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International Criminal Court

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Date: **11 November 2024**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE STATE OF PALESTINE**

**Public**

# Request for Information from Judge Beti Hohler Concerning Prior Activities with the Office of the Prosecutor

**Source:** **The State of Israel**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants (Participation / Reparation)**

**The Office of Public Counsel for Victims**

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

**States' Representatives**
Office of the Attorney General of Israel

**Amicus Curiae**

**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Public Information and Outreach Section**

## I. INTRODUCTION

1. Israel respectfully requests that Judge Beti Hohler provide information to clarify whether there are (or are not) grounds to reasonably doubt her impartiality to adjudicate Israel's pending requests pursuant to article 18 and 19 of the ICC Statute.[1] Judge Hohler's *curriculum vitae*, put forward in support of her candidacy to be an ICC Judge, indicates that she worked for the Office of the Prosecutor ("OTP" or "Prosecution") from April 2015 until the time of her election as an ICC Judge in December 2023. This tenure included serving as a "member of Unified Team Leadership (lead lawyer) in a situation in the preliminary examination and investigation stage (2019-2022)."[2] The c.v. does not identify the situation by name. A subsequent questionnaire completed by Judge Hohler does indicate that the situation to which she was assigned was *The Philippines*, but does not describe the scope of her duties as a member of the "Unified Team Leadership (lead lawyer)", or whether she had access to information concerning, or was involved in developing legal positions concerning, more than one situation. During this period, the *Palestine* situation was one of eight under examination by the OTP.

2. Israel does not suggest that Judge Hohler's previous employment with the OTP *necessarily* or *automatically* gives rise to a reasonable apprehension of a lack of impartiality. However, Judges of this Court have acknowledged that previous duties within the OTP *may*, depending on the circumstances, give rise to a reasonable apprehension of bias.[3] Additional information has been provided by Judges in such a situation to ensure that no such appearance could reasonably arise, and to permit the relevant party to the litigation to determine whether to make an application for disqualification.[4]

3. The information requested includes: (i) whether Judge Hohler worked directly on the *Palestine* situation; (ii) whether Judge Hohler participated in any communications or consultations, in a leadership role or otherwise, that included discussion of confidential information or legal positions in the *Palestine* situation; (iii) whether Judge Hohler otherwise accessed or became aware of confidential information or legal positions concerning the *Palestine* situation, including but not limited to her role as a member of the ICC Appeals Board; and (iv) whether Judge Hohler was involved in formulating the OTP's interpretation of article 18 of the ICC Statute, in particular as

[1] This filing is without prejudice to Israel's position regarding the Court's lack of jurisdiction in respect of the above-captioned Situation, or to Israel's status as a State not Party to the Rome Statute.
[2] https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-EJ2023-SVN-CV-ENG.pdf.
[3] *Bemba*, Decision replacing a judge in the Appeals Chamber, ICC-01/05-01/08-3245, 20 March 2015, Annex A, p. 4.
[4] *Gicheru*, Decision on Defence Request for Information concerning Judge Samba's Prior Employment, ICC-01/09-01/20-168, 27 August 2021, para. 3.

advanced in litigation in *The Philippines* situation, or was involved in developing legal interpretations within the OTP concerning the Court's jurisdictional standards as relevant to the *Palestine* situation. Judge Hohler is also respectfully requested to provide any additional information as she may deem relevant.

## II. PROCEDURAL HISTORY

4. On 16 January 2015, the former Prosecutor announced that she had decided to open a preliminary examination into the "situation in Palestine" ("the Situation").[5]

5. On 22 May 2018, the Prosecution received a purported referral by the "Government of the State of Palestine" pursuant to articles 13(a) and 14 of the ICC Statute,[6] requesting the investigation of crimes "committed in all parts of the territory of the State of Palestine".[7] On the same day, the OTP notified the Presidency, pursuant to Regulation 45 of the Regulations of the Court, that it had received from the "State of Palestine" a referral under Articles 13(a) and 14 of the Statute regarding the Situation.[8]

6. On 24 May 2018, the Presidency, noting the memorandum from the Prosecutor dated 22 May 2018, assigned the Situation to Pre-Trial Chamber I.[9]

7. In its 2018 "Report on Preliminary Examination Activities," the OTP described its ongoing preliminary examination of nine open situations. The report includes a description of the OTP's investigative activities in relation to the "situation in Palestine".[10]

8. In its 2019 "Report on Preliminary Examination Activities," dated 5 December 2019, the OTP described its ongoing preliminary examination of eight open situations. The report includes a description of the OTP's investigative activities in relation to the "situation in Palestine".[11]

[5] ICC OTP, "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine", 16 January 2015.
[6] All further references to "article" and "rule" shall be to the ICC Statute and ICC Rules of Procedure and Evidence, respectively.
[7] ICC OTP, "Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine", 22 May 2018.
[8] ICC OTP, "Notification – Referral from the State of Palestine pursuant to articles 13(a) and 14 of the Rome Statute", ICC-01/18-1-AnxI, 22 May 2018.
[9] Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I, ICC-01/18-1, 24 May 2018.
[10] Report on Preliminary Examination Activities 2018, para. 251 *et seq*.
[11] Report on Preliminary Examination Activities 2019, para. 200 *et seq*.

9. On 20 December 2019, the OTP announced that it had concluded its preliminary examination into the Situation with the determination that the statutory criteria for the opening of an investigation had been met.[12]

10. On 22 April 2024, Judge Maria del Socorro Flores Liera was, at her request, excused by the Presidency from the bench of Pre-Trial Chamber to which the Situation was assigned on the basis of "a potential appearance of a lack of impartiality." The basis of this potential appearance was her spouse's senior position in the Government of Mexico which, on 18 January 2024, had "submitted a referral to the Prosecutor ('Referral'), in addition to a previous referral submitted on 17 November 2023 by different States, with respect to the situation in the State of Palestine."[13] Judge Flores Leira was replaced by Judge Nicolas Guillou.[14]

11. On 20 May 2024, the Prosecutor announced to the media that he had filed an application within the Situation seeking warrants of arrest in respect of, *inter alia*, Israel's Prime Minister, Mr. Benjamin Netanyahu, and Israel's then Minister of Defence, Mr. Yoav Gallant.

12. On 23 September 2024, the State of Israel filed "Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute";[15] and its "Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice."[16]

13. On 25 October 2024, Judge Iulia Motoc was, at her request, excused by the Presidency from the bench of Pre-Trial Chamber I assigned to the Situation, but not from the other cases to which she was assigned, "based on medical grounds and the need to safeguard the proper administration of justice."[17] Judge Motoc was replaced the same day by Judge Beti Hohler.

## III. SUBMISSIONS

### (i) Applicable Law

14. This section sets out the applicable legal principles concerning:

a. The requirement of impartiality in the context where a Judge is a former prosecutor;

[12] ICC OTP, "Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction", 20 December 2019.
[13] Decision replacing a judge in Pre-Trial Chamber I, ICC-01/18-164, 22 April 2024, p.3.
[14] *Id*. p. 4.
[15] ICC-01/18-354-AnxII-Corr ("Article 19 Request").
[16] ICC-01/18-355-AnxI-Corr ("Article 18 Request").
[17] Decision replacing a judge in Pre-Trial Chamber I, ICC-01/18-366, 25 October 2024, p.3.

b. The obligation of a judge to provide clarifying information where there is a potential reasonable apprehension of a lack of impartiality; and

c. The permissibility of any party to the litigation raising these issues to ensure that no adjudication is tainted by a reasonable apprehension of bias.

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*a. <u>The entitlement to an independent and impartial tribunal in the specific context of a Judge who was formerly a prosecutor before the same court</u>*

15. Article 41(2)(a) provides that "[a] Judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground." This provision requires not only an absence of "actual bias" in respect of the matters for adjudication, but also an "appearance of grounds to doubt [a Judge's] impartiality", which must be assessed "from the objective perspective of whether a fair-minded and informed observer, having considered all the facts and circumstances, would reasonably apprehend bias in the judge."[18]

16. In the specific context of a Judge who had formerly been a prosecutor involved in cases before the same court, the European Court of Human Rights observed that:

> [A]ny judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society.[19]

17. The ECHR decided in that case that there had been a violation of the right to "an independent and impartial tribunal" guaranteed by Article 6 of the European Convention on Human Rights. Although the Judge's former role as a prosecutor in the specific case had been *de minimis*, his position of authority – and his corresponding *potential* involvement in the case – gave rise to a reasonable apprehension of a lack of impartiality without any further consideration of his *actual* involvement in the case:

> If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality [….] As the hierarchical superior of the deputies in charge of the file, Mrs. del Carril and

[18] Decision of the Plenary of Judges on the Defence Application for the Disqualification of judges of Pre-Trial Chamber I from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-458-AnxI-Red, 12 September 2019, para. 24-25.
[19] ECHR, *Piersack v. Belgium* (Application No. 8692/79), Judgement, Strasbourg, 1 October 1982, paras. 30-31.

> then Mr. De Nauw, he had been entitled to revise any written submissions by them to the courts, to discuss with them the approach to be adopted in the case and to give them advice on points of law [….] Whether or not Mr. Piersack was, as the Government believe, unaware of all these facts at the relevant time is of little moment. Neither is it necessary to endeavour to gauge the precise extent of the role played by Mr. Van de Walle, by undertaking further inquiries in order to ascertain for example, whether or not he received the covering note of 4 February 1977 himself or whether or not he discussed this particular case with Mrs. del Carril and Mr. De Nauw. It is sufficient to find that the impartiality of the "tribunal" which had to determine the merits (in the French text: "bien-fondé") of the charge was capable of appearing open to doubt.[20]

18. A reasonable apprehension of a lack of impartiality may arise not only from the power to exercise supervisory functions in relation to a matter, but from sufficient knowledge of a case as a prosecutor to have formed a view about its merits. In particular, rule 34(1)(c) provides that the grounds for disqualification under article 41 include:

> Performance of functions, prior to taking office, during which [a Judge] could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned.

19. In determining that Judge Samba was not disqualified from the *Gicheru* case, the Plenary of Judges noted that in her previous role as a Field Operations Officer within the OTP, "she played no part in the investigation or gathering of evidence and had no access to evidential material."[21] In this circumstance, "such limited logistical interactions could not have lead Judge Samba to have formed an opinion on the case nor to have otherwise undermined her impartiality in the eyes of a reasonable observer."[22]

20. Senior prosecutors, on the other hand, are in a very different situation. As the OTP has previously submitted in addressing the permissibility of a former prosecutor joining a defence team in an entirely different situation from the one to which he had been assigned as a prosecutor:

> Within the Prosecution Division ("PD"), lawyers frequently seek strategic and legal advice from each other, exploring how issues are analyzed and resolved in other courts in order to formulate the best approach in their cases. These consultations are so frequent as to be unremarkable. They are also mostly informal, brief, and undocumented. Because of the need for open discussions,

[20] *Id*. paras. 30-31.
[21] *Gicheru*, Public redacted version of "Reasons for the Decision on the 'Request for the Disqualification of Judge Miatta Maria Samba' dated 17 September 2021 (ICC-01/09- 01/20-173-Conf)", ICC-01/09-01/20-205, 1 November 2021, para. 27.
[22] *Id.*

> the employment contracts require that the person accept that everything that occurs within the OTP is deemed confidential.[23]
>
> […]
>
> [A]s one of four P5 Senior Trial Lawyers he participated in PD senior staff meetings during which legal and factual issues arising in all cases were freely discussed.[24]
>
> […]
>
> [A] PD lawyer in the ordinary course of events will have access (thus, be privy) to confidential information with respect to cases that were open when he or she worked at the OTP. Most of that confidential information is shared informally and without any mechanism to track or record the conversations. And that is the only way it can operate: lawyers need to be able to consult with each other quickly, to find persons when they are available, to stop them in the hallway or walk into offices and ask questions, all without taking minutes or convening formal meetings.[25]
>
> […]
>
> A lawyer cannot leave the OTP and immediately sign on to the Defence without using, knowingly or unconsciously, information about the OTP's anticipated strategies, strengths and weaknesses, and litigative concerns. The issue is not simply the ethical obligation that Mr Faal has to Mr Muthaura, his current client [REDACTED] but his ethical obligation of loyalty to the OTP, his former client, which obligation the OTP cannot waive.[26]
>
> […]
>
> The Prosecution submits that proper consideration of these factors, and bearing in mind the working methods of the office, require a Chamber to presume that an OTP – particularly, but not necessarily, a Senior Trial Lawyer – is privy to more than *de minimis* confidential information in cases that are open at the time when he or she is serving at the OTP.[27]

21. The reasonableness of an apprehension of a lack of impartiality is assessed with reference to the scope of the matter that the Judge must adjudicate. Accordingly, the Presidency, by a majority, decided that Judge Fernández de Gurmendi's former senior position within the OTP did not require her disqualification given the limited nature of the proceedings to which she was to be

[23] *Muthaura et al.*, Prosecution's Appeal against the "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)", ICC-01/09-02/11-271, 1 September 2011, para. 5
[24] *Id*. para. 7.
[25] *Id*. para. 18.
[26] *Id*. para. 20.
[27] *Id*. para. 32.

assigned, namely, a post-conviction sentence review procedure under article 110.[28] On the other hand, Judge Fernández de Gurmendi also pronounced her view, whose correctness was not questioned by the Plenary, that she had "'systematically sought to avoid being involved in the judicial proceedings related to any case arising from the investigations that commenced or were conducted during the time [she] worked at the OTP.'"[29]

22. Although a "degree of congruence" standard is sometimes applied to potential reasonable appearance of bias situations, this elevated standard should apply only in respect of prior involvement in a case *as a judge*, not as a party.[30] Accordingly, this "degree of congruence" standard has been routinely applied to Judges who have had a relatively minor role in adjudicating at a previous stage of those proceedings, or in a related matter.[31] This elevated threshold for prior judicial involvement would, as the *Piersack* case holds, be inappropriate for assessing involvement as a Prosecutor. Exposure to confidential information, continuing obligations to the Office of the Prosecutor,[32] and involvement in developing legal arguments on behalf of one party's point of view are all factors that are entirely inapplicable to previous involvement in a case as a judge. In addition, any standard applied must, in accordance with article 21(3) of the Statute, "be consistent with international recognized human rights," of which the European Court of Human Rights' decision in *Piersack* is an articulation.

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[28] *Lubanga*, Notification of the Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-3154, AnxI, 4 August 2015, para. 36 ("The Majority reasoned that the distinct nature of the article 110 proceedings warranted dismissal of the Application. The Majority acknowledged that the article 110 proceedings were part of a single case but distinguished between proceedings dealing with attribution of responsibility (i.e. conviction and sentence) and sentence review. In particular, the Majority emphasized the need to look at the facts and circumstances a judge sitting on a Sentence Review Panel would consider in reaching a decision. The Majority observed that article 110 proceedings require an assessment of facts and circumstances, such as the person's conduct in prison and recognition of his criminal responsibility, that largely arise following conviction and sentence. Accordingly, the Majority found that the functions Judge Fernández de Gurmendi performed in OTP were irrelevant to this type of assessment.")

[29] *Id*. para. 20.

[30] In respect of a reasonable apprehension of bias arising because of prior employment with the Prosecutor, this standard was arguably applied, or at least mentioned in two Plenary decisions concerning Judge Fernández de Gurmendi's prior role with the OTP, but was not applied in the more recent Plenary decision concerning Judge Samba. See *Gicheru*, Public redacted version of "Reasons for the Decision on the 'Request for the Disqualification of Judge Miatta Maria Samba' dated 17 September 2021 (ICC-01/09- 01/20-173-Conf)", ICC-01/09-01/20-205, 1 November 2021, paras. 24-30.

[31] *See e.g.* ICC-02/11-01/15-142-AnxI, 15 July 2015, p. 4 ("The requests for excusal are based on Judge Fernández de Gurmendi and Judge Van den Wyngaert's previous involvement in Pre-Trial Chamber I, where they respectively issued decisions on the maintenance of Mr. Gbagbo's detention. Mr Gbagbo's detention is the very subject of the Appeal from which they request excusal. Accordingly, there is a high degree of congruence with the respect to the legal issues as Judge Fernández de Gurmendi and Judge Van den Wyngaert have previously deliberated on and issued decisions touching upon the subject matter of the appeal").

[32] *Muthaura et al*., Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled "Decision with respect to the Question of Invalidating the Appointment of Counsel to the Defence", 10 November 2011, para. 68 (acknowledging a continuing "duty of confidentiality" of a former employee of the Office of the Prosecutor).

*b. The obligation of a judge to provide clarifying information where there is a potential reasonable apprehension of a lack of impartiality*

23. Plenary decisions have emphasized that "disqualification of a judge is not a step to be undertaken lightly and that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office."[33] Furthermore, "it is for the party requesting the disqualification to demonstrate the appearance of bias"[34] and to "substantiate its claim of an appearance of bias in the eyes of the fair-minded and well-informed objective observer."[35] Given this burden, and the importance of the issue to confidence in the administration of justice, Judges have forthrightly responded to requests for additional information to clarify a potential reasonable appearance of a lack of impartiality. Accordingly, Judge Samba held in response to such a request:

> I, Judge Miatta Maria Samba, noting Article 41(2)(a) of the Statute, the principle of fairness and expeditiousness of the proceedings, as well as the rights of the accused enshrined in Article 67 of the Statute, provide hereby the following information on my prior employment for the Office of the Prosecutor. I do so, because I strongly believe in the impartiality of the judges as a cornerstone of fair proceedings and the parties right to have all the information necessary in order to form their own opinion about this impartiality.[36]

24. Indeed, information was provided upon request by the Defence not only by Judge Samba, but also by the Prosecution.[37] Neither the Prosecution, nor the Judge, nor the Plenary subsequently seized of the matter[38] suggested that this procedure was in any way improper. On the contrary, Judge Samba evidently considered the request to be entirely proper and necessary to dispel any potential appearance of a lack of impartiality.

[33] *Ntaganda*, Notification of the Decision of the Plenary of Judges on the 'Request seeking Judge Lordkipanidze to recuse himself or be disqualified to adjudicate the appeals against the Reparations Order issued by Trial Chamber VI on 8 March 2021' dated 2 July 2021, ICC-01/04-02/06-2711-Anx, 29 September 2021, para. 19 ("Plenary Decision on Disqualification of Judge Lordkipanidze").
[34] Decision of the Plenary of Judges on the Defence Application for the Disqualification of judges of Pre-Trial Chamber I from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-458-AnxI-Red, 12 September 2019, para. 25.
[35] Plenary Decision on Disqualification of Judge Lordkipanidze, para. 24.
[36] *Gicheru*, Decision on Defence Request for Information concerning Judge Samba's Prior Employment, ICC-01/09-01/20-168, 27 August 2021, para. 3.
[37] *Id.* paras.1-2.
[38] *Gicheru*, Public redacted version of "Reasons for the Decision on the 'Request for the Disqualification of Judge Miatta Maria Samba' dated 17 September 2021 (ICC-01/09- 01/20-173-Conf)", ICC-01/09-01/20-205, 1 November 2021.

*c. The permissibility of any party to the litigation raising these issues to ensure that no adjudication is tainted by a reasonable apprehension of bias*

25. Plenaries have also adopted a broad approach to standing in respect of issues touching on impartiality. Although article 41(2)(b) authorizes a request for disqualification only by "[t]he Prosecutor or the person being investigated or prosecuted,"[39] the Plenary has clarified that:

> a broader reading should be adopted in the interest of fairness and to uphold the principle of impartiality. In this respect, it was noted that, read as a whole, article 41(2) establishes this principle of impartiality, which should apply to all phases of a case before the Court.[40]

26. Similarly, Judges Aitala and Ugalde have submitted that article 41(2)(b) should not preclude an application for disqualification in respect of proceedings under article 87(7). The Judges opined that a previous precedent strictly interpreting article 41(2)(b) was distinguishable because "proceedings under article 87(7) of the Statute, although connected to the criminal proceedings, are of a different nature." On that basis, they adopted the view that "we find that Mongolia has an interest in raising the question of disqualification and, therefore, we consider that the Plenary of the Judges can legitimately consider the request."[41]

27. A similar approach is necessary in respect of questions of jurisdiction and admissibility. The appearance of impartiality is a "cornerstone of fair proceedings"[42] and must be guaranteed in respect of decisions that determine whether the Court has jurisdiction over a matter, and has properly respected the sovereign prerogatives of States.

[39] The express authorisation in article 41(2)(b) of challenges by "the person being investigated or prosecuted" demonstrates that the word "case" in article 41(2)(a) is not limited to situations where an arrest warrant has been issued, but also includes those who are merely under investigation. This approach has been confirmed in the similalry-worded context of article 42: *Situation in the Republic of Kenya*, Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David David Nyekorach-Matsanga, ICC-01/09-96-Red, 11 July 2012 (reclassified as public 6 September 2012).

[40] *Lubanga*, Notification of the Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-3154, AnxI, 4 August 2015, para. 34.

[41] Observations of Judge Aitala and Judge Ugalde concerning the 'Application for the Disqualification of Judges' filed on 31 October 2024 (ICC-01/22-92-Anx), ICC-01/22-97-AnxII, 7 November 2024, para. 2.

[42] *See* Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of The Prosecutor v. Thomas Lubanga Dyilo, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, ICC-01/04-01/06-2138-AnxIII, 23 September 2009, p. 5 ("The Presidency considers the overriding purpose of article 41(2)(a) to be the safeguarding of the integrity of proceedings of the Court by ensuring that no judge participates in a case in which his or her impartiality might reasonably be doubted on any ground.")

### (ii) Potential Issues Concerning the Appearance of Impartiality of Judge Hohler

28. Judge Hohler's *curriculum vitae* in support of her candidacy to become an ICC Judge indicates that, during her tenure with the Office of the Prosecutor from 2015 up to the date of the c.v., she had been a "member of Unified Team Leadership (lead lawyer) in a situation in the preliminary examination and investigation stage (2019-2022)."[43] The situation is not identified in this official c.v. However, in response to a questionnaire of the International Criminal Court Bar Association, Judge Hohler identified the situation as *The Philippines* and offered her views concerning the scope of her potential disqualification from matters as an ICC Judge:

> I was a leading member of the Prosecution team in a completed case (*Ongwen*), acting Head of Unified Team and lead lawyer in another (pre-trial) case (*Kony*) and a member of Unified Team Leadership as a lead lawyer in the preliminary examination and investigation stage of a situation (*The Philippines*) [….] Having served with the Court in a prosecutorial capacity, I want to directly address the question of excusal from cases which I have prosecuted whilst with the ICC. The Rome Statute anticipates that ICC Judges may have previously served with the Court in other capacities and should therefore excuse themselves from those cases (article 41, rule 35). Legal professionals moving between different roles is the norm in almost all jurisdictions. The ICC is no different. Indeed, it makes sense that individuals who have specialised knowledge and are versed in the legal texts and processes of the Court (such as prosecutors and defence counsel) are elevated to judicial posts. [….] As Trial Lawyer (aka prosecutor), I only acted in individual cases (rather than engaging in strategic decisions across all situations and cases). Considering the limited number of cases and situations in which I have served, the practical impact on my assignment to chambers would be minimal and is therefore not a limiting factor for my candidature. Let me be concrete. I spent most of my time with the ICC prosecuting the case against Dominic *Ongwen* whose case is completed with a final judgment. I have subsequently and concurrently acted in the *Philippines situation* and the *Kony* case. Accordingly, I would have to be excused from one case (*Kony*, only remaining case in the Uganda situation) and one situation *(The Philippines*) at pre-trial and trial stage, where there is a total of 17 open situations and dozens of cases. In the unlikely event that I would be assigned to the Appeals Chamber, I would excuse myself from three individual cases in which I assisted the teams with various prosecutorial issues and are all currently already on trial before set chambers: *Abd-Al-Rahman* (Sudan), *Said* (CAR), *Al Hassan* (Mali). I note that, if elected, I would almost certainly be assigned to Pre-Trial or Trial Division given my background and experience and given the judicial vacancies will arise in these divisions with the six judges whose mandate ends in 2024 departing from the Court.

29. With respect, the scope of a potential reasonable apprehension of bias is not necessarily limited to the cases to which a prosecutor was formally assigned. As quoted above from the Prosecution's own submissions, "a Chamber [must] presume that an OTP – particularly, but not necessarily, a Senior Trial Lawyer – is privy to more than *de minimis* confidential information in

[43] https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-EJ2023-SVN-CV-ENG.pdf, p. 3.

cases that are open at the time when he or she is serving at the OTP."[44] This seems even more likely in respect of the *Palestine* and *The Philippines* situations, which during Judge Hohler's tenure at the OTP, involved substantially overlapping and unprecedented legal issues. The article 18(1) notification in the *Palestine* situation was sent on 9 March 2021, and that of *The Philippines* situation was sent on 6 October 2021.[45] In addition, the article 18 notification in the *Venezuela* situation was sent on 16 December 2021.[46] The Prosecution's submissions concerning article 18 before the Pre-Trial Chamber seized of *The Philippines* situation were all filed in 2022 – i.e. during the very period ("2019-2022") that Judge Hohler describes herself as "lead lawyer in the preliminary examination and investigation stage of a situation (*The Philippines*)". It would be surprising indeed if the Office of the Prosecutor did not coordinate a common position and approach across different situations.

30. Judge Hohler is now required as a member of this Pre-Trial Chamber to adjudicate the proper interpretation of article 18. In particular, Judge Hohler will be required to determine the implications of the Appeals Chamber's decision in *The Philippines* situation which, as Israel contends, constituted a clear rebuke to the Prosecution's position in that situation.[47] The Prosecution's submissions included the assertion, in a filing dated 24 June 2022 while Judge Hohler was the "lead lawyer" for the OTP in the *Philippines* situation, that "the Chamber should compare the domestic proceedings with the scope of the Prosecution's intended investigation, **as defined by the sum of potential cases within the parameters of the authorised situation** which could be pursued by the Prosecutor in the exercise of his broad discretion under articles 53, 54 and 58."[48] Israel contends in its Article 18 Request that this approach is unduly broad, and that it was rejected by the Appeals Chamber as failing to reflect the specificity required of an article 18(1) notification.[49] If Judge Hohler was involved in formulating these legal positions on behalf of the OTP, then no reasonable person, even fully informed of the judicial oath and duties of office, could

[44] *Muthaura et al*., Prosecution's Appeal against the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)', ICC-01/09-02/11-271-Red, 1 September 2011, para. 32.
[45] https://www.legal-tools.org/doc/tn4lq3/pdf/, p.1.
[46] *Venezuela*, Decision authorising the resumption of the investigation pursuant to article 18(2), ICC-02/18-45, 27 June 2023, para. 4.
[47] *See e.g.* Article 18 Request, para. 31 ("Contrary to the Prosecution's position that the 'intended investigation' under article 18(1) notice should be treated as simply 'the sum of potential cases within the parameters of the authorized situation,' the Venezuela I Pre-Trial Chamber held that [….].")
[48] *Situation in the Republic of the Philippines*, Prosecution's request to resume the investigation into the situation in the Philippines pursuant to article 18(2), ICC-01/21-46, 24 June 2022, para. 62 (emphasis added).
[49] Article 18 Request, paras. 31, 41, 48.

fail to reasonably apprehend that this would "adversely affect the required impartiality of the person concerned."[50]

31. Judge Hohler may also have been involved in formulating the Prosecution's position concerning the Court's jurisdiction in the *Palestine* situation. These issues were litigated in the *Palestine* situation concurrent with Judge Hohler's tenure as a "lead lawyer" in one of a small number of situations under preliminary examination. The potential of her involvement is enhanced by her authorship of an article, published just before she joined the OTP in 2015, entitled "The Accession of Palestine to the ICC: A Brief Analysis," which discusses issues relevant to whether the Court's jurisdiction and the consequences of Palestine's purported accession to the Rome Statute.[51] The article is indicative of Judge Hohler's interest in the *Palestine* situation that could have led to her involvement in the development of legal arguments, or exposure to factual information, relevant to the litigation that she must now adjudicate.

32. Finally, Judge Hohler's c.v. indicates that she was a "member of the ICC Appeals Board". It is understood that this body is empowered to review OTP staff complaints regardless of the case or situation to which the complainants were assigned and that this might, in turn, necessitate exposure to and consideration of substantive and confidential issues of evidence, law and strategy arising in relation to those situations.

33. Based on these circumstantial indications of a potential reasonable apprehension of a lack of impartiality, Israel respectfully requests that Judge Hohler provide any information that she deems relevant to the circumstances described above. In particular, the following information is respectfully requested as likely being of relevance to these issues:

a. whether Judge Hohler worked directly on the *Palestine* situation;

b. whether Judge Hohler participated in any communications or consultations, in a leadership role or otherwise, that included discussion of confidential information, evidence, strategy or legal positions in the *Palestine* situation;

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

[50] ICC Rules of Procedure and Evidence, Rule 34(1)(c).
[51] Beti Hohler, *The Accession of Palestine to the ICC : A Brief Analysis* (2015).

d. whether Judge Hohler was involved in formulating the Office of the Prosecutor's interpretation of article 18 of the ICC Statute, in particular as advanced in litigation in *The Philippines* situation, or was involved in developing legal interpretations within the OTP concerning the Court's jurisdictional standards as relevant to the *Palestine* situation; and

e. whether there was a vetting procedure carried out by the Presidency as to the scope of her previous role in the OTP prior to her assignment to the *Palestine* situation.

## IV. CONCLUSION AND RELIEF SOUGHT

34. Israel wishes to underscore that it does not question Judge Hohler's integrity, expertise, or professionalism. However, additional information is required in the present situation to dispel the indications of a potential reasonable apprehension of a lack of impartiality on the part of Judge Hohler. As in the *Gicheru* case, where similar circumstances arose, the proper approach is an inquiry from the concerned party, followed by forthright disclosure of the requested information to allay any apprehension of a lack of impartiality.

**Respectfully submitted:**

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

Dated this 11th day of November 2024, at Jerusalem, Israel.