failed to address that a new situation had arisen following the referral by five States Party on 17 November 2023. This referral expresses concern at “escalating” violence but also: (i) acknowledges that the scope of the 2018 Referral concerns the “Israeli settlement regime”; (ii) recognizes that the events in Gaza following 7 October 2023 involve not only “escalating” violence but also a new situation of crisis; and (iii) purports to refer a situation with a broadened “jurisdictional scope” to encompass that new situation of crisis.⁸ This November 2023 Referral triggered the existence of a new situation. The Prosecutor violated the Regulations of the Court by failing to formally transmit the November 2023 Referral to the Presidency, thus circumventing judicial review of whether a new situation had arisen. The PTC unaccountably ignored Israel’s arguments concerning the significance of this November 2023 Referral, doing no more than reciting its existence in the “Procedural history” of the Impugned Decision.

4. Third, the PTC failed to consider the extent to which the patterns and forms of alleged criminality, the scale and nature of the acts, the groups or categories of alleged perpetrators, and the factual context of the alleged criminality under investigation has changed since 7 October 2023 as compared to the 2021 Notification. Paradoxically, the PTC did refer to some – but not all – of these criteria in asserting that the 2021 Notification was sufficiently specific in the abstract,⁹ but then failed to apply any of these factors in assessing whether the 2021 Notification was sufficiently specific or representative of the *current* investigation.¹⁰

5. Israel underscores once again that it is not a Party to the Rome Statute. This filing is without prejudice to that status, and to Israel’s long-standing position regarding the Court’s lack of jurisdiction in respect of the situation captioned by the Court as “The Situation in the State of Palestine”, an issue which has now been remanded to the PTC.¹¹ Israel’s status as a State not Party to the Rome Statute also raises serious questions about how article 18(2) must be interpreted in light of Article 34 of the VCLT (which reflects customary international law) and within the constraints of international law more generally. Israel invites the Appeals Chamber to exercise its inherent discretion to consider any matters that it considers relevant to the

⁷ [Venezuela AD](#), paras 10, 182, 281, 348; [Philippines AD](#), para. 106.

⁸ [Referral](#), paras 1, 2.

⁹ [Impugned Decision](#), para. 11.

¹⁰ [Impugned Decision](#), para. 15.

¹¹ [Appeal Judgment on Jurisdiction](#), para. 64.

resolution of an appeal, but respectfully requests that it be permitted to provide additional submissions on any issues that the Appeals Chamber decides to address *proprio motu*.¹²

6. The PTC's errors are primarily legal, as they involve the misinterpretation and misapplication of article 18 and other statutory provisions, the appreciation of legal notifications provided under these provisions, and the legal characterization of the Prosecution's post-7 October 2023 investigations. Despite some factual considerations arising from circumstances arising since 7 October 2023, the "correctness" standard of review is therefore applicable to this appeal.¹³ Israel requests the Appeals Chamber to reverse the Impugned Decision. The Impugned Decision should be amended to require the Prosecution, following a determination pursuant to article 53(1) as to whether to initiate an investigation with new defining parameters, to provide Israel with a notification pursuant to article 18(1) or, alternatively, the matter should be remanded to the PTC for deliberations in accordance with the Appeals Chamber's corrective instructions.

II. RELEVANT EVENTS AND PROCEDURAL HISTORY

7. On the morning of 7 October 2023, Hamas indiscriminately launched thousands of rockets into Israel while thousands of Hamas and other militants invaded Israeli territory and killed more than 1,200 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; and continue to hold 58 hostages to this day.

8. Intense fighting followed between Israel and Hamas, as well as other Palestinian armed groups, who systematically used civilians as human shields and conducted hostilities from civilian objects, including medical facilities and UN compounds. Hamas and other groups also routinely fired rockets indiscriminately into Israel. Within a short period of time Israel also came under attack from other armed groups in Lebanon, Iraq and Yemen, and during the course of the conflict, also suffered missile and UAV attacks launched by Iran.

9. Concurrent with these events, the Prosecutor announced that he intended to embark on an investigation not only of crimes committed by Hamas inside the territory of Israel, but also

¹² [Erdemovic Appeal Judgment](#), para. 16.

¹³ See e.g. [Venezuela AD](#), para. 41.

Israel's conduct of hostilities in Gaza, including issues in relation to humanitarian access and the provision of relief supplies.¹⁴

10. On 17 November 2023, South Africa, Bangladesh, Bolivia, Comoros and Djibouti sent a "State Party referral in accordance with Article 14 of the Rome Statute of the International Criminal Court."¹⁵ On the same day the Prosecutor issued a public 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 2023."¹⁶

11. On 18 January 2024, Mexico and Chile wrote to the Prosecutor, "under the provisions of Article 14, paragraph 1 of the Rome Statute," to "refer for your investigation regarding the situation in the State of Palestine."¹⁷ This referral, unlike any previous referral, specifically encompassed "the attack of 7 October 2023 conducted by Hamas militants."¹⁸

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 requesting that he "in accordance with the principle of complementarity to [...] defer any investigation" in respect of "Israeli nationals or others within [its] jurisdiction [...] in favour of Israel's processes for review, examination, investigation and proceedings under its national legal system".¹⁹ The letter invited 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."²⁰

13. On 7 May 2024, the Prosecution declined to provide such a notification, asserting instead, with reference to a previous notification that had been provided on 9 March 2021, that: "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."²¹

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."²² The Prosecution responded

¹⁴ [OTP Statement 30 October 2024](#).

¹⁵ [17 November 2023 Referral](#), p. 3.

¹⁶ [OTP Statement 17 November 2023](#).

¹⁷ [18 January 2024 Referral](#).

¹⁸ [18 January 2024 Referral](#), p. 2.

¹⁹ Letter from Israel to OTP, 1 May 2024, p. 2.

²⁰ Letter from Israel to OTP, 1 May 2024, p. 5.

²¹ Letter from OTP to Israel, 7 May 2024.

²² [Article 18 Request](#).

on 27 September 2024.²³ On 21 November 2024, the PTC rejected the Request.²⁴ On 27 November 2024, Israel sought leave to appeal this decision in respect of three issues.²⁵ The Prosecution responded on 2 December 2024.²⁶

15. After the Appeals Chamber determined by a 3-2 majority that a concurrent appeal filed by Israel as of right pursuant to article 82(1)(a)²⁷ was not admissible,²⁸ the PTC certified the First Issue in respect of which Israel had sought leave to appeal,²⁹ namely: “Whether the PTC 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.”³⁰

III. APPLICABLE PROVISIONS

16. Article 14(1), entitled “Referral of a situation by a State Party”, provides that:

A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation [...].

17. Article 18, entitled “Preliminary rulings regarding admissibility”, requires that:

(1) 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) further specifies 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.

IV. SUBMISSIONS

A. First Ground of Appeal: The PTC erred in finding that the Prosecution’s post-7 October 2023 investigations fall within the scope of its pre-existing investigation on the basis that it concerns the “same type of armed conflicts” and “same alleged parties to these conflicts”

i. Introduction

²³ [OTP Response to Abridged Request](#).

²⁴ [Impugned Decision](#).

²⁵ [Request for Leave to Appeal](#).

²⁶ [OTP Response to Request for Leave to Appeal](#).

²⁷ [Appeal on 18\(1\) Notice](#).

²⁸ [Article 18 Appeal Decision](#).

²⁹ [Decision on Leave to Appeal](#), paras 17-20.

³⁰ [Request for Leave to Appeal](#), para. 21.

19. The Impugned Decision appears to accept that article 18(1) requires the Prosecution to give notice of the “defining parameters”³¹ of its “intended investigation”³² that are “sufficiently specific”³³ to allow a State to show that they are mirrored by its own investigations. At paragraph 15 of the Impugned Decision, the PTC also appeared to accept that, if the Prosecution’s investigation expanded beyond these previously notified “defining parameters”, a new article 18(1) notification would be required. However, the PTC rejected that this was the case in respect of the Prosecution’s post-7 October 2023 investigations on the basis that they concern “conduct committed in the context of the same type of armed conflicts, concerning the same territories, with the same alleged parties to the conflicts.”³⁴

20. This conclusion, which is not based on any detailed discussion of the language actually used in the 2021 Notification,³⁵ is wrong for three subsidiary reasons: first, an “armed conflict” is not a “defining parameter” of, or even mentioned at all in, the 2021 Notification or in the Referral; second, the single reference to “hostilities” mentioned in the 2021 Notification is temporally limited to 2014; and third, the 2021 Notification exceeds the scope of the 2018 Referral to the extent that it is interpreted as purporting to give notice of an investigation into a broad and ongoing “armed conflict.”

ii. “Armed Conflict” was not a defining parameter of the 2021 Notification or of the 2018 Referral

21. The 2021 Notification never uses the phrase “armed conflict”. The 18-page 2018 Referral likewise contains no reference to “armed conflict”.³⁶ Rather, the Referral expressly states that the crimes alleged therein were committed, and are ongoing, within the context of an alleged Israeli “settlement regime,”³⁷ “settlement-related crimes”³⁸ and a “settlement policy.”³⁹ This

³¹ [Impugned Decision](#), para. 15.

³² The PTC only uses the expression “investigation”, but the Appeals Chamber makes clear that what matters is the Prosecution’s prospective intentions (i.e. “intended investigation”) as conveyed through the Notification. *See Venezuela AD*, para. 8 (“sufficiently specific information as regards the temporal scope of his or her intended investigation.”).

³³ [Impugned Decision](#), para. 11.

³⁴ [Impugned Decision](#), para. 15.

³⁵ [Judge Bossa Dissenting Opinion](#), para. 17 (“As part of this assessment, a PTC has to identify the scope of the Prosecutor’s investigation on the basis of the notice provided under article 18(1) of the Statute and related information”); [Venezuela AD](#), para. 220 (“Crucially, as recalled above, at this stage of the proceedings, the Prosecutor’s intended investigation will have to have certain defining parameters, which the Prosecutor indicates in the article 18(1) notification.”).

³⁶ Article 18(1) Notification, p. 1 (“I hereby wish to notify you that on 3 March 2021, I initiated an investigation with respect to alleged crimes within the jurisdiction of the Court committed in the Situation in Palestine since 13 June 2014, on the basis of a referral submitted by the Government of the State of Palestine on 22 May 2018”).

³⁷ [Referral](#), paras 2, 3, 11, 13, 18(c).

³⁸ [Referral](#), para. 8.

³⁹ [Referral](#), paras 2-3.

“settlement policy” is repeatedly referenced throughout the Referral as defining the situation of crisis referred to the Court for investigation.⁴⁰

22. Importantly, the alleged crimes committed in relation to this policy are said to include not only crimes against humanity but also “war crimes”⁴¹ – which can be committed by a State alleged to be in occupation of territory even in the absence of any active fighting between parties to an armed conflict. The 2018 Referral, in this context, also refers to events in Gaza. “Israeli occupation forces” are alleged to have committed violence against “peaceful demonstrations” in Gaza in March 2018, without any reference to armed conflict or fighting with any armed group.⁴² This Referral, accordingly, does not identify an “armed conflict” as the relevant context for the situation referred, including in respect of Gaza, but instead frames the situation as related to a purported “settlement policy”.

23. As with the Referral, the 2021 Notification makes no reference to armed conflict, including in respect of the March 2018 events in Gaza: “the scope of the investigation encompasses allegations of crimes committed by the IDF through 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.”⁴³ Notwithstanding Israel’s rejection of the Prosecutor’s depiction of these events, the reference to “non-lethal and lethal means” against “demonstrators” implies that the Prosecutor perceives Israeli conduct in this respect as mere crowd control unrelated to any armed conflict, and there is no indication of any related “hostilities”.

24. The Article 18(1) Notification does, however, depart from the Referral by referring to crimes committed in the context of “hostilities”: “war crimes were committed in the context of the 2014 hostilities in Gaza. In particular, there is a reasonable basis to believe that members of the Israeli Defence Forces (“IDF”) committed the war crimes” of disproportionate attacks, wilful killing and intentionally directing attacks at objects or persons using the distinctive emblems of the Geneva Conventions.⁴⁴ “War crimes” are also alleged to have been potentially committed by “members of Hamas and Palestinian Armed Groups” in the context of these same “hostilities” taking place during 2014. Despite the absence of any explanation or discussion,

⁴⁰ [Referral](#), paras 2, 3, 11, 13, 18(c).

⁴¹ [Referral](#), para. 3.

⁴² [Referral](#), para. 16(c).

⁴³ Article 18(1) Notification, p. 2.

⁴⁴ Article 18(1) Notification, pp. 1-2.

this is presumably the primary basis on which the PTC asserted that the post-7 October 2023 investigations concerns the “same armed conflict” and the “same alleged parties.”

25. However, this reference to a specific episode of “hostilities”, limited to a specific time-period in 2014, and without any express reference to any broader armed conflict, cannot be equated with an investigation into a time-unlimited armed conflict. An article 18(1) notification must be sufficiently specific⁴⁵ and sufficiently representative⁴⁶ to permit a State to show that its own proceedings “sufficiently mirror the scope of the Prosecutor’s intended investigation.”⁴⁷ The only “intended investigation” of “hostilities” of which notice is given through the 2021 Notification is in respect of a specific, time-limited set of events in Gaza in 2014. The omission of any reference to any other such events is striking in relation to the Prosecution’s current characterization of the situation of crisis as relating to the fact that “[s]ince at least 2008, Israel and Hamas have been engaged in a non-international armed conflict, entailing extensive and repeated airstrikes, the killing of civilians, the destruction of property.”⁴⁸ In the absence of such broader references, if Israel had sought to demonstrate in 2021 that its own investigations sufficiently mirrored those of the Prosecution, it would not have been required, based on the language of the 2021 Notification, to demonstrate that it had opened investigations into every unenumerated exchange of fire or skirmish with Hamas between 2014 and 2021.⁴⁹ On the contrary, all that would have been required is a demonstration of an investigation into those specific hostilities in 2014. This Notification, especially when read in the context of a Referral defining a situation of crisis arising from a “settlement policy,” does not provide sufficiently specific nor representative notice of an intention to investigate crimes in relation to an ongoing armed conflict which is not even mentioned let alone defined.

⁴⁵ [Venezuela AD](#), paras 3, 110 (“article 18(1) notification must be sufficiently specific in order for the State to be able to assert its jurisdiction in the proceedings under article 18(2) of the Statute.”).

⁴⁶ [Venezuela PTD](#), para. 77 (“In order to ensure that the domestic investigations sufficiently mirror the scale of criminality that the Prosecution intends to investigate in a given situation, 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 Statute and **representative enough** of the scope of criminality that it intends to investigate in any future case(s)”).

⁴⁷ [Philippines AD](#), para. 106 (“The Majority recalls that any investigation, irrespective of its stage, have certain defining parameters, which may vary depending on the circumstances of each specific situation. The Majority is of the view that, for the purpose of admissibility challenges under article 18 of the Statute, a State is required to demonstrate an advancing process of domestic investigations and prosecutions of the same groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality, within a situation. The domestic criminal proceedings must sufficiently mirror the scope of the Prosecutor’s intended investigation”). See [Venezuela AD](#), paras 10, 348.

⁴⁸ [OTP Consolidated Response](#), para. 3.

⁴⁹ In fact, the Prosecution acknowledges that Israel did provide information concerning the 2014 hostilities without any suggestion that information should have been provided on other instances of hostilities: [OTP Response to Appeal](#), para. 52 (“Tellingly, Israel itself engaged in discussions and sharing of information regarding the 2014 wave of hostilities during the preliminary examination.”).

26. The language of the Article 18(1) Notification and Referral may be contrasted in this respect with the scope of the Prosecution's intended investigation in the *Afghanistan* Situation, upon which the PTC erroneously (and without discussion) relied.⁵⁰ There, the Prosecution expressly indicated that the scope of its intended investigation was linked to an armed conflict,⁵¹ extensively defined and described,⁵² and repeatedly referenced as being the context in which various suspected crimes were committed.⁵³ The Appeals Chamber approved the requested investigation, noting that 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."⁵⁴ Thus, the authorized investigation was defined in relation to crimes that "have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation."⁵⁵ The scope of the investigation authorized was presumably also conveyed through the article 18(1) notification for that situation.

27. The armed conflict is a defining parameter of the *Afghanistan* investigation not just because war crimes are alleged or because armed groups are mentioned, but because the Prosecution made clear, through sufficiently specific and representative information, that its intended investigation encompassed all crimes related to a well-defined armed conflict. No such information – let alone any reference to "armed conflict" – is found in the 2021 Notification or in the Referral. Despite the Prosecution's current assertions concerning the purported frequency and continuity of such events,⁵⁶ they were not even mentioned by the Prosecution in the 2021 Notification.

28. Furthermore, the emphasis on "settlement policies" as defined in the Referral is reinforced by the 2021 Notification's specific allegation, as a war crime, of the "transfer of Israeli civilians into the West Bank since 13 June 2014."⁵⁷

29. Armed conflict is not a defining parameter of the Prosecution's investigation as communicated through its Article 18(1) Notification.

⁵⁰ [Impugned Decision](#), para. 15, fn. 26.

⁵¹ See e.g. [Afghanistan Authorisation Request](#), paras 1, 186, 376.

⁵² See e.g. [Afghanistan Authorisation Request](#), paras 2, 13-21, 162, 190.

⁵³ See e.g. [Afghanistan Authorisation Request](#), paras 1, 2, 13, 32, 49, 61, 74, 127, 129-137, 186, 246, 270, 361, 376.

⁵⁴ [Afghanistan Authorisation AD](#), para. 62.

⁵⁵ [Afghanistan Authorisation AD](#), p. 3, para. 79.

⁵⁶ [OTP Consolidated Response](#), para. 3.

⁵⁷ Article 18(1) Notification, p. 2.

iii. The single reference to “hostilities” in the Article 18(1) Notification is limited temporally

30. The single reference to “hostilities” is temporally closed: “in the context of the 2014 hostilities in Gaza.” By contrast, the same Notification is not temporally closed in respect of the alleged occupation-related crime of “transfer of Israeli civilians into the West Bank since 13 June 2014.”⁵⁸ The *Afghanistan* Authorisation Request is likewise not temporally closed, seeking to open an investigation into crimes related to an armed conflict “in the period since 1 May 2003,”⁵⁹ which was granted,⁶⁰ and presumably also notified through an article 18(1) notification.

31. The significance of the temporally closed reference to “hostilities” does not arise from a requirement of notification of every single incident to be investigated. There is no such requirement. However, the Prosecution must at the very least – within the limits of the Referral or authorized investigation – define its investigation according to criteria, including for example the “groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality”;⁶¹ “temporal scope”;⁶² the context or circumstances of the crimes;⁶³ and the level of the potential perpetrators.⁶⁴ Whichever parameters are chosen, the Prosecution is under an obligation to do more⁶⁵ than simply say that the intended investigation encompasses “the sum of potential cases within the parameters of the authorized situation.”⁶⁶ Hence, “catch-all” provisions such as the one found in the 2021 Notification (“without prejudice to the future scope of a subsequent investigation, which may encompass any alleged crimes within the scope of the situation”)⁶⁷ have been rejected as they “would effectively make it impossible for States to ever be able to successfully seek a deferral pursuant to article 18(2) of

⁵⁸ Article 18(1) Notification, p. 2.

⁵⁹ See e.g. [Afghanistan Authorisation Request](#), paras 1, 44, 50, 376.

⁶⁰ [Afghanistan Authorisation AD](#), para. 79.

⁶¹ [Venezuela AD](#), para. 8.

⁶² [Venezuela AD](#), paras 222-228 (“Necessarily, this includes the provision, on the part of the Prosecutor, of sufficiently specific information as regards the temporal scope of his or her intended investigation.”).

⁶³ [Philippines PTD](#), para. 35 (“in the context of ‘war on drugs’ operations”).

⁶⁴ [Philippines AD](#), para. 163 (“in light of the fact that the Prosecutor’s intended investigation concerns alleged crimes against humanity, the PTC expected the domestic proceedings to focus on high-ranking officials”); [Philippines PTD](#), para. 68; [Venezuela AD](#), para. 348 (“the alleged crimes against humanity were committed as part of an attack against a civilian population “pursuant to or in furtherance of a State policy to commit such an attack”, a policy which “was at a minimum encouraged or approved by the Government of Venezuela”. It was therefore not an error for the PTC to observe that “high-ranking officials are expected to be the investigation’s focus”, and conclude that the national proceedings do not sufficiently mirror the scope of the Prosecutor’s intended investigation due to, among other reasons, “the fact that the focus of the domestic investigations appear to generally be on direct/low level perpetrators.”).

⁶⁵ [Venezuela PTD](#), para. 77.

⁶⁶ [Venezuela OTP Request](#), paras 57, 63.

⁶⁷ Article 18(1) Notification, p. 2.

the Statute.”⁶⁸ Indeed, the Appeals Chamber has been clear that an article 18(1) notification must be “sufficiently specific” in terms to enable a State to evaluate, and then show, whether its own investigations “sufficiently mirror” those of the Prosecutor.⁶⁹ The impropriety of this “catch-all” provision is particularly egregious where, as here, the Referral also contains a “catch-all” provision purporting to encompass any and all “past, ongoing and future crimes within the court’s jurisdiction.”⁷⁰ This practice of defining a situation “without any limitation whether in context or duration” has likewise been rejected as incompatible with the concept of a “situation” and with “the proper functioning of the principle of complementarity.”⁷¹

32. The limitation in the 2021 Notification to “hostilities” having occurred in “2014” is therefore significant. The Referral or Notification could have defined the scope of the situation and intended investigation as an armed conflict, including in the context of a series of hostilities taking place on various occasions, which the Prosecution now asserts was taking place.⁷² But this was not done. The 2018 Referral makes no reference to either armed conflict or hostilities, and the 2021 Notification refers to a single time-limited period of “hostilities” in Gaza without linking these events to any broader series of hostilities or armed conflict. Indeed, the 2021 Notification’s reference to “2014 hostilities” more closely follows the temporally-limited language of the *Philippines* Situation (“between 1 November 2011 and 16 March 2019”),⁷³ than it does the authorization in the *Afghanistan* Situation (“in the period since 1 May 2003”).⁷⁴

iv. Even if the single reference to “hostilities” in the 2021 Notification is interpreted as purporting to provide notice of an investigation into an ongoing armed conflict, this impermissibly exceeds the scope of the situation

33. As just discussed, the reference to “hostilities” in the 2021 Notification does not indicate that the defining parameters of the Prosecution’s investigation are intended to encompass a broad or ongoing armed conflict. However, even if it could be so interpreted, this would be impermissible. An article 18(1) notification must “fall[] within the boundaries of the Situation in relation to which the Court’s jurisdiction is referred to the Prosecutor.”⁷⁵ Accordingly, an

⁶⁸ [Venezuela PTD](#), para. 77.

⁶⁹ [Venezuela AD](#), paras 8, 110, 220, 230, 246, 277.

⁷⁰ [Referral](#), para. 9.

⁷¹ [Mbarushimana Jurisdiction Decision](#), paras 21, 23, 28 (“The Statute cannot be interpreted as permitting a State to permanently abdicate its responsibility by referring a wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether as to context or duration. Such an interpretation would be incompatible with the proper functioning of the principle of complementarity.”).

⁷² [OTP Consolidated Response](#), para. 3.

⁷³ [Philippines AD](#), para. 6.

⁷⁴ See e.g. [Afghanistan Authorisation Request](#), paras 1, 44, 50, 376.

⁷⁵ [Venezuela AD](#), para. 227.

article 18(1) notification may be narrower, but may not exceed, the Situation referred.⁷⁶ Importantly, if the Prosecutor intends “to go beyond the factual boundaries of the scenario encompassed in the referral, he or she must invoke the *proprio motu* powers under Article 15”⁷⁷ – which would require separate judicial authorization. This follows directly from articles 14 and 13(a), which make clear that any investigation is opened with reference to “[a] situation [...] referred to the Prosecutor by a State Party.” Accordingly, ensuring that the Article 18(1) Notification falls within the scope of a Referral is vital to ensuring that the framework of authorizations and supervisions prescribed within the Statute is not usurped by a high-handed Prosecutor.

34. The 2018 Referral frames the situation being referred as arising from Israel’s alleged “settlement regime” pursued “with the aim of pursuing its policy of displacement and replacement of the Palestinian people.”⁷⁸ The policy is framed broadly, but without any reference to armed conflict or to hostilities between any parties to an armed conflict.

35. The Prosecution seeks to bridge the divide between the Referral and the intense hostilities that erupted on 7 October 2023 by asserting that these are merely another example of a long series of “crimes occurring in the context of conduct of hostilities.”⁷⁹ Despite the litany of examples of such hostilities provided in the context of this litigation,⁸⁰ not a single such incident is identified in the 2018 Referral. The Referral scrupulously, conspicuously and seemingly deliberately makes no reference to the alleged series of events that the Prosecution now says is constitutive of the armed conflict. Yet this was not the situation of crisis articulated in the Referral.

36. The Prosecution asserts that even if the scope of the 2018 Referral is limited to “settlement policies” that it was “potentially”⁸¹ obliged and authorized to unilaterally expand the terms of the Referral pursuant to articles 42 and 54. These provisions require, *inter alia*, the Prosecutor to act “independently”, impartially, and investigate “all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.”

⁷⁶ See [Mbarushimana Arrest Warrant Decision](#), para. 6 (“it is only within the boundaries of the situation of crisis for which the jurisdiction of the court was activated that subsequent prosecutions can be initiated”); Ambos, p. 875 (“In other words, a case cannot exceed the parameters of a referred situation under investigation”).

⁷⁷ Ambos, p. 871, fn. 111.

⁷⁸ [Referral](#), para. 2. See [Referral](#), paras 3, 8, 11-13, 16-18.

⁷⁹ [OTP Response to Appeal](#), para. 52.

⁸⁰ [OTP Consolidated Response](#), para. 3; [OTP Response to Appeal](#), para. 37.

⁸¹ [OTP Response to Appeal](#), para. 52 (“This would potentially be contrary to the Prosecution’s statutory obligations under article 42 and 54 of the Statute requiring it to conduct an investigation into a situation as a whole.”)

37. The Prosecution’s “potential[.]” claim has no foundation in reality and is wrong in law. Neither article 42 nor 54 provide any legal basis for the Prosecution unilaterally broadening the terms of a referral made under article 14(1). The *Mbarushimana* PTC has opined that a referral may not be arbitrarily restricted to “certain persons” or “after a given date.”⁸² In one such case, the Prosecutor advised the referring party that a limitation to “the Lord’s Resistance Army” would have to be removed, which resulted in a situation encompassing crimes committed in “Northern Uganda – irrespective of who committed them.”⁸³ In opening an investigation in this Situation, however, the Prosecutor gave no indication either in the 2021 Notification or in public statements that the scope of the 2018 Referral was incompatible with her obligations under the Statute, or that it needed to be broadened. The referring authority was not asked to broaden the scope of the referral, nor was any article 15 application made to the judges.⁸⁴ The Prosecution had no authority to broaden the scope of the referral unilaterally, and did not do so.

38. The consequence is that the Article 18(1) Notification must be read subject to the Referral, which, as previously discussed, makes no reference to any hostilities, let alone armed conflict, as the scope of the referred situation. That scope is defined instead in relation to purported “settlement policies.” Accordingly, even if the Notification is read as purporting to give notice of a broad investigation into an ongoing armed conflict – which it manifestly does not – this would exceed the scope of the Referral. Neither the Referral, nor the Notification, give notice of an intended investigation into a broad armed conflict that includes the events that followed 7 October 2023.

39. On the basis of the foregoing errors, the PTC erred in finding that the Prosecution’s intended investigation as set out in the 2021 Notification is defined with reference to the “same type of armed conflicts” and “same alleged parties to these conflicts” as have occurred following 7 October 2023. On the contrary, armed conflict is not a defining parameter of the investigation notified in 2021 at all, which is defined instead with reference to “settlement policies”.

B. Second Ground of Appeal: The PTC erred in failing to find, and giving no reasons to reject, Israel’s submission that a new Situation was triggered by referrals following 7 October 2023

⁸² [Mbarushimana Jurisdiction Decision](#), para. 27.

⁸³ [Kony Prosecution Observation on Admissibility](#), para. 4. The notification of such an interpretation at least gives the referring authority the opportunity to object, which could be relevant to the interpretation of the scope of the referral.

⁸⁴ [OTP Statement 3 March 2021](#).

40. Following the 7 October 2023 attacks, at least seven States agreed that the 2018 Referral did not encompass the radical change of circumstances that had arisen, and the consequent scope of the situation of crisis to be referred. No longer were the crimes to be investigated by the Prosecution related to a situation concerning “settlement policies”.

41. On 17 November 2023, five States Party, “[a]cting pursuant to Article 13(a) and Article 14(1) of the Rome Statute” submitted a referral to the Prosecutor in which they “hereby refer[] the Situation in Palestine to the Prosecutor of the Court, requesting the Prosecutor to investigate the Situation for the purpose of determining whether one or more specific persons should be charged with the commission” of alleged crimes enumerated in the referral.⁸⁵ In paragraph 1 of this referral, the States purport to re-state the scope of the 2018 Referral, which they characterise as encompassing “all matters related to the Israeli settlement regime.”⁸⁶ In paragraph 2, however, the States refer “additional crimes” beyond the scope of the 2018 Referral: “Furthermore, and in recent weeks, some of the same crimes appear to have continued to be committed and additional crimes appear to have been committed within the jurisdictional scope of the Court.”⁸⁷ Amongst the additional alleged crimes identified are “genocide”⁸⁸ and various violations concerning methods of warfare in the course of hostilities.⁸⁹ While the Preamble refers to “the escalation of violence,” it is apparent from the operative paragraphs that the States are well aware of the scope of the 2018 Referral as concerning “settlement” policies, and considered that a referral was necessary to trigger jurisdiction in respect of “additional crimes”. On 18 January 2024, two States Party submitted an additional referral which, broadly speaking, adopts the 17 November 2023 Referral, while also for the first time making reference in a referral to “the attack of 7 October 2023 conducted by Hamas militants.”⁹⁰

42. Israel firmly rejects the allegations in these Referrals as utterly baseless. Nevertheless, these referrals are significant as they: (i) correctly note the scope of the 2018 Referral as relating to a purported “settlement regime”; (ii) acknowledge the radical change in the situation of crisis arising from the 7 October 2023 attacks; and (iii) submit new referrals encompassing “additional crimes” and additional circumstances that were not previously encompassed. The content of the November 2023 Referral triggered a new situation obliging the Prosecutor to

⁸⁵ [17 November 2023 Referral](#), para. 3.

⁸⁶ [17 November 2023 Referral](#), para. 1.1.

⁸⁷ [17 November 2023 Referral](#), para. 2.

⁸⁸ [17 November 2023 Referral](#), paras 2.1, 2.4.3.

⁸⁹ [17 November 2023 Referral](#), paras 2.3, 2.4.1, 2.4.2.

⁹⁰ [18 January 2024 Referral](#), p. 2.

make a decision whether to investigate pursuant to article 53(1) and, if so, requiring the provision to Israel of a new article 18(1) notification.

43. Not every referral under article 14 necessarily gives rise to a new situation. A referral that is co-extensive with an existing situation could not do so. However, any referral that goes beyond the scope of an existing situation, even if only in part, necessarily requires: the registration of a new situation in accordance with Regulations 45 and 46 of the Regulations of the Court; a decision regarding an investigation pursuant to article 53(1); and, following a decision to open an investigation, a new article 18(1) notification.

44. The Prosecutor short-circuited this process by failing to comply with regulation 45 of the Regulations of the Court, which requires that “[t]he Prosecutor shall inform the Presidency in writing as soon as a situation has been referred to the Prosecutor by a State Party.” Contrary to submissions by the Prosecutor,⁹¹ his failure to have done so is not consistent with his past practice in the *Venezuela* and *DRC* situations. In both situations, the Prosecutor complied with Regulation 45 despite a preliminary assessment that the new referrals overlapped with existing situations.⁹² The need for particular caution in this respect arises from article 18(1) itself, which is triggered in the first instance “[w]hen a situation has been referred to the Court pursuant to article 13(a).”

45. The PTC erred in law by failing to provide any reasons at all in the Impugned Decision addressing this issue; failing to find that the 2023 Referral required the registration of a new situation before the Court; and failing to find that a new article 18(1) notification had to be provided to Israel if the Prosecutor were to conclude, on the basis of the second condition in article 18(1) that “there would be a reasonable basis to commence an investigation.”

C. Third Ground of Appeal: The PTC erred in failing to consider other defining parameters of the Prosecution’s Article 18(1) notification in assessing whether it encompassed post-7 October 2023 events

46. As discussed in the First Ground, the PTC mistakenly found that the Referral and the Article 18(1) Notification were defined by reference to “armed conflicts”, which resulted in the erroneous conclusion that the Prosecution’s post-7 October 2023 investigations concern the “same type of armed conflicts” and the “same alleged parties to these conflicts”.⁹³

⁹¹ [OTP Response to Appeal](#), para. 49; [OTP Consolidated Response](#), fn. 29.

⁹² [Venezuela II Assignment](#), p.3 (notification provided to Presidency despite Prosecutor’s view that a new referral “appear[ed] to overlap geographically and temporally” with the existing situation”); [OTP Statement 17 February 2020](#); [OTP Statement 15 June 2023](#); [DRC II Assignment](#), p. 3.

⁹³ [Impugned Decision](#), para. 15.

47. However, the PTC did not analyse or refer to any further potential defining parameters of the Prosecution's intended investigation despite, in an earlier paragraph, reciting other potentially relevant defining parameters of the Prosecution's investigation, including "the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality" and "the types of alleged crimes, potential alleged perpetrators, the starting point of the relevant timeframe".⁹⁴ Previous jurisprudence has also mentioned other potentially relevant defining parameters, including the context or circumstances of the crimes,⁹⁵ the hierarchical level of the potential perpetrators⁹⁶ and whether the crimes were committed as part of a "State policy".⁹⁷ None of these criteria were considered or applied in assessing whether the Article 18(1) Notification was sufficiently specific and representative of the scope of the Prosecutor's post-7 October investigation.

48. The Chamber's reference to various criteria in paragraph 11 for the purposes of specificity, but not in relation to the scope of the post-7 October 2023 investigation in paragraph 15, suggests that the PTC did not properly turn its mind to whether the 2021 Notification is sufficiently specific or representative in relation to the post-7 October 2023 investigation. Yet this is the relevant inquiry. As explained by the *Venezuela* Pre-Trial Chamber, the sufficiency of an article 18(1) notification must be judged according to whether it "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 that it intends to investigate in any future cases."⁹⁸ While it is impossible for future crimes to be known in advance, the Prosecution must nonetheless, as the *Venezuela* Appeals Chamber stated, provide "examples of alleged crimes [...] sufficient to provide in broad terms the contours of the investigation she wishes to investigate."⁹⁹ If the "future cases" investigated deviate from the scope of the Article 18(1) Notification, then such

⁹⁴ [Impugned Decision](#), para. 11.

⁹⁵ [Philippines PTD](#), para. 35 ("in the context of 'war on drugs' operations").

⁹⁶ [Philippines AD](#), para. 163 ("in light of the fact that the Prosecutor's intended investigation concerns alleged crimes against humanity, the PTC expected the domestic proceedings to focus on high-ranking officials"); [Philippines PTD](#), para. 68; [Venezuela AD](#), para. 348 ("the alleged crimes against humanity were committed as part of an attack against a civilian population "pursuant to or in furtherance of a State policy to commit such an attack", a policy which "was at a minimum encouraged or approved by the Government of Venezuela". It was therefore not an error for the PTC to observe that "high-ranking officials are expected to be the investigation's focus", and conclude that the national proceedings do not sufficiently mirror the scope of the Prosecutor's intended investigation due to, among other reasons, "the fact that the focus of the domestic investigations appear to generally be on direct/low level perpetrators.").

⁹⁷ [Venezuela AD](#), paras 348-349.

⁹⁸ [Venezuela PTD](#), para. 77 ("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 that it intends to investigate in any future case(s).").

⁹⁹ [Venezuela AD](#), para. 106 (quoting the appeals Chamber [Afghanistan Authorisation AD](#), para. 59).

notice would become “meaningless”.¹⁰⁰ the Prosecutor could simply change and enlarge the scope of its future investigations without having given adequate notice under article 18(1).

49. Various defining parameters of the 2021 Notification indicate that it is not sufficiently specific or representative of the Prosecution’s post-7 October investigations.

50. First, as previously discussed in the First Ground, no “armed conflict” of any character is articulated in the Notification as a defining parameter of the Prosecution’s intended investigation. Although a reference to crimes committed under sub-sections (a), (b), (c) and (e) of article 8 of the Rome Statute presupposes the existence of an armed conflict, there is no articulation that this constitutes a “defining parameter” of the scope of the intended investigation. Converting this unstated pre-condition into a defining parameter of the 2021 Notification would render the notification requirement of article 18(1) meaningless.

51. Second, the Article 18(1) Notification does not allege crimes carried out systematically or as a matter of State policy except for the alleged “transfer of Israeli civilians into the West Bank.”¹⁰¹ The crimes that are now alleged to have been committed as a matter of State policy since 7 October 2023 are of an entirely different nature, involving allegations of mass criminality including the crime of extermination (albeit rejected by the PTC). This entails a major shift in the potential perpetrators and the nature of the crimes imputed to them.

52. Third, the Article 18(1) Notification did not allege any crimes against humanity whatsoever. The Notification, in this respect, defines the scope of the investigation more narrowly than the scope of the referred situation, which the Referral purports to include various crimes against humanity. However, a Prosecutor is not required to open an investigation that is co-extensive with the scope of a referred situation, and may define it more narrowly.¹⁰² Crimes against humanity necessarily entail the existence of a widespread or systematic attack against a civilian population, committed “in furtherance of a State or organizational policy to commit such attack.”¹⁰³ This element substantially widens the scale and type of investigations.¹⁰⁴ The

¹⁰⁰ [Venezuela PTD](#), para. 77.

¹⁰¹ Article 18(1) Notification, p. 2.

¹⁰² [Venezuela PTD](#), para. 77 (rejecting the Prosecution assertion that the time period of its intended investigation should be treated as co-extensive with the time-period of the referral, and accepting that the Prosecution could define it more narrowly (although it had not, on the facts)).

¹⁰³ [Elements of Crimes](#), Article 7, para. 3; [Expert Panel Report](#), para. 30 (“the crimes were committed in the context of a widespread and systematic attack against the civilian population of Gaza, pursuant to State policy.”).

¹⁰⁴ [Venezuela AD](#), para. 10 (“a State seeking to assert its primary jurisdiction over such crimes must demonstrate the existence of an advancing process of domestic investigations and prosecutions of the facts and circumstances underlying the alleged crimes, including the factual allegations in support of the contextual elements of crimes against humanity that were sufficiently notified through an article 18(1) notification of the Prosecutor.”).

investigation has accordingly been broadened dramatically beyond what was conveyed in the Article 18(1) Notification.

53. Fourth, the general circumstances in which the alleged criminality is said to have occurred has changed radically. The context of events described in the Article 18(1) Notification is entirely different to that which now prevails, involving radically different considerations. In short, the unprecedented factual context has changed so dramatically as to be unrecognizable compared to what is described in the 2021 Notification.

54. The “defining parameters” criteria merely formalize common sense: there has been such a radical change of circumstance following 7 October 2023 compared to what is reflected in the 2021 Notification that a new Article 18(1) Notification is required. This is the view of the United States¹⁰⁵ and Germany,¹⁰⁶ one of the most stalwart supporters of the Court, and of one of the drafters of article 18 itself.¹⁰⁷ Indeed, albeit in a different context and in respect of conclusions vigorously contested by Israel, the ICJ observed that it would not analyse events having occurred in Gaza following 7 October 2023 as they could not be “considered to be part of ‘Israel’s ‘ongoing’ or ‘continuing’ policies and practices.’”¹⁰⁸ As emphasized in a Joint Opinion, the “situation in the Gaza Strip has undergone a fundamental change following the murderous attacks committed by Hamas from Gaza on Israeli territory on 7 October 2023 and Israel’s large-scale military operation that followed.”¹⁰⁹

55. Nor is the requirement of a new article 18(1) notification unworkable. Previous adjudications under Article 18(2) have been conducted relatively expeditiously – 235 days and 216 days in the *Venezuela* and *Philippines* situations, respectively. Any challenge by the Prosecutor to an Israeli notification under article 18(2) (following the issuance of a second Article 18(1) notice in October 2023) could, accordingly, have been resolved by July 2024 – almost a year ago now – if the Prosecutor had only provided a timely article 18(1) notification.

¹⁰⁵ [US Observations](#), paras. 19, 21 (“[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.”).

¹⁰⁶ [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”).

¹⁰⁷ [Scheffer](#) (The Prosecutor “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.”).

¹⁰⁸ [ICJ AO](#), para. 81.

¹⁰⁹ [ICJ AO, Joint Opinion](#), para. 14.

Nor would the time required for adjudication under article 18(2) have had any significant negative impact on the OTP's information gathering, including through open-sources, informal voluntary interviews, or reviewing any information that may be received by the Prosecution. Furthermore, more formal investigative steps may be authorised by the PTC when justified pursuant to article 18(6). Accordingly, any delay arising from the requirement of a new Article 18(1) notification is modest, and more than justified by the importance of the interests concerned, which include fostering "dynamic complementarity" with domestic authorities that facilities and encourages their own domestic investigation.¹¹⁰ The Prosecution's refusal to provide a meaningful article 18(1) notification in respect to its post-7 October 2023 investigations undermines those objectives.

56. It also undermines the respect owed by the Court to State sovereignty and – vitally – judicial supervision of the operation of article 18. 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 to pursue criminal investigations and/or prosecutions.¹¹¹

57. Israel, to be sure, has not been given an opportunity to "explain itself" in respect of the Prosecution's investigation that has now led to allegations against Israel's Prime Minister and former Minister of Defence of directing State policy to commit crimes of widespread violence. These allegations bear no resemblance to the scope of the investigation described in the 2021 Notification.

V. CONCLUSION AND RELIEF SOUGHT

58. Complementarity is "the cornerstone of the Statute and of the functioning of the Court."¹¹² That cornerstone is even more important in respect of a State not Party to the Rome Statute,

¹¹⁰ [OTP Policy on Complementarity](#), preface.

¹¹¹ [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.

¹¹² [Kony First Admissibility Decision](#), para. 34.

which is governed by the rule of law, and engaged in a war that was forced upon it in a brutal attack and invasion. Unfortunately, Israel's good faith attempts to engage with the Prosecution and to trigger the complementarity regime were abruptly canceled by the Prosecution on 20 May 2024. The Impugned Decision added insult to injury by providing, at best cursory reasoning or, in some respects, no reasoning at all in relation to Israel's request for an article 18(1) notification. The intervention of the Appeals Chamber is urgently required to correct the PTC's errors, to restore the principle of complementarity, and to ensure that it is implemented faithfully in accordance with the Statute.

59. The Prosecution's investigations into events following 7 October 2023, which are the purported basis for arrest warrants issued against the current Prime Minister and former Minister of Defence of Israel, do not fall within the scope of the 2018 Referral or the 2021 Notification. Either because a new situation arose following the referral of 17 November 2023, or because the Prosecution has embarked on an investigation with defining parameters different than that contained in the 2021 Notification, Israel was entitled to a notification of the Prosecution's intended investigation following 7 October 2023. No less was required to accord Israel a fair and reasonable opportunity to show the extent to which its own proceedings mirror those of the Court, and no less is required now to vindicate the principle of complementarity. The PTC erred in finding the contrary, and this error was manifestly material to its conclusions.

60. On the basis of the foregoing errors, the Appeals Chamber is requested to:


REVERSE the Impugned Decision; and

ORDER the Prosecutor to comply with regulation 45 of the Regulations of the Court and article 53(1) of the Statute in respect of the 2023 Referral;

ORDER the Prosecution, following evaluation in accordance with article 53(1), to provide Israel with a notification pursuant to article 18(1); or, in the alternative:

REMAND the issue to the PTC for further deliberations and resolution in accordance with the Appeals Chamber's corrective instructions.

Respectfully submitted:



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

Dated this 26 May 2025

At Jerusalem, Israel