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PRE-TRIAL CHAMBER I

Before: **Judge Iulia Motoc, Presiding Judge**
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN THE STATE OF PALESTINE

Public
with Confidential Annexes A to D

Prosecution's consolidated response to observations by interveners pursuant to article 68(3) of the Rome Statute and rule 103 of the Rules of Procedure and Evidence

Source: **Office of the Prosecutor**

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Victims Participation and Reparations Section	**Other**

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I. INTRODUCTION

1. In accordance with Pre-Trial Chamber I's order of 9 August 2024,[1] the Prosecutor files this consolidated response in the *Situation in the State of Palestine* to the observations of interveners, including legal representatives of victims, members of academia, private citizens, international and non-profit organisations, and States. The Prosecution requests the Chamber to decide with the utmost urgency the Prosecution's Article 58 Applications on the basis of its submissions and the Article 19(3) Decision.[2]

2. Israel has occupied Palestine since 1967.[3] As the International Court of Justice ("ICJ") held in its *Advisory Opinion* of 19 July 2024, Israel's continued presence in the Occupied Palestinian Territory ("oPt") is unlawful.[4] The territory occupied includes Gaza, over which Israel exercises a range of forms of control.[5] It has done so both before and after its unilateral disengagement in 2005, and before and after its military operations in response to the attacks of 7 October 2023.[6] It includes the West Bank and East Jerusalem, where Israel has established, maintained, and expanded settlements in violation of international law.[7] Israel has also engaged in policies and practices in violation of international law that have resulted in the annexation of large parts of the oPt,[8] that entail systematic discrimination,[9] and that impede the right of the Palestinian people to self-determination.[10]

3. Since 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, and the taking of hostages. On 7 October 2023, Hamas carried out an attack on Israel with the assistance of other Palestinian armed groups, killing hundreds of Israeli civilians and abducting over 240 persons, many of whom continue to be held hostage. Following the attack, Israel launched a large-scale military operation in Gaza, which has caused and continues to cause extensive civilian casualties, including tens of thousands of Palestinians killed, massive

[1] ICC-01/18-325, para. 8; ICC-01/18-173-Red, para. 8. The Prosecution will interchangeably use "Pre-Trial Chamber I" and "Chamber".
[2] ICC-01/18-143 ("Article 19(3) Decision").
[3] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, p. 136 ("*Wall Advisory Opinion*"), paras. 73-78; "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem", Advisory Opinion, 19 July 2024 ("*ICJ Advisory Opinion*"), para. 87.
[4] *ICJ Advisory Opinion*, para. 261.
[5] *ICJ Advisory Opinion*, para. 93.
[6] *ICJ Advisory Opinion*, paras. 86-94.
[7] *Wall Advisory Opinion*, para. 120; *ICJ Advisory Opinion*, para. 67.
[8] *ICJ Advisory Opinion*, para. 173.
[9] *ICJ Advisory Opinion*, paras. 180-229.
[10] *ICJ Advisory Opinion*, paras. 230-243.

destruction of civilian infrastructure, and the displacement of the overwhelming majority of the population. Israel has deprived the Palestinian population of objects indispensable to their survival.

4. As described above and as victims participating in these proceedings have asserted: "the situation clearly did not start on 7 October 2023".[11] As noted in the referrals by Chile and México, and by South Africa, Bangladesh, Bolivia, Comoros and Djibouti, these recent events represented an escalation in the violence that had long been part of the existing criminality alleged in this situation.[12] As such, the events of 7 October 2023 and Israel's response thereto fall squarely within the parameters of, and are in any event sufficiently linked to, the situation referred by Palestine to the Court in May 2018, which has been under investigation by the Prosecution since 3 March 2021.

5. It is settled law that the Court has jurisdiction in this situation. On 5 February 2021, after a thorough and inclusive process triggered by the Prosecution's article 19(3) request, this Chamber—in a different composition—held unanimously that Palestine is a State Party to the Statute and, by majority, that the Court's jurisdiction extends over the oPt, that is, the West Bank, including East Jerusalem, and Gaza.[13] It also specifically held that the Oslo Accords were not a bar to opening the Court's investigation.[14] These findings apply no less to the current proceedings, since in the present *ex parte* context this ruling is settled law, and therefore does not need to be revisited.

6. The Prosecutor's announcement of his intention to make applications under article 58, initiating prosecutions against certain individuals, could not and did not alter the *ex parte* nature of the resulting article 58 proceedings, to which the Prosecutor is the only party. The *ex parte* nature of article 58 proceedings is regulated by the Court's legal framework and accords with their limited purpose and applicable evidentiary threshold; it is unrelated to the level of classification of filings. Nor is this the first time that an ICC Prosecutor has made a public announcement. Indeed, the Prosecutor has publicly announced the filing of requests for arrest warrants or summons to appear with respect to at least 13 persons in at least four other situations—in 2008, in 2010, in 2011, and in 2022.[15] Yet, in each of those cases the proceedings remained *ex parte* (Prosecutor only) and the Chambers issued their decisions under article 58

[11] ICC-01/18-335 ("Sourani *et al.*"), para. 2.
[12] Chile and Mexico Article 14 Referral; South Africa *et al.* Article 14 Referral.
[13] Article 19(3) Decision, p. 60.
[14] Article 19(3) Decision, paras. 124-129.
[15] *See* Darfur, Kenya, Libya and Georgia.

on the basis of the Prosecution's submissions only and without any preceding rule 103 process. There is no reason to treat this situation differently.

7. In any event, the Oslo Accords—which should be considered an agreement between an occupying power (Israel) and a local authority (the Palestinian Liberation Organization) regulating aspects of the occupation, as foreseen by article 47 of GCIV[16]—are irrelevant to the Court's jurisdiction. The Court's jurisdiction is exclusively and exhaustively governed by article 12 of the Statute, interpreted in accordance with ordinary modes of treaty interpretation under international law and the Court's consistent jurisprudence.

8. Furthermore, there are no "uncontested facts that render [the] case[s] clearly inadmissible," nor is there any "ostensible cause" otherwise compelling the Chamber to assess admissibility in the current proceedings.[17] As the Prosecution has concluded, and as is evident from the public record, there are no domestic proceedings at present which deal with substantially the same conduct and the same persons as the cases presented to the Chamber pursuant to article 58 of the Statute. There is no information indicating that Benjamin NETANYAHU or Yoav GALLANT, Israel's Prime Minister and Minister of Defence, respectively, are being criminally investigated or prosecuted, and indeed the core allegations against them have simply been rejected by Israeli authorities.

9. Adhering to the Court's settled law concerning article 58 proceedings—in which admissibility determinations are discretionary, and only to be made in exceptional cases such as when there is an "ostensible cause"—creates no prejudice either for any State with jurisdiction or for any suspect for whom an arrest warrant has been sought.[18] These rights are expressly preserved by article 19(2) of the Statute, which allows for the possibility of admissibility challenges if the Chamber decides to issue an arrest warrant pursuant to article 58 of the Statute.

10. Finally, the Prosecution recalls that the Court is required to respect the internationally recognised rights of victims with regard to the conduct of its proceedings, especially the rights of victims to know the truth, to have access to justice, and to request reparations.[19] This means

[16] GCIV, article 47. In interpreting the Oslo Accords, the ICJ considered it necessary to take into account article 47 of GCIV, which provides that the protected population "shall not be deprived" of the benefits of the Convention "by any agreement concluded between the authorities of the occupied territories and the Occupying Power": *ICJ Advisory Opinion*, para. 102.

[17] ICC-01/04-169 OA ("*DRC* Arrest Warrant Appeal Judgment"), para. 52.

[18] To the contrary, the Appeals Chamber has held that judicial restraint at the article 58 stage may protect such interests: *see e.g.* *DRC* Arrest Warrant Appeal Judgment, paras. 48-51.

[19] ICC-RoC46(3)-01/18-37 ("Bangladesh/Myanmar Jurisdiction Decision"), paras.87-88, quoting ICC-01/04-01/06-772 OA4, para 37.

that the Chamber must fulfil its solemn responsibility to consider and decide on the Article 58 Applications with utmost urgency. Any unjustified delay in these proceedings detrimentally affects the rights of victims.[20]

11. The situation in the oPt, including Gaza, is catastrophic, owing in large part to the ongoing criminality described in the Applications. As anticipated by article 58(1)(b)(iii) of the Statute, the arrest of the persons named in the Applications appears *necessary* "to prevent [them] from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances." This is manifestly evident in this situation where victims are "struggling with death, hunger and disease".[21] The issuance of the requested arrest warrants could avert further harm to the victims who remain in Gaza and to those who were forced to leave but continue to suffer physical and mental harm.[22] The ICJ has already addressed the situation in the oPt on four separate occasions during 2024,[23] and it is now for the Court to ensure that there is no delay in the pursuit of criminal accountability in the *Situation in the State of Palestine*.

II. BACKGROUND

12. On 1 January 2015, pursuant to article 12(3) of the Statute, Palestine accepted the Court's jurisdiction for crimes allegedly committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014".[24]

13. On 2 January 2015, Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General pursuant to article 125(3) of the Statute.[25] The Statute entered into force for Palestine on 1 April 2015.[26] Since its accession and as a State Party to the Statute, Palestine has developed an active role in the work of the Assembly of States Parties ("ASP"), has contributed to the Court's budget and has participated in the adoption of resolutions by the ASP.[27]

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[20] Bangladesh/Myanmar Jurisdiction Decision, para. 88.
[21] ICC-01/18-330 ("Van Hooydonk & Dixon"), para. 3.
[22] ICC-01/18-337 ("Gallagher"), para. 14.
[23] *ICJ Advisory Opinion*; Order 24 May 2024; Order 28 March 2024; Order 26 January 2024.
[24] *See* Press Release Palestine Acceptance ICC Jurisdiction since 13 June 2014, 5 January 2015. *See also* Palestine Article 12(3) Declaration, 31 December 2014 (signed by Mahmoud Abbas as President of the State of Palestine); Letter from ICC Registrar to Mahmoud Abbas, 7 January 2015 (indicating confirmation of receipt on 1 January 2015 of the 31 December 2014 Declaration).
[25] Press Release Palestine Accession, 7 January 2015; UNSG Notification of Palestine Accession, 6 January 2015.
[26] *See* ASP President Speech, 1 April 2015; *see* Statute, article 126(2).
[27] Article 19(3) Decision, para. 100.

14. On 16 January 2015, the Prosecutor opened a Preliminary Examination into the *Situation in the State of Palestine*.[28]

15. On 22 May 2018, Palestine referred this situation to the Prosecutor requesting "the Prosecutor to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine".[29] It specified that "[t]he State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, [which] includes the West Bank, including East Jerusalem, and the Gaza Strip".[30]

16. On 22 January 2020, the Prosecution requested Pre-Trial Chamber I to rule on the scope of the Court's territorial jurisdiction in this Situation pursuant to article 19(3) of the Statute.[31]

17. On 28 January 2020, and upon the Prosecution's suggestion, the Chamber expressly invited Israel as well as other States, organisations and/or persons to provide observations on the question identified by the Prosecution for the purpose of article 19(3).[32]

18. On 20 February 2020, the Chamber allowed numerous legal representatives of victims,[33] States Parties,[34] intergovernmental organisations,[35] and *amici curiae*[36] to provide observations of up to 30 pages on the question identified by the Prosecution.[37] In total, the Chamber received submissions from some 11 groups of one or more victims, 31 States Parties (from eight States

[28] *See* Press Release Prosecutor Statement PE Palestine, 16 January 2015.
[29] *See* Prosecutor Statement Palestine Article 14 Referral, 22 May 2018. *See also* Palestine Article 14 Referral, 15 May 2018 (signed by Dr. Riad Malki, Minister of Foreign Affairs and Expatriates), para. 9.
[30] Palestine Article 14 Referral, fn. 4.
[31] *See* ICC-01/18-12 ("Prosecutor Request"), paras. 5, 220.
[32] ICC-01/18-14 ("Article 19(3) Order"), paras. 15-16.
[33] *See* LRV1 Brief (victims represented by Zegveld); LRV2 Brief (victims represented by Gaynor and Kiswanson van Hooydonk); LRV3 Brief (victims represented by Parker and Quzmar); OPCV Brief (OPCV on behalf of unrepresented victims); LRV4 Brief (victims represented by Darshan-Leitner *et al.*); LRV5 Brief (victims represented by Gallagher); LRV6 Brief (victims represented by Sourani *et al.*); LRV7 Brief (victims represented by Cochain Assi); LRV8 Brief (victims represented by Devers); LRV9 Brief (victims represented by Powles and Francis); LRV10 Brief (victims represented by [Redacted]).
[34] *See* Czech Republic Brief; Austria Brief; Palestine Brief; Australia Brief; Hungary Brief; Germany Brief; Brazil Brief; Uganda Brief.
[35] *See* OIC Brief (Organisation of Islamic Cooperation); Arab League Brief (League of Arab States). The Organisation of Islamic Cooperation represents 57 States of which Afghanistan, Albania, Bangladesh, Benin, Burkina Faso, Chad, Comoros, Côte d'Ivoire, Djibouti, Gabon, Gambia, Guinea, Guyana, Jordan, Maldives, Mali, Niger, Nigeria, Palestine, Senegal, Sierra Leone, Suriname, Tajikistan, Tunisia, and Uganda (25) are also ICC States Parties. The League of Arab States represents 22 States of which the Comoros, Djibouti, Jordan, Palestine, and Tunisia (5) are also ICC States Parties.
[36] *See* ICC-01/18-63 ("*Amicus Curiae* Decision"); ICC-01/18-128 ("Further *Amicus Curiae* Decision"). *See further* Quigley Brief; ECLJ Brief; Schabas Brief; PBA Brief; Khalil and Shoaibi Brief; Bazian Brief; Shaw Brief; Falk Brief; MyAQSA Brief; Shurat HaDin Brief; IBA Brief; Lawfare Project *et al.* Brief; Buchwald and Rapp Brief; FIDH *et al.* Brief; Gvirsman Brief; OPCD Brief; Guernica 37 Brief; UKLFI *et al.* Brief; Blank *et al.* Brief; Ross Brief; Benvenisti Brief; PCHR *et al.* Brief; Badinter *et al.* Brief; IAJLJ Brief; PCPA Brief; TIHRH Brief; IL Brief; Heinsch and Pinzauti Brief; IFF Brief; Intellectum Scientific Society Brief; Weiss Brief; Romano Brief; ICmJ Brief; IADL Brief.
[37] *Amicus Curiae* Decision, paras. 53-56, 58-59.

Parties directly, and from two international organisations which represent more than 20 States Parties, alongside more than 30 other non-States Parties), and 34 academics or non-governmental organisations (individually or in groups).

19. On 30 April 2020, the Prosecution filed a consolidated response to the above observations.[38]

20. On 5 February 2021, the Chamber issued its Article 19(3) Decision, where it unanimously confirmed that Palestine is a State Party and, by majority, that Palestine is a State for the purposes of article 12(2)(a) of the Statute, that the territorial scope of the Court's jurisdiction in this situation extends to the territories occupied by Israel since 1967 (namely, the West Bank, including East Jerusalem, and Gaza),[39] and that the Oslo Accords do not bar the initiation of the Prosecution's investigation.[40] Judge Perrin de Brichambaut appended a separate opinion regarding the application of article 19(3).[41] Judge Kovács appended a partly dissenting opinion with respect to the majority's reasoning and conclusion.[42]

21. On 3 March 2021, the Prosecutor announced the opening of the investigation in the *Situation in the State of Palestine* with respect to crimes within the jurisdiction of the Court that are alleged to have been committed in the Situation since 13 June 2014.[43]

22. On 17 November 2023, South Africa, Bangladesh, Bolivia, Comoros and Djibouti referred the Situation to the Prosecutor.[44] They recalled Palestine's referral, the Prosecution's investigation, and noted the recent "escalation of violence" in the Situation.

23. On 18 January 2024, Chile and México also referred the Situation to the Prosecutor.[45] They noted the 17 November 2023 referral and "encouraged by this example, [they] want[ed] to draw further attention of the Office of the Prosecutor to the situation in the State of Palestine". They likewise noted the "latest escalation of violence" and requested the Prosecution to investigate the Situation beginning on 13 June 2014.

24. On 20 May 2024, the Prosecutor publicly announced his intention to apply under article 58 for the arrest of five persons in the *Situation in the State of Palestine*.[46]

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[38] ICC-01/18-131 ("Prosecution Response").
[39] Article 19(3) Decision, p. 60. The resolution of this question necessarily required answering the question of whether Palestine was a State for the purposes of the exercise of the Court's jurisdiction under article 12(2)(a).
[40] Article 19(3) Decision, para. 129.
[41] ICC-01/18-143-Anx2 ("Judge Perrin de Brichambaut's Separate Opinion").
[42] ICC-01/18-143-Anx1 ("Judge Kovács' Partly Dissenting Opinion").
[43] Prosecutor Statement, 3 March 2021.
[44] South Africa *et al.* Article 14 Referral.
[45] Chile and Mexico Article 14 Referral.
[46] Prosecutor Public Statement, 20 May 2024. The Prosecution will refer to these applications as "Article 58 Applications" or "Applications".

25. On 10 June 2024, the United Kingdom requested leave to provide observations under rule 103 on "[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords".[47]

26. On 27 June 2024, the Chamber granted the United Kingdom's request to file observations and invited any further requests under rule 103 to be submitted by 12 July 2024.[48]

27. On 4 July 2024, the Chamber granted the request by the United Kingdom for an extension of time to provide its observations, given the approaching general election in the United Kingdom on 4 July 2024.[49] Ultimately, the United Kingdom did not file any observations.

28. On 22 July 2024, after receiving over 70 applications from individuals, organisations, and States, the Chamber granted leave to most applicants to provide observations by 6 August 2024. The Chamber also directed legal representatives of potential victims to rely on article 68(3) of the Statute if they wished to provide observations.[50]

29. On 30 July 2024, pursuant to article 68(3) of the Statute, the Office of Public Counsel for Victims ("OPCV") and several groups of legal representatives of victims were granted leave to provide observations by 12 August 2024.[51]

30. On 9 August 2024, the Chamber allowed the Office of Public Counsel for the Defence ("OPCD") to file observations by 16 August 2024. It also authorised the Prosecution to file a consolidated response of no more than 53 pages by 26 August 2024.[52]

31. In total, the Chamber has received submissions from some ten groups of victims (including OPCV),[53] OPCD,[54] 40 States Parties (from 18 States Parties directly,[55] and from two international organisations which represent an additional 22 States Parties, alongside more than

[47] ICC-01/18-171-Red.
[48] ICC-01/18-173-Red ("First Order"), para. 6.
[49] ICC-01/18-178 ("Decision on UK Request").
[50] ICC-01/18-249 ("Second *Amicus* Order"), paras. 11, 14.
[51] ICC-01/18-256 ("Victims Order").
[52] ICC-01/18-325 ("OPCD Order").
[53] Victims include ICC-01/18-327 ("OPCV"); ICC-01/18-338 ("Al Shouli & Al Masry"); ICC-01/18-336 ("Parker & Quzmar"); ICC-01/18-335 ("Sourani *et al.*"); ICC-01/18-330 ("Van Hooydonk & Dixon"); ICC-01/18-337 ("Gallagher"); ICC-01/18-334 ("Devers"); ICC-01/18-333 ("Gvirsman"); ICC-01/18-322 ("Branco") and ICC-01/18-344 ("Raoudha Addassi").
[54] ICC-01/18-342 ("OPCD").
[55] State Parties include ICC-01/18-296 ("Hungary"); ICC-01/18-294 ("Czech Republic"); ICC-01/18-291 ("Palestine"); ICC-01/18-299 ("Colombia"); ICC-01/18-318 ("Spain"); ICC-01/18-316 ("Brazil"); ICC-01/18-306 ("Ireland"); ICC-01/18-307 ("Germany"); ICC-01/18-284 ("Chile & México"); ICC-01/18-309 ("South Africa, Bangladesh, Bolivia, Comoros, Djibouti"); ICC-01/18-264 ("Norway"); ICC-01/18-269 ("Argentina") and ICC-01/18-329 ("DRC"). The USA also filed separately - ICC-01/18-300 ("USA").

30 other non-States Parties),[56] 41 academics and non-governmental organisations (individually or in groups),[57] and three individuals.[58]

III. SUBMISSIONS

32. In the sections below, the Prosecution addresses key issues arising from the interveners' observations with the aim of assisting the Chamber in the expeditious resolution of the Article 58 Applications. The Prosecution has not sought to indicate its agreement or disagreement (as the case may be) with each and every of the many observations received by the Chamber.

- *First*, the Prosecution notes that the United Kingdom requested permission to provide observations solely on the Oslo Accords, which the Chamber considered to be an issue of "potential relevance".[59] Accordingly, since the Chamber has not expressly determined which other issues addressed by the *amici curiae* are of potential relevance to its decisions under article 58, the Prosecution respectfully submits that observations relating to matters other than the Oslo Accords should be dismissed *in limine*. In any event, and to the extent that the Chamber decides to entertain these other observations, the Prosecution rests on its submissions advanced in the Applications. It stands ready to provide further submissions should the Chamber require it.

- *Second*, the Prosecution appreciates and shares the concerns raised by some interveners regarding the current rule 103 process. The Prosecution emphasises that article 58 proceedings are *ex parte*, with the effect that the Chamber decides solely on the basis of the Prosecution's submissions. Nor has the *ex parte* nature of the proceedings been altered. In this regard, the Chamber should not anticipate in its decision matters which might

[56] ICC-01/18-268 ("OIC") and the ICC-01/18-282 ("League of Arab States").
[57] The academics include ICC-01/18-254 ("Quigley"); ICC-01/18-261 ("Zipperstein"); ICC-01/18-262 ("Heinsch & Pinzauti"); ICC-01/18-265 ("Shany & Cohen"); ICC-01/18-275 ("Gordon"); ICC-01/18-314 ("Shoaibi & Khalil"); ICC-01/18-278 ("Lynk & Falk"), ICC-01/18-279 ("Bachman *et al.*"); ICC-01/18-285 ("Chilstein"); ICC-01/18-303 ("Haque"); ICC-01/18-257 ("Schabas"); and ICC-01/18-315 ("Hammouri"). The academic institutes consist of ICC-01/18-270 ("Macrocrimes"); ICC-01/18-277 ("USA Universities") and ICC-01/18-290 ("Al-Quds"). *See also* ICC-01/18-260 and ICC-01/18-260-Anx ("ECLJ"); ICC-01/18-321 ("JURDI & FIDH"); ICC-01/18-267 ("HLMG"); ICC-01/18-273 ("ALMA"); ICC-01/18-297 ("Touro Institute"); ICC-01/18-295 ("CUJS & WUJS"); ICC-01/18-293 ("CIJA"); ICC-01/18-313 ("IBA"); ICC-01/18-283 ("ICJP & SOAS"); ICC-01/18-310 ("JIJ"); ICC-01/18-281 ("JCPA & NGO Research"); ICC-01/18-301 ("The Hague Initiative"); ICC-01/18-286 ("AOHR UK"); ICC-01/18-287 ("Law for Palestine"); ICC-01/18-289 ("Lawyers Palestinian HR"); ICC-01/18-292 ("Guernica 37"); ICC-01/18-317 ("OSJ, ECCHR, Redress, HRW, AI"); ICC-01/18-305 ("Hostages & Wallenberg"); ICC-01/18-288 ("Addameer"); ICC-01/18-298 ("IA Jewish Lawyers & Jurists"); ICC-01/18-311 ("ICJurists"); ICC-01/18-276 ("ICJ Norway & Defend IL"); ICC-01/18-312 ("AJPO"); ICC-01/18-308 ("Al-Haq *et al.*"); ICC-01/18-331 ("ICHR") and ICC-01/18-272 ("UKLFI *et al.*").
[58] The three individuals are ICC-01/18-274 ("Batra"); ICC-01/18-304 ("Graham") and ICC-01/18-280 ("Rosenbaum").
[59] First Order, para. 5.

subsequently be raised, and called to be ruled upon, under article 19(2) of the Statute.

- *Third*, in ruling on the Article 58 Applications, the Chamber should affirm the Court's jurisdiction in this situation consistent with the Chamber's prior Article 19(3) Decision, which already determined, *inter alia*, the irrelevance of the Oslo Accords to the Court's jurisdiction. For the purpose of article 58, bearing in mind the *ex parte* nature of the proceedings, the Article 19(3) Decision has the effect of *res judicata*.
- *Fourth*, the Oslo Accords do not bar the exercise of the Court's jurisdiction, which is determined exclusively and exhaustively in the relevant respect by article 12 of the Statute.
- *Finally*, the cases identified by the Prosecution are admissible before the Court: Israel is not investigating the same persons for substantially the same conduct as alleged in the Article 58 Applications. There are no "uncontested facts" that render the cases inadmissible nor is there any "ostensible cause" otherwise compelling the Chamber to assess complementarity.

A. The observations unrelated to the Oslo Accords should be dismissed *in limine*

33. The United Kingdom requested permission to provide observations on the question of "[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords".[60]

34. In its First Order granting the UK Request, the Chamber noted "the potential relevance of the issue the United Kingdom wishes to address for the Chamber's assessment".[61] It further observed that "the Chamber's decision to grant the United Kingdom leave to file observations, may result in other requests to submit observations", and ordered that any such requests be submitted by 12 July 2024.[62] It follows that the Chamber's First Order must be understood as limiting the scope of the rule 103 process to the Oslo Accords.

35. In its Second Order granting the requests of almost all subsequent applicants under rule 103, the Chamber did not expand the thematic scope of the observations since it did not explain which other topics could also be of potential relevance to its decisions.[63] Accordingly, the scope of the allowed observations remained limited to the Oslo Accords, which was the topic raised

[60] First Order para. 1.
[61] First Order, para. 5.
[62] First Order, para. 6.
[63] Second Order, para. 10 ("[…]the Chamber has evaluated the requests received to assess whether the observations proposed are desirable for the proper determination of the case").

by the United Kingdom and the sole issue identified by the Chamber as being of "potential relevance". This interpretation is consistent with the Court's prior practice in which chambers clearly delimited the questions for interveners to address under rule 103 and to which the Prosecution may respond.[64]

36. This notwithstanding, many interveners provided observations on topics unrelated to the Oslo Accords, including on the merits of the Applications, even if they are not publicly available. Accordingly, the Prosecution respectfully requests dismissal *in limine* of such observations. To the extent that the Chamber decides to consider them, the Prosecution rests on the submissions it advanced in the Applications and herein. It stands ready to provide further submissions should the Chamber require it.

B. The article 58 proceedings are *ex parte* and have a limited purpose

37. The Prosecution notes the tension between the present rule 103 process and the article 58 proceedings highlighted by some interveners.[65] The Prosecution emphasises that proceedings leading to article 58 decisions are *ex parte*, in the sense that the Chamber must decide solely on the basis of the information provided by the Prosecution. The Prosecutor's public announcement prior to the filing of the Applications could not and did not affect the *ex parte* nature of the subsequent article 58 proceedings, which is specified by the Court's legal framework. Notwithstanding the Chambers' bounded discretion to receive observations under rule 103, the Chamber should consider the limited purpose and *ex parte* nature of the article 58 proceedings and not rule on matters that do not arise from the Prosecution's Application and that are not necessary to its determination.

38. *First*, there is no doubt that article 58 proceedings are, and must remain, *ex parte* in the sense that the Prosecutor is the only party.[66] This means that, when seised of an application by the Prosecutor under article 58, the Pre-Trial Chamber decides solely on the basis of the

[64] *See e.g.* ICC-02/04-01/15-1884 A, para. 19; ICC-01/04-02/06-2554 A2, para. 15; ICC-02/18-78 OA, para. 7; ICC-01/09-02/11-898, para. 7.
[65] *See e.g.* JURDI & FIDH, paras. 3-4; Colombia, paras. 10-11; Lynk & Falk, paras. 1-2; Al-Haq *et al.*, paras. 3-14; OPCV, para. 2; Gallagher, para. 10; OPCD, para. 2; Gallagher, para. 9.
[66] ICC-01/09-35, para. 10 ("the proceedings triggered by the Prosecutor's application for a warrant of arrest or a summons to appear are to be conducted on an *ex parte* basis. The only communication envisaged at the article 58 this stage [sic] is conducted between the Pre-Trial Chamber and the Prosecutor"); ICC-01/09-42, para. 16 ("[i]n qualifying the proceedings under article 58 of the Statute as *ex parte*, the Chamber indicates that the proceedings are to be conducted 'without […] argument by any person adversely interested'" and "the concrete factual circumstances are not of relevance and cannot ground the modification of the *ex parte* nature of these proceedings"), *see also* paras. 18-20, 23 ("the proceedings under article 58 of the Statute are to be conducted with the exclusive participation of the Prosecutor"); *see also* Ryngaert, C., "Article 58" in Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed. (Beck/Hart Publishing: München, 2022), p. 1717, mn. 8.

information and evidence presented by the Prosecutor.[67] Indeed, the Court's legal framework does not foresee the involvement of other parties or participants (whether potential suspects, States, victims or other actors) in responding to or providing observations with regard to article 58 applications before the Pre-Trial Chamber,[68] including on matters of jurisdiction and admissibility. The Appeals Chamber has confirmed as much.[69]

39. This absence of other parties or participants in article 58 proceedings is consistent with their non-adversarial character, limited purpose, and the applicable evidentiary threshold—they merely serve to initiate a prosecution on the basis of reasonable grounds to believe that a person has committed a crime within the Court's jurisdiction.[70] It is also consistent with an interpretation of article 58 that accords with other provisions of the Court's legal framework, which allow for matters of jurisdiction and admissibility to be properly raised by relevant actors at other stages of the proceedings.[71] For this reason, the Appeals Chamber has warned that Pre-Trial Chambers seised of article 58 applications should generally refrain from addressing matters, such as complementarity, which might subsequently be raised under article 19(2) of the Statute before the same Chamber.[72] This is necessary to avoid pre-determining questions to the detriment of a suspect who is not allowed to participate in the article 58 proceedings but has a specific avenue to raise these matters after the decision is issued.[73]

40. There is no basis to depart in this situation from the Court's consistent jurisprudence emphasising the exclusive participation of the Prosecution in article 58 proceedings before the Pre-Trial Chamber.[74]

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[67] Statute, art. 58(1) ("At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, *having examined the application and the evidence or other information submitted by the Prosecutor*, it is satisfied that [..]") (emphasis added); *see also* ICC-01/09-35, para. 10 ("[t]he only communication envisaged at the article 58 […] stage is conducted between the Pre-Trial Chamber and the Prosecutor"); ICC-01/09-42, paras. 6, 10 ("the evaluation to be carried out by the Pre-Trial Chamber in the current proceedings is centred on a determination as to the sufficiency of evidence and material presented by the Prosecutor in establishing reasonable grounds to believe that the conditions provided for in article 58 of the Statute have been met"); *see also* para. 11 (noting that "there have been no instances wherein victims or amici curiae have been allowed to participate in the proceedings under article 58 of the Statute before a Pre-Trial Chamber").

[68] *See* ICC-01/09-42, paras. 11, 16, 18; Gallagher, para. 10.

[69] *DRC* Arrest Warrant Appeal Judgment, para. 45 ("article 58 [...] foresees that the Pre-Trial Chamber takes its decision on the application for a warrant of arrest on the basis of the information and evidence provided by the Prosecutor").

[70] Statute, art. 58(1)-(2); *see* Van Hooydonk & Dixon, para. 8 ("The specific role of the Pre-Trial Chamber is to examine the Prosecutor's request and satisfy itself hat the requirements of Article 58(1) have indeed been met"); *see also* South Africa, Bangladesh, Bolivia, Comoros, Djibouti, para. 33.

[71] *See* Van Hooydonk & Dixon, paras. 6-7; Parker & Quzmar, para. 32; OPCV, para. 25; Devers, para. 17..

[72] *DRC* Arrest Warrant Appeal Judgment, paras. 48-51.

[73] *DRC* Arrest Warrant Appeal Judgment, paras. 48-51; OPCD, paras. 26-27.

[74] ICC-01/09-35; ICC-01/09-42; ICC-01/09-43; ICC-01/09-47.

41. *Second*, the Prosecutor's public announcement of his intention to submit the Article 58 Applications could not and did not change the *ex parte* nature of the subsequent article 58 proceedings—which is determined by the Court's legal framework, and which is formally distinct from the classification of judicial records.[75] Proceedings can be *ex parte* (Prosecutor only), yet filings made public. Nor did the Prosecutor's decision to consult with external experts affect the *ex parte* nature of these proceedings. This fell within the exercise of the Prosecutor's independent mandate and his full authority over the management of his Office, consistent with article 42 of the Statute.

42. In fact, this is far from the first time that article 58 proceedings have been publicly acknowledged. In at least the *Darfur*,[76] *Kenya*,[77] *Libya*,[78] and *Georgia*[79] situations, the Prosecutor publicly announced the filing of article 58 applications with respect to at least thirteen persons in 2008, in 2010, in 2011, and in 2022. This did not change the *ex parte* nature of the ensuing article 58 proceedings. In all those cases the Chambers ruled on the Prosecution's applications on the basis of the Prosecution's submissions only. There is no reason to treat this situation differently. Notably, in *Kenya*, the Pre-Trial Chamber expressly rejected requests to provide observations—even by the suspects named in the applications—precisely because of the non-adversarial and *ex parte* nature of the proceedings.[80] Likewise, the *Chambers Practice Manual* acknowledges the possibility of public article 58 proceedings while underscoring their *ex parte* nature and the absence of standing even for the suspect in question.[81]

43. This same rationale must apply even more strongly for third parties who request permission to make observations as *amici curiae* under rule 103 within the context of article 58 proceedings. Any other approach would not only undermine the *ex parte* nature of the proceedings, it would also lead to the absurd result that third parties possess greater procedural

[75] *See* Regulations of the Registry, regulation 14 (levels of confidentiality). As such, proceedings may be *ex parte* (for example, limited only to one party, such as the Prosecution) but yet the filing may still be public (if there is no requirement for confidentiality).
[76] ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur, 14 July 2008.
[77] Kenya's post election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity, 15 December 2010.
[78] Statement of the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo in relation to Libya, 16 May 2011.
[79] ICC Prosecutor, Karim A.A. Khan QC, announces application for arrest warrants in the Situation in Georgia, 10 March 2022.
[80] ICC-01/09-42, para. 22 ("the Chamber is not of the view that such publicity caused could ground a construction of the proceedings of article 58 in adversarial terms contrary to the legal instruments of the Court").
[81] 2023 Chambers Practice Manual, para. 3 ("[e]ven if the proceedings are public (which is however not recommended), the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application").

rights than the suspect. Such an approach might enable persons or entities to approach the Court providing unwanted and unhelpful observations without full candour as to their connections to the suspects or the situation.[82]

44. *Third*, notwithstanding that the Chamber has a bounded discretion to receive observations under rule 103,[83] this discretion is not unfettered and must be exercised in accordance with the Court's legal framework governing the stage of proceedings. [84] This means that the receipt of rule 103 observations cannot in any way alter the *ex parte* nature of article 58 proceedings. Nor can these observations become *de facto* (and non-permitted) jurisdictional or admissibility challenges by third parties, where such challenges are not provided for under article 19(2) of the Statute.[85] The Chamber must exercise care not to pre-determine matters which do not arise from the Prosecution's submissions under article 58 and which can be properly raised at other stages of the proceedings.[86] Indeed, the receipt of observations under rule 103 should not subvert the limited scope and purpose of the article 58 proceedings and the carefully delineated legal framework that affords rights to suspects and certain States to raise issues of jurisdiction and admissibility pursuant to article 19(2) *after* article 58 decisions are rendered.[87] Thus, as the Appeals Chamber has expressly confirmed, while the Chamber may exercise its discretion to address matters of admissibility for the purpose of article 58, it should do so only exceptionally, such as when there are "uncontested facts" that render a case clearly inadmissible or there is "an ostensible cause" impelling such *proprio motu* review.[88] Likewise, even if the Chamber must satisfy itself of jurisdiction under article 19(1), it must do so on the basis of the facts and circumstances contained in the Prosecutor's Applications and—in this situation—in light of the decision already rendered under article 19(3) on 5 February 2021 which, among other

[82] *Cf.* Gallagher, para. 11; Heinsch & Pinzauti, fn. 2; Van Hooydonk & Dixon, para. 2.
[83] First Order, para. 3. Chambers have required proposed observations under rule 103 to be desirable in assisting them in resolving questions requiring their determination: *see e.g.* ICC-02/04-01/15-1955 A A2, para. 12; ICC-02/18-78 OA, para. 8; ICC-01/04-02/06-2569 A2, para. 9 and ICC-01/04-02/06-2554 A2, para. 11; ICC-02/04-01/15-1914 A A2, para. 15 and ICC-02/04-01/15-1884 A, para. 19; ICC-02/17-97 OA OA1 OA2 OA3 OA4, para. 31; ICC-01/11-01/11-675 OA8, para. 9; ICC-02/05-01/09-330, para. 1. Chambers have also required that proposed observations under rule 103 are not repetitive: ICC-01/05-01/08-602 OA2, para. 11; ICC-01/09-01/11-988 OA5, para. 12. Chambers have sometimes required that the *amici* possess sufficient qualifications or expertise: ICC-02/04-01/15-1884 A, para. 19; ICC-01/04-02/06-2554 A2, para. 11; *see also* Van Hooydonk & Dixon, para. 15.
[84] Devers, paras. 12-13.
[85] Palestine, p. 5 ("The Court cannot do through the backdoor of Rule 103 what is not permitted by the text of the Rome Statute itself"); Van Hooydonk & Dixon, para. 7.
[86] *DRC* Arrest Warrant Appeal Judgment, paras. 48-51; OPCD, paras. 26-27.
[87] C*f.* Colombia, para. 10; OPCV, para. 2; Al-Haq *et al.*, para. 18; Parker & Quzmar, para. 32; Devers, para. 17.
[88] *DRC* Arrest Warrant Appeal Judgment, para. 52.

issues, already addressed the Oslo Accords and settled this question.[89]

C. The Article 19(3) Decision addressed the Oslo Accords and is settled law

45. As part of the existing ruling on jurisdiction in the Article 19(3) Decision, the Chamber has already concluded by majority that the Oslo Accords do not bar the exercise of the Court's jurisdiction in initiating an investigation.[90] As OPCV puts it, "the matter should have ended there".[91] Indeed, in the present *ex parte* context, this ruling is functionally equivalent to *res judicata* and does not need to be revisited.[92] In support of this conclusion, the Prosecution recalls the specific purpose of the procedure under article 19(3), the thorough and open process adopted by the Chamber leading to its Article 19(3) Decision, and the specific reasoning of the decision itself.

46. Upon the Prosecution's suggestion in its Article 19(3) Request of 22 January 2020, in which the Prosecution sought early resolution of the territorial scope of the Court's jurisdiction in this situation,[93] the Chamber expressly invited Israel[94] as well as other States, organisations and/or persons to provide observations on the question identified by the Prosecution.[95] Although Israel chose not to provide observations, numerous legal representatives of victims, States Parties, intergovernmental organisations, and *amici curiae* responded to the Chamber's call. Since many of the participants provided observations on the purported impact of the Oslo Accords, the Chamber chose to address this question, "[f]or the sake of completeness".[96]

47. In the Article 19(3) Decision, the majority agreed with the Prosecution and various other participants that the Oslo Accords were "not pertinent to the resolution of the issue under

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[89] There is no "clear error of reasoning" or a need "to prevent an injustice" that would justify reconsideration of the Article 19(3) Decision: ICC-02/05-01/20-650, para. 10; ICC-02/05-01/20-938-Red, paras. 13, 56; ICC-01/14-01/21-275, para. 8; ICC-01/12-01/18-1330, para. 4; ICC-01/12-01/18-734, para. 11; ICC-02/04-01/15-468, para. 4; ICC-01/05-01/13-1282, para. 8; ICC-01/04-02/06-519, para. 12; ICC-01/09-01/11-1813, para. 19.
[90] Article 19(3) Decision, para. 129.
[91] OPCV, para. 23.
[92] *See e.g.* Chile & México, paras. 7-10; South Africa, Bangladesh, Bolivia, Comoros, Djibouti, para. 32; USA Universities, paras. 2-3; OPCV, paras. 3, 12, 23; Al-Haq *et al.*, paras. 8, 18; Van Hooydonk & Dixon, paras. 2, 9; Al Shouli & Al Masry, paras. 5, 8.
[93] Prosecutor Request, para. 220. The resolution of this question necessarily required answering the question whether Palestine was a State for the purposes of the exercise of the Court's jurisdiction under article 12(2)(a). In its decision of 5 February 2021, Pre-Trial Chamber I resolved the two questions and unanimously found that Palestine was a State Party to the Statute and by majority, Judge Kovács dissenting, that "Palestine qualifies as '[t]he State on the territory of which the conduct in question occurred' for the purposes of article 12(2)(a)" and "that the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem": Article 19(3) Decision, p. 60.
[94] Article 19(3) Order, para. 16 ("The Chamber notes that Israel has an interest in the adjudication of the Prosecutor's Request and, accordingly, invites Israel to submit written observations of no more than 30 pages by no later than 16 March 2020"). The Prosecutor made a similar request: Prosecutor Request, para. 6.
[95] Article 19(3) Order, para. 15.
[96] Article 19(3) Decision, para. 124.

consideration, namely the scope of the Court's territorial jurisdiction in Palestine" and could be raised in other contexts "rather than in relation to a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor".[97] Echoing the approach of the *Afghanistan* Appeals Chamber with respect to certain agreements between the USA and Afghanistan,[98] the Chamber identified two scenarios where the Oslo Accords might nonetheless be raised again at later stages of the proceedings, namely:

- By the requested State as a possible impediment to executing requests for cooperation or judicial assistance ("RFA") under articles 97 and 98 of the Statute.[99]
- By interested States based on article 19 of the Statute.[100] It is understood that the Chamber considered the issues potentially arising from the Oslo Accords as going to the question of admissibility pursuant to article 19, as submitted by the Prosecutor.[101] This also follows from the closely preceding finding that issues concerning the Oslo Accords were "not pertinent" to the scope of the Court's territorial jurisdiction.[102]

48. The approach in the Article 19(3) Decision to the Oslo Accords remains equally applicable for the purpose of the current proceedings under article 58. Neither of the two scenarios identified above is applicable: no material request for cooperation has been made, nor have the Oslo Accords been raised by a requested State as an obstacle to such cooperation.[103] In addition, no State or other relevant person can make challenge under article 19(2) at this stage.[104] Indeed, prior to the Chamber's decision under article 58, there is no standing to make such a challenge under article 19(2). This is made clear not only by the reference to a "case" in the *chapeau* of article 19(2), but also by the express recognition in article 19(2)(a) that a jurisdictional challenge by a natural person is ripe only once "a warrant of arrest or a summons to appear has been issued". Interpreting article 19(2) in context indicates that the same restriction applies to articles 19(2)(b) and (c). This would be "the earliest opportunity" foreseen in article 19(5) for a State to submit a challenge under article 19(2). The Appeals Chamber has confirmed as much. It has held that:

[97] Article 19(3) Decision, para. 129.
[98] ICC-02/17-138 ("*Afghanistan* Appeal Judgment"), para. 44; *see* Van Hooydonk & Dixon, paras. 11-12.
[99] Article 19(3) Decision, paras. 127-128.
[100] Article 19(3) Decision, para. 129.
[101] Prosecutor Request, para. 185, cited in Article 19(3) Decision, para. 25; *see also* South Africa, Bangladesh, Bolivia, Comoros, Djibouti, para. 31.
[102] Article 19(3) Decision, para. 129.
[103] *See* South Africa, Bangladesh, Bolivia, Comoros, Djibouti, para. 30
[104] OPCV, para. 25.

> [A]rticle 19 of the Statute relates to the admissibility of *concrete cases*. The cases are defined by the *warrant of arrest or summons to appear issued under article 58*, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61. *Article 58 requires that for a warrant of arrest or a summons to appear to be issued*, there must be reasonable grounds to believe that the person named therein has committed a crime within the jurisdiction of the Court.[105]

49. In its original request, the United Kingdom misinterpreted the reasoning in the Article 19(3) Decision on the Oslo Accords, and appears to have erroneously taken into account in this regard a concluding and unrelated paragraph.[106] In any event, nothing in that paragraph—which recalls that, "[w]hen the Prosecutor submits an [article 58] application [], *or* if a State or suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine *further questions of jurisdiction* which may arise at that point in time"[107]—suggests that the Oslo Accords raise any questions of jurisdiction. To the contrary, this is contradicted by the reasoning discussed above, which considers the potential relevance of the Oslo Accords only to cooperation and admissibility, and not to jurisdiction at all.

50. Moreover, the Chamber's emphasis in the Article 19(3) Decision on the possibility of addressing "*further* questions of jurisdiction" [108] is consistent with the view that, at least in the absence of a relevant challenge under article 19(2) of the Statute, the matters which have already been addressed should be regarded as the law of the case—including for the purpose of proceedings under article 58 and article 19(1) of the Statute. Even with respect to article 21(2) of the Statute, the Appeals Chamber has held that it will not readily exercise its discretion to depart from its own prior jurisprudence, absent convincing reasons, given the need to ensure predictability of the law and the fairness of adjudication so as to foster public reliance on its decisions.[109] These considerations apply even more strongly to jurisdictional rulings under

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[105] ICC-01/09-01/11-307 ("*Ruto et al.* Admissibility AD"), para. 40 (emphasis added); *see also* para. 41. *See further* ICC-01/04-101-tEN-Corr, para. 65 (finding that "[c]ases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear."); ICC-01/04-93, p. 4 (considering that "challenges to the jurisdiction of the Court or the admissibility of a case pursuant to article 19(2)(a) of the Statute may only be made by an accused person or a person for whom a warrant of arrest or a summons to appear has been issued under article 58", and concluding that since "at this stage of the proceedings no warrant of arrest or summons to appear has been issued and thus no case has arisen; and that the Ad hoc Counsel for the Defence has no procedural standing to make a challenge under article 19(2)(a) of the Statute"); *DRC* Arrest Warrant Appeal Judgment, para. 51.

[106] UK Request, para. 10. *See* Al-Haq *et al*., paras. 8-10; Van Hooydonk & Dixon, para. 10; Parker & Quzmar, para. 28..

[107] Article 19(3) Decision, para. 131 (emphasis added).

[108] Article 19(3) Decision, para. 131 (emphasis added).

[109] ICC-02/11-01/15-172 ("*Gbagbo* Victims Participation Decision"), para. 14 (finding that "while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not readily do so, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions" and referring to

article 19(3), which are precisely intended to provide legal clarity and certainty for the purpose of subsequent proceedings.[110] In such circumstances, at least to the extent that there is no new party to the proceedings, a doctrine akin to *res judicata* should apply.[111] Notably, as stated above, article 58 proceedings are *ex parte* in nature and the Prosecutor remains the only party in both. By contrast, the right of the suspect and/or States with standing to enter into questions of jurisdiction or admissibility which were addressed without their participation is adequately secured by article 19(2). Such a right, however, does not arise until after the Chamber has positively ruled on a request under article 58.

D. The Oslo Accords do not and cannot bar the Court's exercise of jurisdiction over Israeli nationals for crimes committed in the oPt

51. Certain interveners argue that the Oslo Accords bar the exercise of the Court's jurisdiction over international crimes committed on the territory of the State of Palestine by Israeli nationals. This argument is without merit. *First*, it is inconsistent with the Statute when interpreted in accordance with ordinary modes of treaty interpretation under international law and the Court's consistent jurisprudence, and wrongly seeks to treat the State of Palestine differently from every other State Party. *Second*, the argument that the Oslo Accords bar jurisdiction is premised on a misunderstanding of foundational concepts of jurisdiction under international law, including under the law of occupation, as well as their implications for the Court's exercise of jurisdiction under the Statute.

a. The Court's jurisdiction is regulated by the Statute

52. The Rome Statute establishes and defines the scope and exercise of the Court's

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ICC-01/05-01/08-566, para. 16 where the Appeals Chamber found that absent 'convincing reasons' it will not depart from its previous decisions), cited in ICC-01/14-01/21-318, para. 45. *See also* ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 Marc 2000 ("*Aleksovski* AJ") paras. 107-109; *Rutaganda* AJ, para. 26.

[110] *See also Aleksovski* AJ, para. 97 (where the Appeals Chamber recalled that the need for consistency, certainty and predictability in the law is generally recognized in national jurisdictions, both of common law and civil law traditions, as well as before international tribunals).

[111] *See e.g.* MICT, *Prosecutor v. Karadžić*, MICT-13-55-A, Decision on a Motion for Redacted Versions of Decisions Issued under Rule 75(H) of the ICTY Rules, 18 July 2016, p. 4 (where the MICT Appeals Chamber noted that "legal certainty presupposes respect for the principle of *res judicata*, which holds that no party is entitled to seek a review of a final and binding decision or judgment merely for the purpose of obtaining a rehearing and a fresh determination of the same issue"); *see also Prosecutor v. Simić and al*., IT-95-9, Decision on (1) Application by S. Todorovic to Re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, para. 9 ("the principle of *res judicata* would prevent the Prosecution from raising that specific issue again in any interlocutory proceedings between it and the ICRC unless the Trial Chamber itself were prepared to reconsider its decision"); *Prosecutor v. Prlić and al.,* IT-04-74-T, Decision on Prlić Defence Request for Certification to Appeal, 7 December 2009, p. 3 (where the Chamber dismissed a request for certification to appeal and applied the principle of *res judicata* to a procedural issue that had been previously resolved).

jurisdiction. Article 5 of the Statute endows the Court with jurisdiction over the most serious crimes of concern to the international community as a whole. Article 11, not at issue in these proceedings, sets conditions for the Court's temporal jurisdiction. Article 12 sets certain preconditions to the exercise of jurisdiction and Article 13 provides for triggers for the exercise of jurisdiction. Leaving aside questions of jurisdiction over the crime of aggression, subject to its own regime,[112] these provisions of the Statute establish a clear and straightforward scheme governing the existence and exercise of the Court's jurisdiction.

53. Pursuant to article 12(1), a "State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5."[113] Thereafter, under article 12(2) of the Statute, and leaving aside referrals by the Security Council, the Court's jurisdiction is defined by the two classical and universally accepted bases of jurisdiction under general international law—territoriality under article 12(2)(a) and nationality under article 12(2)(b).[114] The territorial principle as a basis of jurisdiction, in this sense, refers to the plenary competence of States to regulate persons, conduct, and events on their territory.[115] It is an inherent aspect of sovereignty,[116] with its scope defined by customary international law.[117] As noted by the Pre-Trial Chamber in *Bangladesh/Myanmar*: "provided that part of the *actus reus* takes place within the territory of a State Party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law."[118]

54. In summary, therefore, when a State becomes a party to the Statute, it accepts the jurisdiction of the Court. The Court is endowed with jurisdiction in relation to crimes committed on the State's territory or by its nationals. This creates a simple and unitary scheme for the Court such that it may exercise jurisdiction according to consistent and established principles in relation to crimes committed on the territory of each of its 124 States Parties.

b. The Oslo Accords objection

55. The Oslo Accords comprise the Declaration of Principles on Interim Self-Government Arrangements of 1993 (Oslo I)[119] and the Interim Agreement on the West Bank and the Gaza

[112] Statute, article 15*bis*.
[113] Statute, article 12(1).
[114] Schabas and Pecorella, 'Article 12' in Ambos (2021), p. 816-817.
[115] O'Keefe (2016), p. 5; Crawford, *Brownlie's Principles* (2021), p. 440.
[116] Crawford, *Brownlie's Principles* (2021), p. 440.
[117] ICC-01/19-27, para. 55.
[118] ICC-01/19-27, para. 61.
[119] Oslo I.

Strip of 1995 (Oslo II).[120] They should be considered an agreement between an occupying power (Israel) and a local authority (the Palestinian Liberation Organization) regulating aspects of the occupation,[121] as foreseen by article 47 of GCIV.[122] Yet, as made explicit in article 47 of GCIV, and as recently applied by the ICJ in its *Advisory Opinion* of 19 July 2024, such an agreement shall not "in any case or in any manner whatsoever" deprive protected persons of the benefits of the Convention[123] or "be understood to detract from Israel's obligations under the pertinent rules of international law."[124]

56. Article 17 of Oslo II makes provision for the jurisdiction of the Palestinian Council. This jurisdiction is to be exercised in the West Bank and Gaza Strip as a single territorial unit, subject to certain limitations.[125] Annex IV to Oslo II sets out a Protocol on Legal Affairs. The Protocol makes more detailed arrangements for the exercise of criminal jurisdiction in the Territory by the Palestinian Council.[126] It states in article I(2) that: "Israel has sole criminal jurisdiction over the following offenses: […] (b) offenses committed in the Territory by Israelis." It also makes provision for forms of assistance and cooperation between the occupying power and the Palestinian Council.[127]

57. The primary argument of certain interveners, with slight variations, is based on the proposition that the Oslo Accords did not grant to the Palestinian Council the power to exercise criminal jurisdiction over Israeli nationals.[128] Asserting an application of the principle of *nemo dat quod non habet*, these interveners propose that because the Palestinian Council could not exercise jurisdiction over Israeli nationals under the Oslo Accords, the Court cannot do so today under article 12 of the Statute. The consequence of this contention, if correct, would be that the State of Palestine's ratification of the Rome Statute did not have the ordinary effect of endowing the Court with jurisdiction over crimes committed on its territory. It would also mean that ratifying the Statute did not have the same effect for the State of Palestine that it has had for each of the other 123 States Parties to the Statute. Rather, it would mean that the State of

[120] Oslo II.
[121] *ICJ Advisory Opinion*, para. 102.
[122] GCIV, article 47.
[123] GCIV, article 47; *ICJ Advisory Opinion*, para. 102.
[124] *ICJ Advisory Opinion*, para. 102.
[125] Oslo II, article XVII(1).
[126] Annex IV - Protocol on Legal Affairs.
[127] Annex IV - Protocol on Legal Affairs, articles II, III, IV.
[128] ECLJ, paras. 8-13; Zipperstein, paras. 18-22; Shany & Cohen, paras. 10-17; JCPA & NGO Research, paras. 12-30; Hungary, paras. 22-27; Touro Institute, paras. 5-13; Argentina, para. 10; CIJA, paras. 4-13; Bachman *et al.*, paras. 3-10; Graham, paras. 16-18; Czech Republic, paras. 5-10; JIJ, 2-13; The Hague Initiative, para. 4-29; USA, paras. 11-15; Hostages & Wallenberg, paras. 14-17; IA Jewish Lawyers & Jurists, paras. 13-26; DRC, paras. 23-27; UKLFI *et al.*, paras. 9-14.

Palestine's ratification took effect with a qualification: that the Court has jurisdiction over crimes committed on the territory of the State of Palestine except when committed by Israelis.

c. The Oslo Accords objection is without merit

58. The Oslo Accords objection is without merit. *First*, it is inconsistent with the proper interpretation and application of article 12 of the Statute and wrongly seeks to treat the State of Palestine differently from every other State Party to the Statute. *Second*, it misunderstands basic concepts of jurisdiction under international law, including under the law of occupation, and how these concepts relate to the interpretation and application of the Statute.

i. The Oslo Accords objection is incompatible with the proper interpretation and application of article 12 of the Statute

59. The argument of certain interveners that the Oslo Accords bar the exercise of the Court's jurisdiction over international crimes committed on the territory of the State of Palestine by Israeli nationals is inconsistent with article 12 of the Rome Statute. Indeed, the Oslo Accords are irrelevant to the interpretation and application of article 12 of the Statute.

60. Two preliminary points are crucial.

- *First*, in relation to applicable law, article 21(1) provides: "The 'Court shall apply: …In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence."[129] As confirmed by the Appeals Chamber in *Ntaganda*, "[r]ecourse to other sources of law is possible only if there is a lacuna in these constituent instruments."[130] Put another way, if a matter is "exhaustively dealt with by" the text of the Statute, "no room is left for recourse" to other sources of law.[131]
- *Second*, in interpreting the Statute, "chambers of the Court have unanimously and systematically based their interpretation of the Statute on the principles established" in the Vienna Convention on the Law of Treaties ("VCLT").[132] In particular, article 31(1) of the VCLT provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[133]

61. Taking these points in turn, article 21(1) specifies that it is the Statute itself that must be

[129] Statute, article 21(1).
[130] ICC-01/04-02/06-1962 OA5, para 53.
[131] ICC-01/04-01/06-772, para 34. *See also* ICC-01/04-168, para. 39; Article 19(3) Decision, paras. 88, 111.
[132] ICC-01/04-01/07, para 43.
[133] VCLT, article 31(1).

applied in determining the scope of the Court's jurisdiction. As the Chamber held in the Article 19(3) Decision, the Statute exhaustively regulates the preconditions to the Court's exercise of jurisdiction.[134] There is no *lacuna* here, no gap that requires recourse to other sources of law.[135] Article 12 determines the existence and scope of the Court's jurisdiction in this matter.[136]

62. In this respect, applying the general rule of interpretation in the VCLT leads to the straightforward conclusion that article 12 establishes a unitary scheme of territorial jurisdiction with no exceptions. The scheme is unitary in the sense that it applies in the same manner to all State Parties. It has no exceptions in the sense that it applies in relation to every person who commits a crime within the jurisdiction of the Court on the territory of the State Party.[137] Each of the ingredients[138] of the general rule of interpretation under article 31(1) of the VCLT, which are to be considered holistically in good faith,[139] supports this conclusion.

63. *First*, the *ordinary meaning* of the relevant terms of article 12 is clear: "[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute […]: (a) The State on the territory of which the conduct in question occurred." The text itself admits no exceptions, exemptions, immunities, or carve-outs. It does not allow for variable application across different States Parties. It makes no provision for bilateral or other agreements to limit the exercise of the Court's jurisdiction.[140]

64. *Second*, three aspects of the *context* of article 12 support this interpretation of the establishment of a unitary scheme with no exceptions:

- Article 27 of the Statute provides for the irrelevance of official capacity of any person to the exercise of the Court's jurisdiction. No immunity or special procedural rule—whether under national law or international law—bars the Court from exercising its jurisdiction.[141] It makes no sense to assert that the Statute explicitly excludes exemptions from the exercise

[134] Article 19(3) Decision, para. 111.
[135] Norway, para. 13; South Africa, Bangladesh, Bolivia, Comoros, Djibouti, para 18; Palestine, p. 5. *See also* JURDI & FIDH, para. 9; Law for Palestine, para. 16; Devers, paras. 19-20.
[136] See Brazil, para. 18 ("Additionally, the jurisdiction of the Court […] is […] subject to its own set of exhaustive preconditions set forth by the Rome Statute. Once these preconditions are met and jurisdiction is established, no other considerations are pertinent in order to establish the scope and outreach of the ICC's jurisdiction").
[137] Article 26 of the Statute provides that the Court shall have no jurisdiction over persons under the age of 18 at the time of the alleged commission of the crime.
[138] ICC-01/04-01/07, para 45.
[139] ICC-01/04-01/07, para 45.
[140] Palestine, p. 6; Chile & México, para. 3
[141] Statute, article 27(2). *See* ICJ Norway & Defend IL, para. 17.

of jurisdiction in all cases under article 27 while allowing them to operate through the back door under article 12.[142]

- Article 120 of the Statute provides: "No reservations may be made to this Statute." Evident, here, is that the Statute, except as otherwise explicitly provided,[143] establishes a unitary framework for the exercise of jurisdiction. Just as a State cannot accept the jurisdiction of the Court subject to a formal reservation seeking to exempt one category of people, so any functional equivalents[144] should not be smuggled in through the interpretation of other provisions.[145]
- Articles 97 and 98 of the Statute make clear that the drafters of the Statute were well aware that States might bear certain obligations which appear to conflict with obligations under the Statute. As held by the Chamber in the Article 19(3) Decision and discussed in more detail below, and as is evident in their placement within Part 9 of the Statute concerning International Cooperation and Judicial Assistance, any such conflicting obligations are not relevant to the existence and exercise of the Court's jurisdiction under article 12. Indeed, their presence in Part 9 shows how the drafters of the Statute understood the jurisdictional scheme established by article 12.[146]

65. Each of these three contextual aspects confirms that article 12 establishes a unitary scheme with no exceptions for the exercise of the Court's jurisdiction.

66. *Third*, this interpretation of article 12 coheres with the *object and purpose* of the treaty, that is, "that the most serious crimes of concern to the international community as a whole must not go unpunished."[147] It is plainly inconsistent with this object and purpose of the Rome Statute to read into the terms of article 12 an exemption from the Court's jurisdiction based on a bilateral agreement entirely extraneous to the Statute.[148] This inconsistency is exacerbated in

[142] AJPO, para. 7; Haque, paras. 3, 5.
[143] *See e.g.* the transitional arrangements in article 124 of the Statute.
[144] *See* similarly Article 19(3) Decision, para. 102: "on the basis of article 124 of the Statute, the only exemption to the jurisdiction of the Court relates to a particular category of crimes, namely war crimes, for a limited period of time, which entails that the Statute is automatically activated in respect of all other matters. In addition, denying the automatic entry into force for a particular acceding State Party would be tantamount to a reservation in contravention of article 120 of the Statute."
[145] *See* Spain, para. 10 ("to claim that Article XVII.2.c of the Oslo II Accords excludes the exercise of the Court's jurisdiction over Israeli nationals would be tantamount to introducing a limitation on the Court's jurisdiction unilaterally imposed by a State Party (Palestine), contrary to the obligation it freely and voluntarily assumed to accept the Court's jurisdiction as a whole, without the possibility of making reservations to it"). *See also* OPCV, para 19; Haque, paras. 3, 5; AJPO, paras. 4-6; Chile & México, para. 14; Sourani *et al.*, para. 22.
[146] *See* ICC-02/17-33, para. 59
[147] See Statute, preamble, para. 4
[148] See Colombia, para. 17; Chile & México, para. 15; UN Rapporteurs, para. 22; JURDI & FIDH, para. 10; Addameer, para. 6(c).

situations where the agreement in question is one procured by an occupying power.[149] To do so would allow an occupying power, including when in breach of the prohibition on the use of force under international law, to exempt its nationals from the ordinary application of the Court's jurisdiction in relation to international crimes.[150]

67. Three other points further support this interpretation of article 12 as establishing a unitary scheme with no exceptions:

- *First*, under article 31(3)(c) of the VCLT, an interpreter is also enjoined to take into account "any relevant rules of international law applicable in the relations between the parties."[151] As is clear on the face of the text, the Oslo Accords are of no relevance under this provision. The term "in the relations *between the parties*" refers to the parties to the treaty being interpreted—in this instance, the Rome Statute. Whatever the formal status of the Oslo Accords, and whatever the relationship between the PLO and the State of Palestine, the conditions in article 31(3)(c) of the VCLT are simply not met because Israel is not a party to the Rome Statute. To hold otherwise would wrongly allow a State (Israel) which is not a party to a multilateral treaty (the Rome Statute) to modify the generally applicable terms of that treaty.[152]
- *Second*, pursuant to article 21(3) of the Statute, the Court must interpret and apply the applicable law—in this instance, article 12—consistently with internationally recognised human rights. As the Appeals Chamber noted in *Lubanga*: "Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court."[153] In general terms, interpreting article 12 as being subject to negotiated or procured exclusions and exemptions would be inconsistent with the right of victims of international crimes of access to justice.[154] In the matter at hand, it would be inconsistent with the rights of Palestinian victims of access to justice[155] and of the Palestinian people to self-determination,[156] which encompasses the enjoyment of fundamental rights guaranteed by

[149] See Gordon, para. 25
[150] Haque, para. 31.
[151] VCLT, article 31(3)(c).
[152] See Article 19(3) Decision, para 88. See also Macrocrimes, para. 14. *Cf.* Hungary , para. 18.
[153] ICC-01/04-01/06-772 OA4, para 37.
[154] Palestine, pp. 9-10.
[155] OPCV, para. 24; Van Hooydonk and Dixon, para. 14; South Africa, Bangladesh, Bolivia, Comoros, Djibouti, para. 24.
[156] UN Rapporteurs, para. 17. *See also* Haque, para. 8 and further *ICJ Advisory Opinion*, paras. 230-243.

international law.[157] As submitted by the OPCV, it would "inevitably create impunity gaps and deny redress to Victims."[158]

- *Third*, this understanding of article 12 as establishing a unitary scheme with no exceptions is consistent with the overarching aim and need to establish a practical and workable scheme of criminal jurisdiction.[159] Any approach that subjects article 12 to extraneous agreements or limitations on States Parties' exercise of jurisdiction would fragment the Court's jurisdiction and render its scope uncertain.[160] It would impermissibly render it variable over time, in substance, and in relation to particular categories of individuals.[161] It would risk manipulation by States, both in and beyond situations of occupation.[162] Such an approach "would create uncertainty inconsistent with the proper exercise of criminal jurisdiction."[163]

68. Taken together, each of the ingredients of the general rule of interpretation, as well as the injunction in article 21(3) of the Statute and considerations of practicality and certainty underpinned by the requirement of interpretation in good faith, indicate that article 12 establishes a unitary scheme of territorial jurisdiction with no exceptions. The Court's jurisdiction is not limited by, and cannot be limited by, bilateral or other agreements undertaken by States Parties or, indeed, non-parties or other subjects of international law.[164]

69. In applying this provision to the case at hand, there is one additional overarching point. In its Article 19(3) decision, the Chamber explicitly held that there is no basis for treating the State of Palestine differently from any other State Party. It did so in the following terms:

> By becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, all the provisions therein shall be applied to it in the same manner than to any other State Party. Based on the principle of the effectiveness, it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute's inherent effects over it.[165]

70. Taking all these points together, article 12 leads to a straightforward result in these proceedings.[166] Palestine is a party to the Statute of the Court. On becoming a Party, Palestine

[157] Palestine, p. 10.
[158] OPCV, para. 4.
[159] Lynk & Falk, para. 8; AOHR UK, para. 13; ICHR, para. 10.
[160] Heinsch & Pinzauti, para. 7; Ireland, para. 21.
[161] Al-Quds, para. 29; Spain, para. 10.
[162] Haque, para. 5; Heinsch & Pinzauti, para. 6; ICJ Norway & Defend IL, para. 24.
[163] Norway, para. 15.
[164] OIC, para 19. The OIC has 57 member States, including 25 Parties to the Statute. See also Norway, para. 13; Chile & México, paras. 7-16; Macrocrimes, para. 8; Parker & Quzmar, para. 31; Spain, para. 9; ICJurists, para. 4.
[165] Article 19(3) Decision, para. 102.
[166] Brazil, para. 18; ICJurists, para. 13.

accepted the jurisdiction of the Court as defined by the Statute itself in the same manner as every other State Party. This entails territorial jurisdiction under article 12(2)(a) and nationality jurisdiction under article 12(2)(b). Whatever their status and validity,[167] the Oslo Accords are not relevant to the Court's jurisdiction under article 12.[168] As Norway puts it in its observations, "the Statute, according to its clear wording, is to the effect that the Court has jurisdiction in these proceedings."[169]

ii. *The Oslo Accords objection misunderstands foundational concepts of jurisdiction and their relation to the Statute*

71. By itself, the argument set out above establishes the irrelevance of the Oslo Accords to the existence and exercise of the Court's jurisdiction under article 12. Yet there is an additional problem with the contention of certain interveners that the Oslo Accords bar the exercise of the Court's jurisdiction over international crimes committed on the territory of the State of Palestine by Israeli nationals. The argument is based on a misunderstanding of foundational concepts of jurisdiction under international law, including under the law of occupation. It also misunderstands how the drafters of the Statute specifically sought to accommodate certain bilateral and other arrangements.

72. In particular, this contention of certain interveners rests on a flawed understanding of the jurisdictional entitlements of occupying powers under international law. Thus, for one intervener, the Oslo Accords "delegated a limited authority" to the Palestinian Authority.[170] For another, it entailed but a limited transfer of powers to the Palestinian Authority by Israel.[171] For another still, "[a]ll the powers and responsibilities, including the exercise of jurisdiction (prescriptive or enforcement), transferred to the PA were granted by Israel.[172] In short, and in

[167] The Office notes that some interveners have raised doubts about the validity and/or continued applicability of the Oslo Accords or parts thereof – *see e.g.* Quigley, paras. 3-12; AOHR UK, paras. 7-8; ICJ Norway & Defend IL, paras. 5-14; Lawyers Palestinian HR; Gordon, paras. 17-20; League of Arab States; JURDI & FIDH, paras. 5-6; USA Universities, paras. 7-16; Lynk & Falk, paras. 9-24; Guernica 37, paras. 18-21; Hammouri, paras. 2-6. As set out in these submissions, it is not necessary for the PTC to determine these questions in order to determine the scope of the Court's jurisdiction under Article 12.

[168] OPCV, para. 12; Al Shouli & Al Masry, para. 13; AOHR UK, para. 16; ICHR, para. 12; ICJP & SOAS, para. 11; Heinsch & Pinzauti, para. 3; ICJ Norway & Defend IL, para. 15; UN Rapporteurs, para. 6; Gordon, para. 12; JURDI & FIDH, para. 9; OSJ, ECCHR, Redress, HRW, AI, para. 13 ; Colombia, para. 27 ; Addameer, para. 12 ; Gallagher, para. 15; Spain, para. 12; ICJurists, para. 18; Hammouri, para. 7; Al-Haq *et al.*, para. 26; Dr. Adv. Juan Branco, paras. 45-47.

[169] Norway, para. 19. *See also* Palestine, p. 5; Chile & México, para. 5; Heinsch & Pinzauti, para. 2; ICJ Norway & Defend IL, para. 16; Al-Quds, para. 27; Haque, para. 2; Brazil, para. 18; South Africa, Bangladesh, Bolivia, Comoros, Djibouti, para. 11: "The Rome Statute is exhaustive on the preconditions necessary for the Court to exercise its jurisdiction which is met with respect to the application of arrest warrants."

[170] IA Jewish Lawyers & Jurists, para 21.

[171] Shany & Cohen, para. 10.

[172] ECLJ, para 11.

relation to the present matter, according to these interveners whatever jurisdictional entitlements are enjoyed by the State of Palestine today were in Israel's gift.

73. This understanding contradicts the basic and universally accepted foundation of the law of occupation. Occupation does not and cannot transfer title of sovereignty to the occupying power.[173] Plenary jurisdictional competence—as an aspect of sovereignty—rested in the Palestinian people as a group entitled by international law[174] to exercise the right of self-determination.[175] For present purposes, it rests in the State of Palestine as a State Party to the Rome Statute.[176] As the League of Arab States puts it, the right of the Palestinian people to self-determination and the related entitlements of the State of Palestine "includes plenary criminal jurisdiction over all individuals, regardless of nationality" throughout the Palestinian territory.[177]

74. This plenary competence is not affected by and cannot be affected by whatever practical arrangements are set out in the Oslo Accords,[178] which cannot be understood as abandoning any aspect of the State of Palestine's jurisdictional entitlements.[179] It is this plenary jurisdictional competence of the State of Palestine—a State Party to the Statute—over the territory of Palestine that defines the Court's jurisdiction under article 12(2)(a) of the Statute.[180]

75. Moreover, in addition to misunderstanding the law of occupation, the argument of certain interveners seeking to deprive the Court of jurisdiction fails to appreciate the distinction between the *existence* of territorial jurisdiction and limitations that a State Party might have undertaken in relation to its *exercise*.[181] As recalled above, the Court's jurisdiction under article 12 of the Statute is defined by the territorial jurisdiction of its States Parties as it *exists* under international law.[182] Separately, there may arise under international law certain limitations on the exercise of that jurisdiction. Thus, under the Vienna Convention on Diplomatic Relations, diplomatic agents "enjoy immunity from the criminal jurisdiction of the receiving State."[183] Territorial jurisdiction exists, but international law regulates its exercise. Similarly, under a

[173] *ICJ Advisory Opinion*, paras. 105, 108.
[174] *Wall Advisory Opinion*, para. 118; *ICJ Advisory Opinion*, paras. 230-243.
[175] League of Arab States, para. 3; Hammouri, paras. 12-13; Shoaibi & Khalil, para. 10. *See further* Prosecutor Request", paras. 147-156, 187; Prosecution Response, para. 68.
[176] OPCV, para. 15; Schabas, para. 7; Lynk & Falk, para. 9; ICJP & SOAS, para. 14; UN Rapporteurs, para. 11.
[177] League of Arab States, para. 3.
[178] Schabas, para. 8; Addameer, para. 10; Haque, para. 8.
[179] Norway, para. 35; Ireland, para. 23
[180] Addameer, para. 8
[181] O'Keefe (2016), p. 5; Macrocrimes, para. 11.
[182] Haque, para. 16; ICJurists, para. 11
[183] VCDR, article 31(1).

Status of Forces Agreement, a State may agree with the territorial State that the former has "the exclusive right to exercise jurisdiction" over its own forces. Here, too, territorial jurisdiction exists, but its exercise is regulated by an agreement under international law.[184] In each case, the territorial State is bound under international law not to *exercise* its jurisdiction to enforce its criminal law.

76. The key point is that these limitations on the exercise of jurisdiction do not affect the scope of the Court's jurisdiction under article 12 of the Statute.[185] Rather, to the extent valid and applicable in whole or in part, such limitations may be relevant to questions of complementarity or cooperation.[186] As to complementarity, restrictions on the capacity of States to investigate and prosecute are relevant only to the Court's determination of admissibility under article 17 of the Statute.[187] As to cooperation, the Appeals Chamber in *Afghanistan* recognized that "articles 97 and 98 include safeguards with respect to pre-existing treaty obligations and other international obligations that may affect the execution of requests under Part 9 of the Statute."[188] Moreover, the decision of the Pre-Trial Chamber in the same case, not disturbed by the Appeals Chamber, is explicit in relation to such agreements, finding that they:

> do not deprive the Court of its jurisdiction over persons covered by such agreements. Quite to the contrary, article 98(2) operates precisely in cases where the Court's jurisdiction is already established under articles 11 and 12 and provides for an exception to the obligation of States Parties to arrest and surrender individuals.[189]

77. That is, as pointed out in numerous interventions,[190] in addition to their relevance to complementarity, limitations of this kind assumed by States on the exercise of their criminal jurisdiction are to be addressed through the cooperation regime established by the Statute. They are not relevant to the existence and exercise of the Court's jurisdiction under article 12 of the Statute.

78. The same is true with any valid and applicable limitations imposed by the Oslo Accords

[184] O'Keefe (2016), pp. 5, 6; Brazil, para. 13. *See further* ICC-02/17-138, para. 44.
[185] O'Keefe (2016), p. 2; Stahn (2016), p. 451. *See also* Quigley, para. 13; Haque, para. 11.
[186] Norway, para. 25; South Africa, Bangladesh, Bolivia, Comoros, Djibouti, paras. 30-31; Colombia, para. 16; Spain, para. 9.
[187] *See* Statute, article 17.
[188] ICC-02/17-138, para. 44. *See also* Brazil, para. 13.
[189] *See also* ICC-02/17-33, para 59. *See* Quigley, para. 18; Law for Palestine, para. 13; Heinsch & Pinzauti, para. 10.
[190] *See e.g.* Quigley, para. 18; Haque, para. 11; Van Hooydonk and Dixon, para. 12

in relation to Palestine's exercise of criminal jurisdiction.[191] In its Article 19(3) Decision in this situation, the Chamber explicitly pointed to the Statute's accommodation of potentially conflicting obligations of States under articles 97 and 98 of the Statute.[192] As the Chamber noted, the drafters of the Statute explicitly sought to accommodate obligations of this kind at the stage of cooperation between the Court and States.[193] By contrast, the Chamber explicitly held that the Oslo Accords are not relevant to "the scope of the Court's territorial jurisdiction in Palestine" nor "in connection with the initiation of an investigation by the Prosecutor".[194] As set out above, this matter was thus resolved.

79. In addition, certain interveners in these proceedings have sought to rely on a different distinction to argue that the Court has no jurisdiction over international crimes committed by Israeli nationals in Palestine. In particular, these interveners assert that the Oslo Accords regulate the Palestinian Authority's *prescriptive* jurisdiction,[195] and because they regulate the Palestinian Authority's prescriptive jurisdiction, the Court's jurisdiction under article 12 is similarly restricted.

80. The first step of this argument is wrong on its own terms. As numerous other interventions point out, the Oslo Accords, to the extent valid and applicable, concern the exercise of the Palestinian Authority's *enforcement* jurisdiction, in relation to the exercise of adjudicative authority and in relation to other aspects of the exercise of enforcement powers.[196]

81. More importantly, however, even if this argument were correct in relation to the kind of jurisdictional power regulated by the Oslo Accords between Israel and the PLO, it would not deprive the Court of jurisdiction under article 12 of the Statute in the *Situation in the State of Palestine*. As set out above, the Court's jurisdiction under article 12 is defined by its State Parties' territorial jurisdiction as it *exists* under international law. Even if the argument of these interveners were correct, that would entail that the Palestinian Authority agreed not to *exercise* prescriptive jurisdiction in relation to Israeli nationals. This is not what was agreed, but even if it had been, any such agreement not to *exercise* jurisdiction in no way affects the *existence* of

[191] OPCV, para. 12; Al Shouli & Al Masry, para. 19; Shoaibi & Khalil, para. 9; Sourani *et al.*, para. 12; OSJ, ECCHR, Redress, HRW, AI, para. 21.
[192] Article 19(3) Decision, para. 127.
[193] Article 19(3) Decision, para. 127. *See also* Brazil, para. 21.
[194] Article 19(3) Decision para. 129.
[195] Shany & Cohen, paras. 19-20; JCPA & NGO Research, fn. 35.
[196] Quigley, para. 14; Chile & México, para. 16; Heinsch & Pinzauti, para. 15; Norway, para. 45; Shoaibi & Khalil, para. 7; OSJ, ECCHR, Redress, HRW, AI, paras. 19-23; UN Rapporteurs, para. 16; Sourani *et al.*, para. 12; Gordon, para. 14; USA Universities, para. 24; Lynk & Falk, para. 9; ICJurists, para. 19; Guernica 37, para. 11; Brazil, para. 19; Al-Haq *et al.*, para. 21; South Africa, Bangladesh, Bolivia, Comoros, Djibouti, para. 28.

territorial jurisdiction of Palestine as a State Party to the Rome Statute. Again, Palestine's territorial jurisdiction was not and is not for the occupying power, Israel, to give,[197] and that jurisdiction could not be abrogated by an agreement procured by an occupying power from a local territorial administration.[198] Moreover, the Court's jurisdiction under article 12 does not turn on the territorial State having actually exercised its prescriptive jurisdiction in the domestic order.[199] This variant of the Oslo Accords objection thus fails for the same reasons as the more general one.

82. In conclusion, the Oslo Accords are not relevant to the existence and exercise of the Court's jurisdiction under article 12 of the Statute. The Court has jurisdiction to issue warrants of arrest under article 58 of the Statute.

E. There is no complementarity issue barring the Chamber from issuing the Article 58 Decisions

83. As set out above, the Chamber should summarily dismiss the observations by interveners on complementarity matters, since they fall beyond the scope of the rule 103 process triggered by the UK Request. However, due to the importance that the Prosecutor attaches to complementarity and with the aim of further assisting the Chamber to expeditiously decide on the Applications, the Prosecution provides the following observations.

84. Consistent with the Court's settled jurisprudence, the Chamber need not assess complementarity for the purpose of the present article 58 proceedings because there is nothing requiring it to do so. The Prosecution has assessed complementarity and has concluded that there are no relevant proceedings that would render the cases identified by the Prosecution as inadmissible. Moreover, these cases fall squarely within the parameters of this situation and the Prosecutor did not have to open a new investigation. Finally, the 1 May 2024 letter from Israel was not a request for deferral of the Court's investigation.

a. There is no "ostensible cause" that would compel the Chamber to assess complementarity

85. Consistent with its usual practice and obligations, the Prosecution ensured prior to filing the Applications that the cases identified therein were admissible before the Court. It also engaged with the relevant actors in good faith. Pursuant to article 19(1), the Chamber is not

[197] *See also* OIC, para. 15; Addameer, para. 10(a).
[198] OIC, para. 15.
[199] Schabas, para. 9. *See also* Rastan (2012) p. 20; Stahn (2016), pp. 448-449.

obliged to assess complementarity in deciding on the Applications. Rather, as the Appeals Chamber has confirmed, it is generally appropriate for a Chamber to exercise its discretion to assess complementarity only when there is an "ostensible cause" compelling it to do so.[200] There is no such cause in the instant case.

86. The Prosecution's complementarity assessment of the cases identified in the Application was guided by the Court's legal framework and consistent jurisprudence. The key provision is article 17 of the Statute, which entails a two-step inquiry:

- *First*, the Court must determine whether the State concerned is "active" regarding the case(s) in question, establishing an apparent conflict of jurisdiction between it and the Court. In other words, the Court will determine whether there are—or there have been—relevant domestic proceedings within the meaning of article 17(1)(a) to (c). This is assessed in accordance with the three-part scheme in article 17 described below.[201]
- *Second*—and only if the first question is answered in the affirmative[202]—the Court must determine whether the domestic proceedings are not, or were not, "genuine" within the meaning of articles 17(2) and (3) of the Statute.[203]

87. There is no contradiction between the above jurisprudence that there is not a "case" until *after* a Pre-Trial Chamber issues an arrest warrant or summons to appear[204] and the fact that the Prosecution assesses admissibility with respect to cases identified in its article 58 applications *before* a Chamber rules on them. While the former relates to the procedural moment where admissibility challenges under article 19(2) by persons and relevant States are permitted under the Statute, the latter refers to the parameters of the Court's proceedings that the Prosecution compares with the relevant (if any) domestic proceedings for the purposes of its complementarity assessment under article 53(2)(b). At the article 58 stage, these parameters are defined by the persons for whom the arrest warrants or summons to appear are requested

[200] Statute, art. 19(1) ("The Court *may*, on its own motion, determine the admissibility of a case in accordance with article 17") (emphasis added). Pre-Trial Chambers are not required to determine the admissibility of the case in order to issue arrest warrants under art. 58(1). Moreover, bearing in mind the interests of the suspects, the Pre-Trial Chamber should exercise its discretion under article 19(1) only in exceptional circumstances, such as, for example, when there is an "ostensible cause" that impels them to do so. *DRC* Arrest Warrant Appeal Judgment, paras. 1, 52-53.
[201] ICC-01/04-01/07-1497 ("*Katanga* Admissibility AD"), para. 78; ICC-02/11-01/12-75-Red ("*Simone Gbagbo* Admissibility AD"), para. 27; ICC-01/11-01/11-695 ("*Gaddafi* Second Admissibility AD"), para. 58.
[202] *Katanga* Admissibility AD, paras. 75, 78; *Simone Gbagbo* Admissibility AD, para. 27. *See also* Schabas, W. and El Zeidy, M., "Article 17" in Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed. (Beck/Hart Publishing: München, 2022) ("Schabas/El Zeidy"), p. 963, nm. 30.
[203] Statute, article 17(2)-(3); *see also* article 20(3) (if there has been a final decision).
[204] *See above* para. 46.

and for the conduct described in the applications.[205]

88. Regarding the instant cases, there is no conflict of jurisdiction because there are no relevant domestic proceedings. There is thus no need to move beyond the first limb of the inquiry. Since the Prosecution has filed the Article 58 Applications against certain persons alleging specific criminal conduct, the existence of any relevant domestic proceedings is to be determined by reference to the persons and conduct described in the Applications. A case would potentially become inadmissible before the Court only if domestic proceedings were to exist with regard to the *same individual* for *substantially the same conduct* as alleged before the Court.[206] The latter requires comparing the facts underlying the crimes, but also the facts underlying the conduct of the suspect.[207] While this assessment entails some flexibility and domestic authorities need not always investigate *exactly* the same incidents as the Court,[208] "the case that the State is investigating [must] *sufficiently mirror[]* the one that the Prosecutor is investigating".[209] This is a case-specific and fact-sensitive determination.[210]

89. Furthermore, not just *any* domestic investigation or inquiry is relevant for the purposes of article 17(1)(a). Since the fundamental purpose of the Court is to prosecute those responsible for the most serious crimes of international concern in a manner complementary "to national criminal jurisdictions",[211] this provision relates to domestic proceedings seeking to determine *criminal responsibility* as opposed to other procedures.[212] Hence, in *Burundi*, the Pre-Trial Chamber held that "national investigations that are not designed to result in criminal prosecutions"[213] or "national proceedings designed to result in non-judicial and administrative

[205] *Ruto et al.* Admissibility AD, para. 40.
[206] *Ruto et al.* Admissibility AD, para. 40. By referring to "substantially the same conduct", the Appeals Chamber deviated from the text of the Statute which refers to the "same person" and "same conduct". *See e.g.* Statute, articles 20(3) and 90(1).
[207] ICC-01/11-01/11-547-Red ("*Gaddafi* Admissibility AD"), para. 61 ("the parameters of a 'case' are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute"), para. 62 ("the conduct that defines the 'case' is both at that of the suspect […] and that described in the incidents under investigation which is imputed to the suspect" [and t]he exact scope of an incident cannot be determined in the abstract. What is required is an analysis of all the circumstances of a case, including the context of the crimes and the overall allegations against the suspect"). *See also* para. 73. *See also* ICC-01/17-9-Red ("*Burundi* Article 15 Decision"), para. 147 and ICC-01/11-01/11-565 ("*Al-Senussi* Admissibility AD"), para. 100.
[208] To facilitate the comparison and in light of the characteristics of the cases before the ICC (where several crimes are generally committed in different locations), Chambers have generally compared 'incidents': *Gaddafi* Admissibility AD, para. 62. "Incidents" have been defined as "a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators".
[209] *Gaddafi* Admissibility AD, para. 73, cited in *Burundi* Article 15 Decision, para. 147 (emphasis added).
[210] *Gaddafi* Admissibility AD, para. 72.
[211] Statute, Preamble, para. 10.
[212] Schabas/El Zeidy, p. 975, nm. 51.
[213] *Burundi* Article 15 Decision, para. 152.

measures rather than criminal prosecutions" do not meet the admissibility requirements.[214] Likewise, a "national investigation merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court".[215]

90. Finally, the Court must conduct its complementarity assessments on the basis of the relevant facts *as they exist* at the time of the proceedings before the Court.[216] The Prosecution is unaware of any domestic proceedings meeting the conditions described above with regard to the Article 58 Applications, as explained further below.

b. The cases identified in the Article 58 Applications are admissible before the Court

91. The information available does not indicate that Israel is investigating the same persons for substantially the same conduct as that described in the Prosecution's Article 58 Applications. The cases defined in the Applications are therefore admissible before the Court.

92. Crucially, there is no information that the alleged domestic proceedings relate to the *same persons* as those identified in the Applications. There is no information that NETANYAHU or GALLANT are being criminally investigated or prosecuted.[217] While it has been reported that the Military Police has opened criminal investigations into over 70 suspicious incidents,[218] and more than a thousand incidents have been identified by the Military Advocate General ("MAG") and referred to the Fact-Finding Assessment Mechanism ("FFAM"),[219] there is no evidence that these relate to NETANYAHU or GALLANT. Moreover, the Prosecution notes

[214] *Burundi* Article 15 Decision, para. 152; ICC-02/17-33 ("*Afghanistan* Article 15 Decision"), para. 79.
[215] *Burundi* Article 15 Decision, para. 152.
[216] ICC-01/09-01/11-101 ("*Ruto et al.* Admissibility Decision"), para. 70; *Ruto et al.* Admissibility AD, para. 83; ICC-01/15-12-Anx-Corr ("*Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op."), para. 58 ("Article 17 of the Statute is drafted in a manner where the relevant Chamber is duty bound to make a determination on the basis of facts as they exist"); *see also* *Katanga* Admissibility AD, para. 56. This refers to the proceedings before the first instance chamber and does not include subsequent proceedings on appeal: ICC-01/09-01/11-234 ("*Ruto et al.* Updated Investigation Report AD"), para. 10; *Gaddafi* Admissibility AD, paras. 41-43; *Al-Senussi* Admissibility AD, paras. 57-59. *See also* ICC-02/04-01/15-156 ("*Kony et al.* Admissibility Decision"), paras. 51-52 and ICC-02/17-196 ("*Afghanistan* Article 18(2) Decision"), para. 47 (referring to the facts as they exist at the time of the proceedings before the Court). For article 18 proceedings, this is the time when the PTC considers the merits of the Prosecution's request to resume its investigation: *Philippines* Article 18(2) Decision, para. 17.
[217] Chile & México, para. 34; ICJ Norway & Defend IL, para. 33; Law for Palestine, paras. 26-27. The Prosecution notes that the interveners' observations relate to the Israeli nationals for whom the Prosecution has requested the arrest warrants to be issued. In any event, there is no information either on domestic proceedings regarding SINWAR and DEIF.
[218] IDF: Military Advocate General: Remarks of the Military Advocate General at the Israel Bar Association Annual Conference 28 May 2024; Military Advocate General: Addressing Alleged Misconduct in the Context of the War on Gaza, updated on 3 August 2024; IBA, para. 21.
[219] Military Advocate General: Addressing Alleged Misconduct in the Context of the War on Gaza, updated on 3 August 2024; IBA, para. 20.

that NETANYAHU and GALLANT are civilian authorities,[220] and as such may fall outside the jurisdiction of the military justice system, which ordinarily addresses the conduct of soldiers and others in the service of the IDF.[221] Nor is the Prosecution aware of any ordinary domestic criminal proceedings against NETANYAHU and GALLANT for substantially the same conduct as that described in the Applications. Thus, even if the above-mentioned military inquiries can be considered for the purpose of complementarity,[222] they do not involve the *same persons* as those named in the Article 58 Applications. The cases are therefore admissible and there is no need to enquire further as to whether the conduct has been or is being investigated (or not).

93. In any case, and additionally, the available information does not show that Israel is investigating *substantially the same conduct* as the ICC. For instance, the information available does not suggest that the above inquiries relate to the conduct underlying the war crime of starvation and/or related crimes. Likewise, the available information does not suggest any inquiry into patterns of criminality, or the potential responsibility of high-ranking officials, which may among other considerations signify the investigation of contextual elements of crimes against humanity.[223] Indeed, significantly, on 28 May 2024 the MAG categorically rejected the commission of these crimes without any indication or implication that such conclusions resulted from a full and rigorous investigation, or indeed any investigation at all. The MAG stated that "there is no deliberate policy of starvation [because] the IDF is making a tremendous effort to bring food, medicines and humanitarian equipment into the Gaza strip."[224] She also asserted that "the claim that Israel is engaging in the deliberate killing of civilians, and in the systematic destruction of property, [] is completely disconnected from reality".[225] In

[220] Section 2 (b) of the *Basic Law: The Military* states that the Minister of Defence is in charge of the army on behalf of the Government. The heading of the provision reads as "Subordination to the civilian authorities." This suggests that the Minister of Defence is a civilian authority. *See* Annex C.
[221] The military justice system is regulated by the *Military Justice Law* of 1955 ("MJL"). MJL, sections 4, 5 and 8 (2) and (3) indicate that this law is applicable to persons in the service of the army (soldiers and others employed in the service of the IDF; hereinafter: "IDF staff"). Section 13 (a) stipulates that courts martial have competence over IDF staff. Section 178 (4) provides that the MAG may order a preliminary inquiry in any case for a conduct which a court martial is competent to try. Accordingly, military criminal investigations may only be carried out *vis-à-vis* the conduct of IDF staff. This assessment is made without prejudice that military criminal proceedings are relevant for the purposes of complementarity before the Court. *See* Annex C.
[222] The Prosecution does not assess either whether the substantive law applied by these bodies reflect the conduct underlying the Rome Statute crimes.
[223] The Appeals Chamber has confirmed that domestic authorities must investigate the facts underlying the contextual elements of crimes against humanity: ICC-02/18-89 OA ("Venezuela Article 18(2) Appeal Judgment"), paras. 279-280.
[224] IDF: Remarks of the Military Advocate General at the Israel Bar Association Annual Conference, 28 May 2024.
[225] IDF: Remarks of the Military Advocate General at the Israel Bar Association Annual Conference, 28 May 2024.

other situations, such blanket denials without having conducted a prior investigation into the relevant facts have been considered indicative of State inaction.[226]

94. Furthermore, the reported proceedings before the Israeli High Court of Justice ("HCJ") resulting from the petition filed by five Israeli NGOs against the Government of Israel ("GoI"), the Prime Minister (NETANYAHU), the Minister of Defence (GALLANT) and the head of COGAT, are not criminal proceedings.[227] Rather, these are administrative or constitutional procedures[228] where Israeli authorities are requested to show "good cause" and provide legal justification for their actions imposing restrictions on the provision of humanitarian aid and essential commodities to Gaza as well as to explain the government's plans to improve the situation.[229] If the Israeli authorities fail to prove that they meet their obligations with respect to the civilian population in Gaza, the Court could issue a so-called "absolute order" obliging them to do so.[230] Yet, the proceedings would not be criminal in nature even if such an order was issued because they do not relate to the responsibility of individuals. The procedures are thus incapable of rendering cases inadmissible before this Court.

95. Whether any of the above proceedings *may* lead to criminal investigations or prosecutions against NETANYAHU and GALLANT at some unspecified time in the future is irrelevant at this stage, since complementarity must be assessed on the basis of the facts *as they exist* at the time of the Court's proceedings.[231] Neither evidence of a State's *preparedness* or *willingness* to investigate or prosecute, nor the investigation of persons other than those who are suspects in cases before the Court, is sufficient to establish that the State actually is carrying out a relevant investigation or prosecution and therefore cannot render a case inadmissible

[226] ICC-02/18-45 ("Venezuela Article 18(2) Decision"), para. 106; Venezuela Article 18(2) Appeal Judgment, paras. 287-299.
[227] *Contra* IBA, paras. 29 and 31 (d).
[228] *Cf.* Rules of Procedure of the High Court of Justice 1984. *See* Annex C.
[229] *See* HCJ 2280/24 Petition for Order *Nisi* and Request for Urgent Hearing, 18 March 2024, request (a) and (b) pp. 1-2; *see also* HCJ 2280/24 Interim decision of 4 April 2024; HCJ 2280/24 Interim decision of 21 April 2024; HCJ 2280/24 Interim decision of 6 May 2024; HCJ 2280/24 Order Nisi of 10 June 2024; HCJ 2280/24 Interim Decision of 21 July 2024. *See* Annex C.
[230] *See* HCJ 2280/24 Petition for Order *Nisi* and Request for Urgent Hearing, 18 March 2024, final request p. 35 ("the Honorable Court is requested to issue an *order nisi* as requested, to schedule an urgent hearing in the Petition and upon receiving Respondents' response to make the order absolute"); HCJ 2280/24 Petitioners' Response to the Supplementary Notice on behalf of the Respondents and Application for an Order *Nisi*, 19 April 2024, para. 77; HCJ 2280/24 Petitioners' Response to the Supplementary Notice on behalf of the Respondents in Preparation for Hearing 3 May 2024, para. 58. *See* Annex C.
[231] ICC-01/21-77 ("Philippines Article 18(2) Appeal Judgment"), para. 161. In the context of Philippines request for deferral, the Appeals Chamber made clear that whether it was expected that domestic investigations of low or mid-ranking officials would extend or lead to high-ranking officials was insufficient if any such investigation was not being carried out "at present".

before the Court.[232] Nor is it enough for a State to allege having a robust judicial system or to rely on judicial reform actions and promises for future investigative activities.[233] As the Appeals Chamber has held:

> [a]lthough article 17 (1) (a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level. If the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible.[234]

96. Moreover, if it is the case that Israel cannot at present conduct the same proceedings as the Court due to the constraints of the ongoing armed conflict, this in fact calls for the Court's action.[235] One aim of the Court's complementarity scheme is to ensure accountability when the State is not itself able to investigate and prosecute international crimes.[236] Israel also remains free to continue its investigations irrespective of the ongoing proceedings before the Court;[237] if the Chamber grants the Applications and *if* Israeli proceedings sufficiently evolve, either Israel or the suspects named in the Applications could challenge the admissibility of the cases under article 19(2) of the Statute.

97. In sum, the cases described in the Applications are admissible before the Court and there is no "ostensible cause" that would require the Chamber to assess complementarity in deciding on the Applications.

c. The cases described in the Application fall within the parameters of the situation referred by Palestine

98. Some interveners have suggested that the cases in the Applications do not fall within the Prosecution's ongoing investigation into the situation in the State of Palestine, and thus that the Prosecution should have opened a new investigation and sent another round of article 18(1)

[232] *Ruto et al.* Admissibility AD, para. 41; ICC-01/09-02/11-274 ("*Muthaura et al.* Admissibility AD"), para. 40. Nor can admissibility be assessed with respect to non-existing proceedings: *Kony et al.* Admissibility Decision, paras. 51-52; *see also* Law for Palestine, para. 22..
[233] *Ruto et al.* Admissibility Decision, para. 64; *see also* *Burundi* Article 15 Decision, para. 162. *Contra* UKLFI *et al.*, paras. 17-19; CUJS & WUJS, para. 24; Germany, para. 9; IBA, para. 2; HLMG, para. 25; Bachman *et al.*, para. 12.
[234] *Gaddafi* Admissibility AD, para. 78, quoting *Ruto et al.* Admissibility AD, para. 44.
[235] The Appeals Chamber dismissed similar arguments from Libya: *Gaddafi* Admissibility AD, para. 165.
[235] Statute, art. 17(3). *Contra* HLMG, para. 24; Chilstein, para. 37; Graham, para. 20; Germany, para. 10.
[236] Statute, art. 17(3).
[237] Venezuela Article 18(2) Appeal Judgment, para. 231; ICC-01/21-67 ("Philippines Decision on Suspensive Effect"), para. 19; ICC-01/11-01/11-387 ("Gaddafi Decision on Suspensive Effect"), para. 26.

letters notifying States Parties and States with jurisdiction of this new investigation.[238] These submissions misunderstand the features of this situation and the Prosecution's investigation thereof. As demonstrated below, the cases identified in the Applications fall squarely within the parameters of the situation referred by Palestine on 22 May 2018,[239] and in any event are sufficiently linked to the situation of crisis described therein.[240] Accordingly, the Prosecution was not required to open a new investigation and there was no basis for issuing new article 18(1) letters.

99. In its 2018 referral, Palestine defined the geographical and temporal parameters of the situation (the oPt since 13 June 2014)[241] and described a situation of crisis arising from the ongoing Israeli occupation, the expansion of settlements and alleged violations of fundamental rights throughout the territory, including Gaza.[242] Palestine listed a sample of alleged war crimes and crimes against humanity,[243] including murder, unlawful attacks on civilians, and persecution.[244] On 3 March 2021, the Prosecution opened its investigation into this situation

[238] *See e.g.* USA, paras. 17-23; CIJA, paras. 25-27; Chilstein, paras. 32-34; The Hague Initiative, paras. 31-32; Graham, paras, 22-32; Germany, paras. 13-14; IA Jewish Lawyers & Jurists, paras. 5, 10-12; Shany & Cohen, paras. 23-25. With respect to Shany & Cohen, the Chamber should not consider their "position elaborated in [their] *Just Security* post". As the Appeals Chamber has held, "it is impermissible to attempt to incorporate by reference submissions" (ICC-02/04-01/15-1850 A ("*Ongwen* AD"), para. 15) and "[t]he arguments of a participant to an appeal must be fully contained within that participant's filing in relation to that particular appeal. The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere.": ICC-01/04-01/06-774 ("*Lubanga* Second Redactions AD"), para. 29. Likewise, arguments incorporated by reference to other filings circumvent the applicable page limit; accordingly, they should be dismissed *in limine*: ICC-01/05-01/13-2276-Red ("*Bemba et al.* SAJ"), paras. 254-255; ICC-01/04-02/06-2666-Red ("*Ntaganda* AJ"), para. 901.

[239] As to the definition of situation: *see* ICC-02/05-01/20-391 ("*Abd-Al-Rahman* Jurisdiction Decision"), para. 25 (quoting ICC-01/04-101-tEN-Corr, para. 65: a situation is "generally defined in terms of temporal, territorial and in some cases personal parameters"; and ICC-01/04-01/10-451 ("*Mbarushimana* Jurisdiction Decision"), para. 16: possibly including "not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral"). *See also* Marchesi, A. and Chaitidou, E., "Article 14: referral of a situation by a State Party" in Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Marchesi and Chaitidou"), p. 718 (nm. 27: explaining this definition: "[t]he territorial and personal parameters are in the alternative. The territorial parameter enquires whether the crime occurred on the territory of a State Party pursuant to article 12(2)(a) […] or of a State which lodged an *ad hoc* declaration under article 12(3). The personal parameter pertains to the perpetrator of the crime(s) who is a national of a State Party (article 12(2)(b)) or a non-State Party which lodged an article 12(3) declaration"); *see also* p. 717 (nm. 25: "the concept of a situation must be understood in a generic and broad fashion: a description of facts, defined by space and time, which circumscribe the prevailing circumstances at the time ('conflict scenario')").

[240] *Mbarushimana* Jurisdiction Decision, para. 16. The Pre-Trial Chamber observed that a situation can include crimes committed at the time of the referral and subsequent crimes that were sufficiently linked to the situation of crisis which was ongoing at the time of the referral.

[241] Palestine Article 14 Referral, para. 9, fn. 4.

[242] Palestine Article 14 Referral, para. 3.

[243] Palestine Article 14 Referral, paras. 11-13; *see* para. 12 (noting that "the crimes set forth below [] are not intended to limit the scope of the OTP's investigation").

[244] Palestine Article 14 Referral, para. 12 (iv) and (vi).

within these parameters. The Prosecutor's public announcement,[245] as well as the contents of the article 18(1) letters (both enclosing the document setting out the Prosecution's summary findings of the preliminary examination),[246] described a sample of the relevant criminality allegedly affecting the West Bank and Gaza and identified categories of alleged perpetrators (the IDF, Israeli authorities, and members of Hamas and other Palestinian Armed Groups ("PAGs"). The Prosecution recalled that the preliminary examination findings were made for the threshold-setting purpose of opening an investigation under article 53(1) and were without prejudice to the future investigation—which could encompass any crimes within the scope of the situation and could thus include subsequent crimes and incidents.[247]

100. The Applications filed on 20 May 2024 against two high-ranking Israeli leaders and three senior Hamas leaders related to events arising from the 7 October 2023 attack by Hamas and other PAGs, as well as to subsequent Israeli actions and policies in Gaza. The Prosecutor alleged the criminal responsibility of NETANYAHU and GALLANT for the war crimes of (i) starvation under art. 8(2)(b)(xxv); (ii) wilfully causing great suffering, or serious injury to body or health under art. 8(2)(a)(iii), or cruel treatment under art. 8(2)(c)(i); (iii) wilful killing under art. 8(2)(a)(i), or murder under art. 8(2)(c)(i); (iv) intentionally directing attacks against a civilian population under arts 8(2)(b)(i), or 8(2)(e)(i); and the crimes against humanity of (v) extermination and/or murder under arts 7(1)(b) and 7(1)(a); (vi) persecution under art. 7(1)(h); and (vii) other inhumane acts under art. 7(1)(k). The Prosecution alleged the criminal responsibility of HANIYEH, SINWAR and DEIF for the war crimes of murder under art. 8(2)(c)(i); taking of hostages under art. 8(2)(c)(iii), rape and other forms of sexual violence under art. 8(2)(e)(vi), torture and cruel treatment under art. 8(2)(c)(i), outrages upon personal dignity under art. 8(2)(c)(ii) in the context of captivity; the crimes against humanity of extermination under art. 7(1)(b); murder under art. 7(1)(a); rape and other forms of sexual violence under art. 7(1)(g), torture under art. 7(1)(f), and other inhumane acts under art. 7(1)(k) in the context of captivity.[248]

101. These crimes and related incidents fall squarely within the parameters of the situation, and in any event are sufficiently linked to the situation of crisis ongoing at the time of the referral.[249]

[245] Prosecutor Statement, 3 March 2021.
[246] Article 18(1) notification, 9 March 2021, Summary of Preliminary Examination Findings. *See* Annex A.
[247] Summary of Preliminary Examination Findings, paras. 7-8. *See* Annex A.
[248] Prosecutor Public Statement, 20 May 2024.
[249] *Mbarushimana* Jurisdiction Decision, para. 16.

- *First*, the crimes took place in the context of the ongoing Israeli occupation of the West Bank and Gaza, and the associated armed conflicts identified at the time of the referral. Indeed, as held by the ICJ, Israel has occupied the West Bank and Gaza since 1967 (notwithstanding its disengagement from Gaza in September 2005) and has annexed East Jerusalem.[250] Moreover, Israel and Hamas have been parties to a non-international armed conflict since at least 2008, one that has involved confrontations such as Operation Cast Lead in 2008-2009,[251] Operation Pillar of Defence in 2012,[252] Operation Protective Edge in 2014 (which was analysed during the preliminary examination),[253] and Operation Guardian of the Walls in 2021.[254] Between these major operations, extensive airstrikes continued to be carried out by Israel in Gaza[255] and repeated rocket attacks against Israel were carried out by Hamas.[256]

- *Second*, the crimes alleged in the Applications involve conduct of some of the same groups or categories of perpetrator allegedly responsible for the crimes at the time of the referral and opening of the investigation: Israeli authorities and the IDF as well as Hamas and other PAGs. The victims were also the same: the Palestinian civilian population in Gaza and civilian and non-civilian victims (for hostage-taking) in Israel.

- *Third*, the crimes are consistent with, and reflect a continuation of, the criminality identified at the time of the referral and the opening of the Prosecution's investigation, which was taken into account solely for the limited purpose of opening the investigation. As noted, Israel has occupied the oPt since 1967 and has maintained and expanded illegal settlements.[257] Israel and Hamas have been engaged in ongoing hostilities since the Court began to exercise its jurisdiction, causing serious harm to civilians from both sides and resulting in potential war crimes and crimes against humanity similar to those described in the Applications. Since its founding, Hamas has committed acts of violence against military and also civilian targets, including bombings, rocket and mortar attacks,[258] shootings,

[250] *ICJ Advisory Opinion*, paras. 78, 104, 138, 170, 179; *see above* para. 2.
[251] IDF, 30 Oct. 2017; UN Ind. Com. Rep., 18 Mar. 2019, para. 220; UN Fact-Finding Rep., 25 Sept. 2009, para. 29.
[252] IDF, 30 Oct. 2017; UN Ind. Com. Rep., 18 Mar. 2019, para. 220; UNHCHR Rep., 4 July 2023, paras. 4-8.
[253] IDF, 30 Oct. 2017; UN Ind. Com. Rep., 18 Mar. 2019, para. 220; UN Com. Inq. Rep., 24 June 2015, para. 19.
[254] IDF, 14 June 2021; UN Ind. Com. Rep., 5 Sept. 2023, paras. 13, 22, 54.
[255] UN Ind. Com. Rep., 5 Sept. 2023, paras. 34, 48, 58; UN Ind. Com. Rep., 18 Mar. 2019, para. 221.
[256] UN Ind. Com. Rep., 5 Sept. 2023, para. 51; UN Ind. Com. Rep., 18 Mar. 2019, para. 221.
[257] *ICJ Advisory Opinion*, paras. 104, 155-156.
[258] CTC Sentinel, Oct./Nov. 2023; UN Ind. Com. Rep., 5 Sept. 2023, para. 51; UN Ind. Com. Rep., 18 Mar. 2019, paras. 220-222.

stabbings,[259] as well as hostage-taking.[260] Israeli military operations in Gaza have resulted in extensive death and harm to Palestinian civilians and caused widespread destruction.[261] Further, the population of Gaza was already in a precarious situation prior to 7 October 2023 as a result of restrictions to the products allowed in through the border crossings controlled by Israel.[262]

- *Finally*, the referrals of México and Chile,[263] and of South Africa, Bangladesh, Bolivia, Comoros and Djibouti,[264] referred to and relied upon the very same parameters described in Palestine's 2018 referral (oPt since 13 June 2014) and did not purport to trigger a new investigation.[265] Rather, these States described the current events as an "escalation of violence" in the context of the alleged ongoing commission of crimes within the Court's jurisdiction. The additional referrals sought to emphasise the importance of the Court's *existing* investigation, rather than to suggest that a new investigation needed to be opened.

102. Likewise, the Prosecutor's statements leading to the filing of the Applications (emphasising that humanitarian assistance should be allowed in Gaza) further indicated that the Office was concerned with the most recent events.[266]

103. In conclusion, since the crimes fall within the parameters of the referred situation, and are in any event sufficiently linked to the situation of crisis ongoing at the time of the referral, there was no need to open a new investigation, and consequently no basis for the Prosecution to issue new article 18(1) letters, as further demonstrated below.

d. The Prosecutor was not required to open a new investigation or issue a new article 18(1) notification

104. The interveners who advocate for a new investigation not only misunderstand the features of this situation but also the Court's complementarity framework.

105. *First*, it is clear that the article 18(1) notification serves the limited purpose of enabling a State to exercise its right to request a deferral of the investigation and provide supporting

[259] CTC Sentinel, Oct./Nov. 2023.
[260] U.S. Department of State Country Reports on Terrorism, 2022 at 274.
[261] OCHA Humanitarian overview, December 2021, pp. 11-12.
[262] OCHA Humanitarian Impact, June 2022.
[263] Chile and Mexico Article 14 Referral, 18 January 2024.
[264] South Africa et al. Article 14 Referral, 17 November 2023.
[265] *Contra* USA, para. 22.
[266] Statement of ICC Prosecutor Karim A. A. Khan KC from Ramallah on the situation in the State of Palestine and Israel, 6 December 2023.

material. It does not limit in any way the Prosecution's investigation.[267] The Appeals Chamber has further confirmed that "there is no expectation at [the article 18] stage of the proceedings that the Prosecutor should notify States of every act he or she intends to investigate," since "the Prosecutor may be in no position to identify all potential cases that fall within the scope of a broad referral".[268] Evidently, for example, the Prosecutor will not be able to refer to crimes which may occur *after* the article 18(1) notification but which the Prosecutor is nonetheless authorised to investigate.[269] This is particularly so in this situation, which Palestine's referral of 22 May 2018 primarily defined according to broad geographic and temporal parameters, namely: "the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, [which] includes the West Bank, including East Jerusalem, and the Gaza Strip" since 13 June 2014 (without an ending date).[270] After assessing the article 53(1) criteria, the Prosecutor decided to investigate within those broad parameters.[271] In both its article 19(3) application and article 18(1) notification letters, the Prosecutor not only noted that the criminality in this situation is ongoing, but also referred to settled jurisprudence that investigations are not limited to the acts, incidents or groups of persons assessed during the Preliminary Examination.[272] Indeed, Chambers have recalled that the Prosecutor is not required only to investigate the acts or incidents identified in the article 15 application[273] or in the article 18(1) notification.[274] Instead, the Prosecutor's investigation can extend to other and subsequent acts as long as they fall within the parameters of the situation, or in any event are sufficiently linked to it.[275]

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[267] *Venezuela* Article 18(2) Decision, para. 77; *Venezuela* Article 18(2) Appeal Judgment, para. 230; *contra* USA, para. 16.
[268] *Venezuela* Article 18(2) Appeal Judgment, para. 110.
[269] *Venezuela* Article 18(2) Appeal Judgment, para. 106 quoting *Afghanistan* Appeal Judgment, para. 59 (explaining that in its article 15 request the Prosecutor "will not be in a position to identify exhaustively or with great specificity each incident, crime or perpetrators that could be subject to investigation [and] evidently she will not be able to reference crimes which may occur after the request for authorisation"); *Mbarushimana* Jurisdiction Decision, para. 16 ("a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral").
[270] Palestine Article 14 Referral, fn. 4 and para. 16(e).
[271] Prosecutor Statement, 3 March 2021; Summary of Preliminary Examination Findings; ICC-01/18-12 ("Article 19(3) Application"), para. 98; article 18(1) notification, 9 March 2021, *see* Annex A.
[272] Article 19(3) Application, paras. 99-100, Summary of Preliminary Examination Findings, paras. 7-9, article 18(1) notification, 9 March 2021, p. 2, *see* Annex A.
[273] *Afghanistan* Appeal Judgment, paras. 60, 61, *see also* para. 63. *See also* ICC-01/21-12 ("*Philippines* Article 15(4) Decision"), para. 117.
[274] *Venezuela* Article 18(2) Decision, para. 76 ("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 Request is granted"); *Venezuela* Article 18(2) Appeal Judgment, para. 230.
[275] *See e.g. Afghanistan* Appeal Judgment, para. 79 (defining the parameters of the Prosecutor's investigation into the *Afghanistan* situation: "the Prosecutor is authorised to commence an investigation 'in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that

106. *Second*, the contrary approach advanced by some interveners would effectively limit the scope of the Prosecution's investigation, and any subsequent prosecutions, to those crimes and incidents identified during the preliminary examination—as such, to those crimes pre-dating the State referral (or the commencement of the Prosecution's investigation). The Appeals Chamber has repeatedly rejected this approach,[276] and so have the Pre-Trial Chambers in defining the parameters of the authorised situations in their article 15(4) decisions.[277]

107. Since the Prosecutor's investigative powers are limited during the preliminary examination, the Appeals Chamber reasoned in *Afghanistan* that the Prosecution will not ordinarily be in a position at that stage to exhaustively identify each incident, crime or perpetrator that could be subject to investigation.[278] This limitation is consistent with the applicable threshold for the Prosecution's assessment in considering whether to proceed—relevantly, a reasonable basis to believe that "*a* crime" within the jurisdiction of the Court has been committed,[279] which is to say "*at least one*" such crime.[280] While the Prosecutor may in his discretion choose to identify multiple "examples",[281] this is "merely illustrative of a threshold that has already been met."[282] As the Appeals Chamber held in *Afghanistan*, "the examples of alleged crimes presented by the Prosecutor" [in its article 15(3) request] "should

have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002'").

[276] *Afghanistan* Appeal Judgment, paras. 2, 61; *Afghanistan* Second Appeal Judgment, paras, 57-59; *Venezuela* Article 18(2) Appeal Judgment, para. 230.

[277] *See e.g.* *Bangladesh/Myanmar* Article 15(4) Decision, para. 133 ("the Chamber finds that any crimes committed after the issuance of this decision remain within the temporal scope of the authorised investigation, as long as such crimes are sufficiently linked to the situation identified in the present decision"); ICC-02/11-14-Corr ("*Côte d'Ivoire* Article 15(4) Decision"), para. 179 ("Bearing in mind the volatile environment in Côte d'Ivoire, the Chamber finds it necessary to ensure that any grant of authorisation covers investigations into 'continuing crimes' – those whose commission extends past the date of the application. Thus, crimes that may be committed after the date of the Prosecutor's application will be covered by any authorisation, insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011").

[278] *Afghanistan* Appeal Judgment, para. 59.

[279] Statute, art. 53(1)(a). While the Pre-Trial Chamber's jurisdictional assessment is set out in article 15(4), the Prosecution is obliged to consider article 53(1) for the purpose of determining whether to proceed under article 15(3) as a consequence of rule 48. *See* *Afghanistan* Appeal Judgment, paras. 34-37.

[280] ICC-01/13-34 ("*Comoros* First Decision"), para. 13 (emphasis added).

[281] ICC-02/11-15-Corr ("*Côte d'Ivoire* Decision, Opinion of Judge Fernández"), para. 32 (recalling that "the facts and incidents identified" in an article 15(3) application "are not and could not be expected to be exhaustive […], but are intended solely to give concrete examples to the Chamber"); *see also* para. 34 (referring to "this early and necessarily non-comprehensive identification of incidents"). The Prosecutor may elect to provide additional examples for instrumental rather than legal reasons, such as public transparency or to anticipate potential concerns about admissibility: *see e.g.* Cross, M., "The Standard of Proof in Preliminary Examinations" in Bergsmo and Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2* (Torkel Opsahl Academic EPublisher: Brussels, 2018) ("Cross"), pp. 248-249; Rastan, R., "The Jurisdictional Scope of Situations before the International Criminal Court", *Criminal Law Forum* (2012) ("Rastan (2012)"), pp. 26-27.

[282] Rastan (2012), p. 27.

be sufficient to define in broad terms the contours of the situation" to be investigated.[283]

108. Moreover, in a preliminary examination the Prosecutor cannot, by definition, identify crimes which may occur *after* his request under article 15(3).[284] There is no reason in law or logic to demand that such crimes, if they fall within the parameters of a previously referred or authorised situation—or in any event are sufficiently linked to it— require further article 15(4) authorisation by the Pre-Trial Chamber (or other referrals) before they may be investigated by the Prosecution.[285]

109. Indeed, the Appeals Chamber has stated that the Prosecution's duties under article 54(1) of the Statute, in particular its truth-seeking function, necessarily affect the scope of any investigation. To fulfil those duties, and to obtain a full picture of the relevant facts (including their potential legal characterisation as crimes within the Court's jurisdiction, and the responsibility of the various actors who may be involved), the Prosecution must carry out an investigation into the situation *as a whole*.[286] Conversely, "restricting the authorised investigation to the factual information obtained during the preliminary examination would erroneously inhibit the Prosecutor's truth-seeking function".[287]

110. For these same reasons, States can only refer to the Prosecutor an *entire situation* and cannot cherry-pick incidents or select crimes committed by certain persons for the Court to investigate.[288] Consistent with this approach, persons have been tried and convicted by the Court for conduct that occurred *after* the relevant State referrals and which was not as such described in the article 18(1) notification letters, since it fell within the identified parameters of the Court's investigation into the situation. Thus, for example, Dominic Ongwen was convicted of crimes committed in northern Uganda as late as 31 December 2005, even though

[283] *Afghanistan* Appeal Judgment, para. 59.
[284] *Afghanistan* Appeal Judgment, para. 59.
[285] First Decision, para. 42.
[286] The Appeals Chamber has stressed the Prosecutor's duty, pursuant to article 54(1) of the Statute, "to establish the truth", "to extend the investigation to cover 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" and "to [t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court": *Afghanistan* Appeal Judgment, para. 60. *See also* *Philippines* Article 15(4) Decision, para. 117.
[287] *Afghanistan* Appeal Judgment, para. 61.
[288] *Mbarushimana* Jurisdiction Decision, para. 27 ("[a]ccordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, *e.g.* crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated"). *See also* para. 21 ("[..] as determined by the Chamber, the territorial and temporal scope of a situation is to be inferred from the analysis of the situation of crisis that triggered the jurisdiction of the Court through the referral. Crimes committed after the referral can fall within the jurisdiction of the Court when sufficiently linked to that particular situation of crisis").

Uganda referred the situation in December 2003 and the Prosecution announced the opening of the investigation in July 2004. [289]

111. *Fourth*, the position endorsed by some interveners would be contrary to an interpretation of article 18 that accords with the VCLT, particularly with regard to the drafting history of the provision. Article 18 was introduced after a belated proposal by the USA, which sought to ensure that States would be aware of the commencement of the Court's investigation in order to avoid or at least minimise duplication of proceedings.[290] The drafting history is clear that the USA was not seeking to reopen the agreement reached on the complementarity provisions, and that article 18 was intended to be consistent with those provisions.[291] Significantly, States wanted to avoid any interpretation of article 18 that would allow States to protect perpetrators by frustrating and delaying investigations by the Prosecutor.[292]

e. Israel's 1 May 2024 Letter was not a request for deferral under article 18(2)

112. The letter of 1 May 2024 in which Israel's ambassador purportedly requested the deferral of the investigation did not constitute a "deferral request" within the terms of article 18.[293] The Court's legal framework clearly stipulates a deadline of one month for a relevant State to request the deferral of the Court's investigation under article 18(2) of the Statute.[294] As recently confirmed by the Appeals Chamber in the *Venezuela* situation, "these provisions indicate that the proceedings under article 18 of the Statute must indeed be conducted expeditiously".[295] It would contravene these provisions, and their objective, if Israel could request the deferral of

[289] Ongwen was convicted of crimes that took place from 1 July 2002 to 31 December 2005: ICC-02/04-01/15-1762-Red ("*Ongwen* Trial Judgment"), paras. 1, 32, 3116. Uganda referred the situation on 16 December 2003. The Prosecutor's article 18(1) notification letter dates 28 July 2004. Al-Hassan was brought to trial for crimes that took place between 1 April 2012 and 28 January 2013: ICC-01/12-01/18-2594-Red ("*Al-Hassan* Trial Judgment"), para. 9. Mali referred the situation on 13 July 2012. The Prosecution's article 18(1) letter dates 16 January 2013. *See* Annex D.

[290] Holmes, J., "The Principle of Complementarity" in Lee (ed.), *The International Criminal Court: the making of the Rome Statute* (Martinus Nijhoff Publishers: The Hague, 1999) ("Holmes 1999"), p. 69; Schabas, "Investigation and Pre-Trial Procedure" in *An Introduction to the International Criminal Court* (Cambridge University Press: 2020), p. 293.

[291] Holmes 1999, p. 69; Nsereko, D. and Ventura, M., "Article 19" in Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed. (Beck/Hart Publishing: München, 2022) ("Nsereko/Ventura"), p. 1012, mn. 4.

[292] Holmes 1999, p. 70; Nsereko/Ventura, p. 1013; Holmes, J., "Complementarity: National Courts versus the ICC" in Cassesse *et al.* (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (Oxford University Press: 2002), pp. 681-682.

[293] *Contra* USA, paras. 16, 24-25. It would appear that Israel has shared this letter with the USA. *See* Annex B.

[294] Statute, art. 18(2) ("Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States"). A State's request for additional information does not affect this time limit, as per rule 52(2) of the Rules.

[295] *Venezuela* Article 18(2) Appeal Judgment, para. 130.

the Prosecutor's investigation three years after receiving the Prosecutor's timely notification under article 18(1) and having failed to request deferral within the statutory deadline.[296]

113. In addition to being manifestly out of time, Israel's letter neither mentions article 18 nor satisfies the legal requirements of a deferral request under article 18.[297] Merely asserting the capacity of the Israeli justice system and that some investigations are ongoing is not sufficient. The requesting State bears the burden of proof and must demonstrate that its proceedings sufficiently mirror the scope of the Prosecution's intended investigation.[298] It must provide information of a sufficient degree of specificity and probative value to demonstrate an advancing process of relevant domestic investigations or prosecutions, including patterns of criminality and high-ranking officials.[299] Israel did not provide any such material that would meet this burden. Nor, as outlined above, does any such information appear to exist.

IV. RELIEF REQUESTED

114. The Prosecution respectfully requests the Pre-Trial Chamber to:

- dismiss *in limine* the observations unrelated to the Oslo Accords; and
- urgently render its decisions under article 58, on the basis of the Prosecution's Applications, these submissions, and the Article 19(3) Decision.

Karim A.A. Khan KC, Prosecutor

Dated this 23rd day of August 2024

At The Hague, The Netherlands

[296] *See* Annex A, including the Prosecutor's article 18(1) notification of 9 March 2021; Israel's letter of 8 April 2021; the Prosecutor's letter in response of 9 April 2021, and Israel's reply via email of 26 April 2021.
[297] Rules of Procedure and Evidence, rules 53 to 55.
[298] *Philippines* Article 18(2) Appeal Judgment, paras. 74, 75, 77; *Venezuela* Article 18(2) Appeal Judgment, paras. 75-77.
[299] *Philippines* Article 18(2) Appeal Judgment, paras. 1, 2, 74, 77-80, 106; *Philippines* Article 18(2) Decision, paras. 14, 90; *Venezuela* Article 18(2) Decision, para. 66.