

Pursuant to Pre-Trial Chamber I's instruction dated 21.11.2024, this document is reclassified as Public

Annex I

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**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/18**
Date: **10 September 2024**

PRE-TRIAL CHAMBER I

Before:

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

SITUATION IN PALESTINE

Secret, EX PARTE, only available to the State of Israel and the Prosecution

Request for leave to reply to Prosecution Response to Israel's "Request to extend the page limit for submission concerning article 18(1)" (ICC-01/18-345-SECRET-Exp-Anx)

Source: The State of Israel

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

The Office of the Prosecutor

Mr. Karim A.A. Khan KC

Mr. Andrew Cayley KC

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

Registrar

Mr. Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Public Information and Outreach Section

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I. INTRODUCTION

1. Israel respectfully requests leave to reply to the Prosecution's response¹ regarding Israel's request² for an extension of the page limit for a prospective filing concerning the Prosecution's non-compliance with article 18(1) of the Statute.³

2. This request for leave to reply is not made lightly. However, the Response makes unforeseeable submissions relating to standing which subvert the proper functioning of the principle of complementarity and warrant a reply.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23 *bis* (2) of the Regulations of the Court, this filing is classified as secret and *ex parte* only available to the Prosecution and the State of Israel as it pertains to a filing that bears the same classification. Israel notes the Prosecutor's submission in its Response that "it sees no basis for the present classification and submits that these matters should be public."⁴ Israel reiterates that it classified its initial request as confidential, as it referred to correspondence between Israel and the Office of the Prosecutor that was classified by both interlocutors as confidential.⁵ As noted in Israel's Request, however, and in line with the Prosecution's submission, Israel reiterates that it also has no objection to the initial Request and all filings in relation thereto being reclassified as public.

III. SUBMISSIONS

4. Regulation 24(5) of the Regulations of Court prescribes that, unless otherwise provided, a reply to a response is permitted only with leave of the Chamber, and must be limited to new issues that could not have been reasonably anticipated by the party seeking to reply. The jurisprudence applying this provision has consistently held that a reply may be appropriate: (i) "in respect of issues raised in the response which the replying participant could not reasonably have anticipated"; and (ii) where it "would otherwise be necessary for the adjudication" of the matter.⁶ As the Appeals Chamber has held, a party seeking leave to reply must: (i) do more than "point [...] to issues" to

¹ ICC-01/18-349-SECRET-Exp ("Response").

² ICC-01/18-345-SECRET-Exp-Anx ("Request").

³ 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.

⁴ Response, para. 2

⁵ Request, paras. 4-6.

⁶ *Situation in the Islamic Republic of Afghanistan*, Decision on the Prosecutor's request for leave to reply, 23 December 2022, ICC-02/17-206 (OA5), paras. 8-9 (granting the Prosecution leave to reply in respect of new issues raised by victims); *Ntaganda*, Decision on Mr. Ntaganda's request for leave to reply, 17 July 2017, ICC-01/04-02/06-1994, ("Ntaganda Appeal Decision on Replies"), para. 9.

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which it wishes to reply, but must rather “demonstrate [...] why they are new and could not reasonably have been anticipated”;⁷ and (ii) “explain why a reply to the aforementioned issues is otherwise warranted.”⁸

5. Leave to reply is sought in respect of three issues.

6. **First**, the Prosecution unforeseeably addresses standing in respect of a filing that has not yet been made.⁹ If granted leave to reply on this issue, Israel will address whether issues of standing for an article 18(1) admissibility filing can be appropriately addressed, let alone adjudicated, in the context of an application for an extension of the page limit, and submit that the consequence is that the Prosecution's submissions in this regard should be rejected *in limine*.

7. **Second**, the Response asserts that Israel could have raised non-compliance with article 18(1) as an *amicus curiae*,¹⁰ despite having argued the opposite in those proceedings. To be precise, the Prosecution “request[ed] dismissal *in limine* of such observations.”¹¹ If granted leave to reply on this issue, Israel will show that this inconsistency reflects a pattern of Prosecution submissions whose manifest purpose is to deny standing not merely “at this juncture,”¹² but permanently, in respect of the Prosecution's compliance with article 18(1). The reply would also address the merits of the Prosecution's suggestion that any matters concerning article 18(1) have already been sufficiently presented in the *amicus curiae* submissions (despite its request that those very same submissions be rejected *in limine*), and the extent to which this approach could cause Israel irreparable prejudice.

8. **Third**, the Response unforeseeably contends that standing for the prospective filing should be denied based on the incorrect claim that it is a prospective filing in an *ex parte* proceeding, namely the Pre-Trial Chamber's article 58 deliberations.¹³ This argument was unforeseeable as the Request is filed in “The Situation in Palestine” and the subject-matter concerns whether the conduct of investigations within that Situation comply with article 18(1). If granted leave to reply on this issue, Israel will address how the prospective filing concerns the Situation as a whole, and that any potential consequences for any pending *ex parte* proceeding have no bearing on a State's standing to make a filing in the Situation in relation to article 18(1).

⁷ *Ntaganda* Appeal Decision on Replies, para. 13.

⁸ *Ntaganda* Appeal Decision on Replies, para. 14.

⁹ Response, para. 4.

¹⁰ Response, para. 5.

¹¹ ICC-01/18-346, para. 36.

¹² Response, para. 4.

¹³ Response, para. 4.

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IV. CONCLUSION

9. Article 18 is a pillar of the Rome Statute. Adherence to its requirements is necessary to ensure that the Court functions within the bounds of complementarity as agreed by States Parties. Article 18 also impacts on States not Party to the Rome Statute, such as Israel. It is regrettable that the Prosecution is seeking to stifle litigation on foundational issues before the Pre-Trial Chamber by not only opposing a good faith request for a reasonable extension of the page limit, but also a State's right to make any filing at all in relation to the application of article 18(1).

Respectfully submitted:



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

Dated 10 September 2024, at Jerusalem, Israel.