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**International
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Court**

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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

**Secret, *EX PARTE*, only available to the Prosecution and the State of Israel
with Secret, *EX PARTE*, Annex A, only available to the Prosecution and the State of
Israel**

**Prosecution Response to Israel's "Request for Access to the Application for
Arrest Warrants for Benjamin Netanyahu and Yoav Gallant"**

Source: Office of the Prosecutor

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

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Unrepresented Victims	Unrepresented Applicants
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
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I. INTRODUCTION

1. Israel's request for access to the article 58 applications for arrest warrants against senior Israeli officials filed by the Prosecutor on 20 May 2024 ("Israel's Request" or the "Request") should be rejected.¹ Israel has no standing to file the Request, which relates to *ex parte* proceedings. Nor do Israel's arguments purporting to justify its access to the Article 58 Applications have any legal basis under the Statute, which exhaustively regulates the procedures permitting challenges to the exercise of the Court's jurisdiction over a case, and its admissibility.

II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(2) of the Regulations of the Court and regulation 14(b) of the Regulations of the Registry, this application is filed SECRET following the classification of the Request. If the Request is reclassified, this Response can follow the same classification.

III. SUBMISSIONS

3. On 11 July 2024, Israel requested access on a confidential basis to the Prosecutor's Article 58 Applications filed on 20 May 2024. Israel seeks this access "so that it is able, if it deems appropriate"² to challenge the Court's jurisdiction under article 19(2)(c) and because "[it] may also wish to make submissions on issues of admissibility".³ Israel puts forward five contentions in support of its request for access:⁴

- *First*, Israel should be heard as "the State that would be most aggrieved by the exercise of the [Court's] jurisdiction", which it asserts is provided for in article 19(5) of the Statute.
- *Second*, the Pre-Trial Chamber's Article 19(3) Decision⁵ anticipates that the Court would receive submissions from the relevant State in the event of an article 58 application.

¹ ICC-01/18-187-SECRET-Exp-AnxI. The Prosecutor will refer to the article 58 applications against Benjamin Netanyahu and Yoav Gallant as the "Article 58 Applications". Pre-Trial Chamber I will be referred to as "Pre-Trial Chamber I" or the "Chamber".

² Request, para. 1.

³ Request, para. 5.

⁴ Request, para. 14.

⁵ ICC-01/18-143 ("[Article 19\(3\) Decision](#)").

- *Third*, the Prosecutor has eliminated the secrecy and confidentiality of the Article 58 Applications by making their existence public, along with some of their content, and has extinguished the *ex parte* nature of the article 58 proceedings by sharing materials with a panel of experts.
- *Fourth*, Israel does not wish to “fully participate” in the article 58 proceedings, but merely seeks to offer submissions on the potential exercise of the Court’s jurisdiction.
- *Fifth*, Israel asserts that granting access to the Article 58 Applications will not affect the expeditiousness of the proceedings since litigating jurisdictional issues at this stage will ensure that the arrest warrants are not based on a jurisdictional error.⁶

4. Finally, in relation to complementarity, Israel also submits that it “wishes to examine any representations that may have been made by the Prosecution to the Pre-Trial Chamber concerning admissibility”. It posits that complementarity is a live issue due to Israel’s purported “deferral request” of 1 May 2024.⁷

5. The Prosecutor respectfully requests that the Chamber dismisses Israel’s Request. *First*, Israel has no standing to file the Request, which relates to *ex parte* proceedings. The Request should therefore be dismissed on this basis alone. *Second*, Israel’s arguments to justify its request for access to the Article 58 Applications lack a legal basis. The Request disregards the Court’s legal framework and consistent jurisprudence. Accordingly, even if the Chamber decides to consider the merits of the Request, it should be dismissed in its entirety.

(i) *Israel lacks standing to file the Request*

6. Israel’s Request does not rely on (nor does it refer to) the Order of 27 June 2024, whereby the Pre-Trial Chamber authorised the filing of requests to provide *amicus curiae* observations under rule 103 in this situation.⁸ Israel’s Request thus falls outside the only procedural mechanism potentially available at this stage to permit such interventions, and should therefore be dismissed.

⁶ Request, para. 14.

⁷ Request, para. 15; see Annexes A and B to the Request.

⁸ [ICC-01/18-173-Red](#) (“Order”). The Prosecution understands that the Chamber will issue an order deciding on the numerous applications to provide observations. However, considering that the Request falls outside the parameters of the Order and in light of the 10-day deadline for the Prosecution to respond to the Request (see Regulations 24(1) and 34(b) of the Regulations of the Court), it hereby files this Response.

7. Notwithstanding the Chamber's decision to receive *amicus curiae* observations in this situation,⁹ article 58 proceedings are *ex parte* in the sense that they involve the Prosecution and the Pre-Trial Chamber only.¹⁰ This means that, when seised with an application by the Prosecutor under article 58, the Pre-Trial Chamber decides solely on the basis of the information and evidence presented by the Prosecutor.¹¹ 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,¹² including on matters of jurisdiction and admissibility which can be properly raised by relevant actors at other stages of the proceedings.¹³ This is consistent with the non-adversarial character and limited purpose of article 58 proceedings, which serve to initiate a prosecution (by issuing an arrest warrant), and thus differ in nature from subsequent judicial proceedings once a prosecution has been initiated. There is no reason to depart in this situation from the Court's consistent jurisprudence emphasising the exclusive participation of the Prosecutor in article 58 proceedings.¹⁴

8. The Prosecutor's public statement prior to submitting the Article 58 Applications, giving a basic outline of some of their features, does not change the *ex parte* nature of the current proceedings, which are determined by the Court's legal framework.¹⁵ Notably, for example,

⁹ [Order](#), para. 3.

¹⁰ [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 in Ambos (ed.), Rome Statute of the International Criminal Court: Article-by-Article Commentary, Beck/Hart Publishing, 4th ed., "Article 58", p. 1717, nm. 8.

¹¹ 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").

¹² See [ICC-01/09-42](#), paras. 11, 16, 18.

¹³ See below para. 11. Even if Israel argues that it only seeks access to the Applications to provide observations on the Court's exercise of jurisdiction (Request, para. 14(h)), its Request already goes beyond: see Request, para. 14(c).

¹⁴ [ICC-01/09-35](#); [ICC-01/09-42](#); [ICC-01/09-43](#); [ICC-01/09-47](#).

¹⁵ *Contra* Request, para. 14(f).

Pre-Trial Chambers have confirmed the *ex parte* nature of article 58 applications, even when the applications had been publicly announced by the Prosecutor, and rejected requests to provide observations on such matters.¹⁶

9. Nor does the Prosecutor's decision to consult with external experts—within the context of his independent mandate under article 42(1)—eliminate the *ex parte* nature of the judicial proceedings before the Pre-Trial Chamber or otherwise justify any intervention unforeseen by the Statute. Since the Prosecutor has full authority under the Statute over the management and administration of his Office,¹⁷ his discretion to avail himself of the advice of experts where he considers it appropriate does not bear on the conduct of subsequent proceedings before the Pre-Trial Chamber.

(ii) *Israel's arguments lack legal basis*

10. Israel's arguments purporting to justify its access to the Applications disregard the Court's legal framework and consistent jurisprudence.¹⁸ Accordingly, even if the Chamber should decide to entertain Israel's Request, the Request lacks any merit and should be similarly dismissed for the following reasons.

11. *First*, Israel's asserted reason for seeking access to the Article 58 Applications is to assess "if it deems appropriate" to challenge the Court's jurisdiction under article 19(2)(c). Yet the Statute does not afford any right to challenge the Court's jurisdiction at this stage of the proceedings. The Chamber must first decide positively on the Prosecutor's Applications before a jurisdictional challenge may be lodged 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 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 implies the same restriction applies to articles 19(2)(b) and (c). This would be "the earliest opportunity" foreseen in the Statute for a State to submit a challenge under article 19(2), within the meaning of article 19(5).¹⁹

¹⁶ [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"). There are different purposes in keeping the litigation as including the Prosecution and Pre-Trial Chamber only and maintaining the confidentiality of article 58 applications, such as protection of victims and witnesses, protection of information, and ensuring that the Court can exercise its functions independently.

¹⁷ Statute, art. 42(2).

¹⁸ Request, paras. 13-17. The Prosecution's arguments provided herein apply to Israel's Request to access the Applications in full and in redacted form.

¹⁹ *Contra* Request, para. 14(b).

12. *Second*, Israel misrepresents the Article 19(3) Decision.²⁰ The Pre-Trial Chamber did not state that Israel or any other State could provide further submissions after the Prosecutor filed an article 58 application. Instead, the Chamber identified two different scenarios in stating 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”).²¹ These are different conditions, recognising the different procedures under articles 19(1) and (2) respectively.

13. Accordingly, as noted above, nothing in the Article 19(3) Decision is inconsistent with the *ex parte* nature of article 58 proceedings and the fact that rights under article 19(2) are triggered only after the Pre-Trial Chamber decides to initiate a prosecution by issuing an arrest warrant.

14. Significantly, Israel did not previously avail itself of the opportunity to provide observations on the Prosecutor’s Article 19(3) Request, in which the Prosecution sought early resolution of the territorial scope of the Court’s jurisdiction in this situation,²² even though the Pre-Trial Chamber expressly invited Israel to do so.²³ This notwithstanding, the Chamber also allowed observations from other States, organisations and/or persons.²⁴ Although Israel chose not to provide observations, numerous legal representatives of victims,²⁵ States Parties,²⁶

²⁰ Request, para. 14(d)-(e), referring to [Article 19\(3\) Decision](#), para. 131.

²¹ [Article 19\(3\) Decision](#), para. 131 (emphasis added).

²² ICC-01/18-12 (“[Prosecutor Request](#)”), para. 220. 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). 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.

²³ [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.

²⁴ [Article 19\(3\) Order](#), para. 15.

²⁵ [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](#) (Office of Public Counsel for 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).

²⁶ [Czechia Brief](#); [Austria Brief](#); [Palestine Brief](#); [Australia Brief](#); [Hungary Brief](#); [Germany Brief](#); [Brazil Brief](#); [Uganda Brief](#).

intergovernmental organisations,²⁷ and *amici curiae*²⁸ responded to the Chamber's call. In total, the Chamber received submissions from some 11 groups of one or more victims, 31 States Parties (from 8 States Parties directly, and from 2 international organisations which include 23 States Parties, alongside more than 30 other non-States Parties), and 33 academics or non-governmental organisations (individually or in groups). Such a wide variety of perspectives ensured that the Chamber had the benefit of a diverse range of arguments, which contributed to the reasoning in the Court's Article 19(3) Decision.

15. *Third*, and as noted, in the Article 19(3) Decision, the majority of the Pre-Trial Chamber stated that there would be opportunity to examine “*further* questions of jurisdiction which may arise” in resolving the Prosecutor's article 58 applications or when presented with challenges under article 19(2).²⁹ This implies that questions already decided in the Article 19(3) Decision have been definitively settled. In particular, it is settled that Palestine is a State Party, that Palestine is a State for the purposes of article 12(2)(a) of the Statute, and 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.³⁰ Although the Chamber must satisfy itself that it has jurisdiction under article 19(1) of the Statute with respect to the cases resulting from the initiation of any prosecutions, there are no exceptional bases or circumstances that could justify its *ex novo* reconsideration of the matters already settled in its

²⁷ [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. Two members of these organisations (Palestine and Uganda) additionally filed their own observations.

²⁸ See [Amicus Curiae Decision](#); [Further Amicus Curiae Decision](#). In order of filing, see further [Quigley Brief](#); [ECLJ Brief](#) (European Centre for Law and Justice); [Schabas Brief](#); [PBA Brief](#) (Palestinian Bar Association); [Khalil and Shoaibi Brief](#); [Bazian Brief](#); [Shaw Brief](#); [Falk Brief](#); [MyAQSA Brief](#); [Shurat HaDin Brief](#); [IsBA Brief](#) (Israeli Bar Association); [Lawfare Project et al. Brief](#); [Buchwald and Rapp Brief](#); [FIDH et al. Brief](#) (International Federation of Human Rights and others); [Gvirsman Brief](#); [OPCD Brief](#) (Office of Public Counsel for Defence); [Guernica 37 Brief](#); [UKLFI et al. Brief](#) (UK Lawyers for Israel and others); [Blank et al. Brief](#); [Ross Brief](#); [Benvenisti Brief](#); [PCHR et al. Brief](#) (Palestinian Centre for Human Rights and others); [Badinter et al. Brief](#); [IAJLJ Brief](#) (International Association of Jewish Lawyers and Jurists); [PCPA Brief](#) (Popular Conference for Palestinians Abroad); [TIHRH Brief](#) (Touro Institute on Human Rights and the Holocaust); [IL Brief](#) (International-Lawyers.org); [Heinsch and Pinzauti Brief](#); [IFF Brief](#) (Israel Forever Foundation); [Intellectum Scientific Brief](#); [Weiss Brief](#); [Romano Brief](#); [ICmJ Brief](#) (International Commission of Jurists); [IADL Brief](#) (International Association of Democratic Lawyers).

²⁹ [Article 19\(3\) Decision](#), para. 131.

³⁰ [Article 19\(3\) Decision](#), p. 60. Likewise, the Pre-Trial Chamber, by Majority, found that the Oslo accords had no bearing in the exercise of the Court's jurisdiction: see [Article 19\(3\) Decision](#), paras. 124-129.

Article 19(3) Decision.³¹ This is particularly relevant in this case where the Article 19(3) Decision was issued after an open and comprehensive debate that permitted the ventilation of all possible perspectives on the issues.³²

16. 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.³³ These reasons of principle and policy apply even more strongly in the present context, which falls outside article 21(2)—and is more akin to the doctrine of *res judicata*³⁴—since it does not concern the relevance of prior interpretations of law for the purpose of other proceedings but rather the Chamber's previous determination of the very same matter in the very same situation.

17. The Prosecution respectfully submits that there is a need for finality and certainty with respect to foundational matters such as the exercise of the Court's jurisdiction and its scope, which not only affect the Court as a whole but also external actors with whom the Court interacts, including victims.³⁵ This ensures certainty, procedural economy, and fairness in the

³¹ *Contra* Request, para. 14(a). On such exceptional grounds of a "clear error of reasoning" or "to prevent an injustice", see: [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.

³² Notwithstanding certain differences, in the *Afghanistan* situation the Appeals Chamber recently held that since "the scope of the Court's jurisdiction and the Prosecutor's investigation in the Afghanistan situation has already been ruled upon by the Appeals Chamber, the Appeals Chamber's determination is *res judicata*, and as such, binding on the Pre-Trial Chamber in this case": [ICC-02/17-218](#) OA5, para. 59.

³³ [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 [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](#) ("Said Interim Release AD), para. 45. See also [Aleksovski AJ](#), paras. 107-109, [Rutaganda AJ](#), para. 26.

³⁴ 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).

³⁵ Cf. ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, [Judgement](#), 24 Marc 2000 ("[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).

application of the law, and is fully consistent with the Court's legal framework. That Israel chose not to participate in the article 19(3) process cannot detract from the finality of the determination of issues in the Decision. Otherwise, the Court's ability to discharge its mandate effectively would be made subject to the decisions of external actors on whether and when to participate in the Court's proceedings or not.

18. *Fourth*, Israel cannot provide observations on complementarity in the context of the Prosecutor's Article 58 Application.³⁶ The Court's legal framework does not afford Israel the right to challenge the admissibility of the cases at this stage, pending a Chamber's decision on the Prosecutor's Applications. As with jurisdiction, the Chamber must decide on the Applications before Israel can lodge an admissibility challenge under article 19(2) of the Statute. Any such challenge at this stage would be premature.

19. Consistent with this approach, the Chamber itself is not mandated to assess complementarity when seised of an article 58 application.³⁷ The Prosecutor did address this matter in this situation.³⁸ Prior to filing the Applications, the Prosecutor sought to ascertain whether Israel, and other relevant States, are conducting proceedings with respect to the same persons for substantially the same conduct as set out in the Applications.³⁹ The Prosecution was satisfied that the cases identified in the Applications are admissible before the Court.

20. Furthermore, the letter of 1 May 2024 in which Israel's ambassador requested the deferral of the investigation does not constitute a "deferral request" within the terms of article 18.⁴⁰ The Court's legal framework clearly stipulates a deadline of one month for a relevant State to

³⁶ *Contra* Request, paras. 15, 17.

³⁷ 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). However, 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" or a "self-evident factor" that impels them to do so. [DRC Arrest Warrants AJ](#), paras. 1, 52-53.

³⁸ Statute, art. 53(2)(b); see *cf.* [ICC-01/14-01/18-678](#) OA ("Yekatom & Ngaïssona Admissibility AJ"), para. 43 (noting that "Chambers are entitled to rely on the presumption that the Prosecutor has made an earnest and objective assessment of the domestic situation before launching a criminal investigation into a particular case. Accordingly, unless the admissibility of a case is challenged by a State, an accused, or a person for whom a warrant of arrest or summons to appear has been issued, Chambers are allowed to proceed without considering the admissibility of the case before them").

³⁹ ICC-01/09-01/11-307 ("[Ruto Admissibility AD](#)"), para. 40; see also ICC-01/11-01/11-547-Red ("[Gaddafi Admissibility AD](#)"), paras. 61-62.

⁴⁰ *Contra* Request, para. 15, referring to Annex A to the Request.

request the deferral of the Court's investigation under article 18(2) of the Statute.⁴¹ 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".⁴² In addition to being manifestly out of time, Israel's letter does not satisfy the legal requirements of a deferral request under article 18.⁴³ Merely asserting that investigations are ongoing is not sufficient. The requesting State must provide information of a sufficient degree of specificity and probative value demonstrating an advancing process of relevant domestic investigations or prosecutions.⁴⁴ It would contravene these provisions, and their objective, if Israel is now allowed to request the deferral of the Prosecutor's investigation when it chose not to do so more than three years ago, after receiving the Prosecutor's timely notification under article 18(1).⁴⁵

21. Finally, that the Prosecutor's article 18(1) notification of 8 March 2021 announcing the commencement of the investigation in the *Palestine* situation did not refer to the specific acts set out in the Article 58 Applications does not trigger a renewed application of the article 18 process. The Appeals Chamber has 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".⁴⁶ This is particularly so in this situation where Palestine's referral of 22 May 2018 broadly defined the scope of the situation as "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 2014.⁴⁷ After assessing the article 53(1) criteria the Prosecutor decided to investigate within those broad parameters.⁴⁸ Moreover, in both its article 19(3) Application and article 18(1) notification letter, the Prosecutor noted that the criminality in this situation is ongoing. The Prosecutor stressed the settled law confirming that investigations are not limited to the acts,

⁴¹ 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.

⁴² [ICC-02/18-89](#) OA ("Venezuela Article 18 Appeal Judgment"), para. 130

⁴³ Rules of Procedure and Evidence, rules 53 to 55.

⁴⁴ ICC-01/21-77 ("Philippines Article 18 Judgment"), paras. 1, 2, 74, 77-80, 106; ICC-01/21-56-Red ("Philippines Article 18 Decision"), paras. 14, 90; ICC-02/18-45 ("Venezuela Article 18 Decision"), para. 66.

⁴⁵ 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.

⁴⁶ [Venezuela Article 18 Appeal Judgment](#), para. 110.

⁴⁷ [Palestine Article 14 Referral](#), fn. 4 and para. 16(e).

⁴⁸ [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.

incidents or groups of persons assessed during the Preliminary Examination but can be expanded to others falling within the parameters of the situation or sufficiently linked to it,⁴⁹ such as those cases the Prosecutor identified in the Applications.

22. Confirming these principles, Chambers have recalled that the Prosecutor is not required to only investigate the acts or incidents identified in the article 15 application⁵⁰ or a subsequent article 18(1) notification.⁵¹ Instead, the Prosecutor's investigation can extend to other and subsequent acts as long as they fall within the parameters of the situation or are sufficiently linked to it.⁵² This approach is consistent with the Prosecution's duty to carry out independent and objective investigations and prosecutions, as set out in articles 42, 54 and 58 of the Statute,⁵³ and accords with the Prosecution's truth-seeking function.⁵⁴ It is also consistent with the approach adopted by Pre-Trial Chambers in defining the parameters of the authorised situations in their article 15(4) decisions.⁵⁵

⁴⁹ [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.

⁵⁰ [ICC-02/17-138](#) ("Afghanistan Appeal Judgment"), paras. 60, 61, *see also* para. 63. *See also* [ICC-01/21-12](#) ("Philippines Article 15(4) Decision"), para. 117.

⁵¹ [ICC-02/18-45](#) ("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").

⁵² *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 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'"). As to the definition of situation: ICC-02/05-01/20-391 ([Abd-Al-Rahman Jurisdiction Decision](#)"), para. 25 (quoting ICC-01/04-01/10-451 ([Mbarushimana Jurisdiction Decision](#)"), para. 16: ("a situation is 'generally defined in terms of temporal, territorial and in some cases personal parameters', 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'").

⁵³ [Afghanistan Appeal Judgment](#), paras. 60-61, 63; [ICC-01/19-27](#) ("Bangladesh/Myanmar Article 15(4) Decision"), para. 128; [ICC-01/15-12](#) ("Georgia Article 15(4) Decision"), para. 63-64; *see also* [ICC-01/09-19-Corr](#) ("Kenya Article 15 Decision"), para. 74-75, 205.

⁵⁴ [Afghanistan Appeal Judgment](#), para. 60; [Philippines Article 15\(4\) Decision](#), para. 117.

⁵⁵ *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").

IV. RELIEF REQUESTED

23. For these reasons, the Prosecution respectfully requests that the Chamber rejects Israel's Request.



Karim A.A. Khan KC, Prosecutor

Dated this 22nd day of July 2024

At The Hague, The Netherlands