

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: **4 October 2024**

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 State of Israel and the Prosecution

**Request for leave to reply to Prosecution Response to “Israel’s challenge to the jurisdiction
of the Court pursuant to article 19(2) of the Rome Statute”
- ICC-01/18-354-SECRET-Exp-AnxI-Corr**

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 challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute ("Jurisdiction Challenge").²
2. Leave is sought in respect of three issues only: (i) whether the Prosecution is correct in arguing that either the Pre-Trial Chamber in this case, or the Venezuela Pre-Trial Chamber, held that States are precluded from bringing jurisdiction challenges under article 19(2)(c) until after the issuance of an arrest warrant;³ (ii) whether Israel's standing to file the Jurisdiction Challenge should be denied on the basis that the article 12(2) jurisdictional bases of territoriality and nationality are set as alternatives;⁴ and (iii) whether Israel's standing to file the Jurisdiction Challenge should be denied on the basis of the 2021 decision on the Prosecution's request pursuant to article 19(3) ("the 2021 Decision").⁵ These arguments could not have reasonably been anticipated, and/or otherwise warrant a reply to facilitate the Pre-Trial Chamber's deliberations.

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 that the Pre-Trial Chamber reclassified the Jurisdiction Challenge, which had been submitted by Israel in 'Confidential' and in 'Public and Redacted' versions, to 'Secret'. Israel notes the Prosecution's submissions that "there seems to be no basis for this classification" and "these matters of law should be addressed in public."⁶ Israel respectfully reiterates that it wishes for the 'Public and Redacted' version of the Jurisdiction Challenge, and all related filings, to be 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. The jurisprudence applying this

¹ Prosecution Response to "Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute" – ICC-01/18-354-SECRET-Exp-Anx1-Corr, 27 September 2024, ICC-01/18-357-SECRET-Exp ("Response").

² Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute, 23 September 2024, ICC-01/18-354-SECRET-Exp-AnxI-Corr ("Jurisdiction Challenge"). The caption "Situation in the State of Palestine" on the cover page reflects the name assigned to this Situation by the Court, and is without prejudice to Israel's position that "Palestine" is not a State.

³ Response, para. 9.

⁴ Response, paras. 20-21.

⁵ Response, paras. 22, 24.

⁶ Response, para. 3.

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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.⁷ As the Appeals Chamber has held, a party seeking leave to reply must: (i) do more than “point [...] to issues” to which it wishes to reply, but must rather “demonstrate [...] why they are new and could not reasonably have been anticipated”;⁸ and (ii) “explain why a reply to the aforementioned issues is otherwise warranted.”⁹

5. Specifically in relation to proceedings brought under article 19(2) of the Rome Statute and rule 58 of the Rules of Procedure and Evidence, the Court has made clear that “the triggering force and main actor in such proceedings is the entity challenging the admissibility of the case.”¹⁰ On this basis, the Court has found it appropriate to authorise States challenging the admissibility of a case to file a reply to responses dealing with admissibility due to that State’s status as the triggering force and main actor in such proceedings.¹¹ This reasoning applies equally to the actors permitted to challenge the Court’s jurisdiction under article 19(2) and rule 58.

6. Moreover, the Court has also previously considered it appropriate to grant a State leave to file a reply due to the “importance of the issue under consideration which involves respect of the State’s sovereign rights and requires due consideration of the relationship between the Court and the States under the Statute” noting in these circumstances that “the filing of a reply will also enable the Chamber to have before it all the relevant information and arguments from the parties prior to its determination of the matter *sub judice*.”¹²

7. Leave to reply is sought in respect of three issues only, which should not be taken as reflecting any agreement with the many other mischaracterisations of Israel’s Jurisdiction Challenge, or misstatements of law, contained in the Response and which are already addressed in the challenge. In particular, Israel notes that the Prosecution continues to adopt an interpretation of

⁷ *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.

⁸ [Ntaganda Appeal Decision on Replies](#), para. 13.

⁹ [Ntaganda Appeal Decision on Replies](#), para. 14.

¹⁰ *Gaddafi and Al-Senussi*, Decision on OPCD request for variation of time limit, 28 May 2012, [ICC-01/11-01/11-159](#), para. 9.

¹¹ *Gaddafi*, Decision on the Libyan Government Application for leave to reply to any response/s to article 19 admissibility challenge, 26 July 2012, [ICC-01/11-01/11-191](#), para. 8; *Al-Senussi*, Decision on Libya’s request for leave to file a consolidated reply, 16 July 2013, [ICC-01-11/01-11-382](#), para. 11.

¹² *Al-Senussi*, Decision on Libya’s application for leave to reply to the Defence of Abdullah Al-Senussi, 10 May 2013, [ICC-01/11-01/11-335](#), para. 8.

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article 19¹³ that is inconsistent with the positions it took in previous litigation in this Situation,¹⁴ without even attempting to reconcile and explain its contradictory positions.

8. Leave to reply is sought in respect of the following three issues.

9. **First**, the Prosecution is incorrect to suggest that either the Pre-Trial Chamber (as it was then composed) in this case, or the *Venezuela* Pre-Trial Chamber, held that States are precluded from bringing jurisdictional challenges under article 19(2)(c) until after the issuance of an arrest warrant.¹⁵ The Prosecution's characterisation of these decisions could not have been foreseen and merits a reply. If granted leave, Israel will explain that the Pre-Trial Chamber in this Situation did not decide the issue, and that the *Venezuela* Pre-Trial Chamber merely stated that a jurisdiction challenge would be premature where the Prosecution has not yet identified any "suspects".¹⁶ Now that the Prosecution has filed article 58 applications this threshold has plainly been surpassed.

10. **Second**, the Prosecution challenges Israel's first ground for asserting standing under article 19(2)(c) as the State of nationality under article 12(2)(b), claiming that because the preconditions of article 12(2) are in the alternative, once one is satisfied, there is no need to consider the other.¹⁷ In so doing, the Prosecution conflates the preconditions to the exercise of jurisdiction by the Court under article 12 with the standing requirements for a jurisdiction challenge by a State under article 19(2)(c). Israel could not have reasonably foreseen that the Prosecution would advance such a narrow interpretation of article 19(2)(c) which effectively renders that provision devoid of all meaning. If leave is granted, Israel will explain why the Prosecution's novel position is untenable and, if adopted by the Court, would deprive States not parties to the Statute from exercising the procedural rights available to them under the Rome Statute. These procedural avenues are essential for challenging the exercise of the Court's jurisdiction in situations which could otherwise lead to an *ultra vires* expansion of the Court's remit through an unchecked procedure, violating States' prerogatives within the ICC statutory framework, as well as damaging the Court's legitimacy more broadly.

11. **Third**, the Prosecution suggests that Israel's second ground for asserting standing to file the Jurisdiction Challenge should be denied on the basis that the 2021 Decision has conclusively

¹³ Response, paras. 5, 7. See also Prosecution Consolidated Response to Observations by Interveners pursuant to Article 68(3) of the Statute and Rule 103 of the Rules of Procedure and Evidence, 23 August 2024, [ICC-01/18-346](#), para. 48.

¹⁴ Prosecution Request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, [ICC-01/18-12](#), para. 24.

¹⁵ Response, para. 9.

¹⁶ *Situation in the Bolivarian Republic of Venezuela*, Decision authorising the resumption of the investigation pursuant to Article 18(2) of the Statute, 27 June 2023, [ICC-02/18-45](#), para. 36.

¹⁷ Response, paras. 20-21.

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settled the merits of Israel's Jurisdiction Challenge.¹⁸ The Prosecution's position misreads the express language in the 2021 Decision as well as the clear text of article 19(2). It also mischaracterises Israel's position as set out in its Jurisdiction Challenge. If accepted by the Court, the Prosecution's submissions would prevent adjudication of Israel's Jurisdiction Challenge, by wrongly conflating standing under article 19(2)(c) with the merits of a challenge under that provision. If granted leave to reply, Israel will explain the rationale for avoiding giving article 19(2)(c) an unduly restrictive interpretation as to the States which have standing to file a jurisdiction challenge. The right of a State that has not accepted the jurisdiction of the Court to bring a jurisdiction challenge under article 19(2)(c) is of particular importance in circumstances where there is a tenable case that the legal basis for the Court to exercise jurisdiction circumvents the article 12(3) requirement for a State not Party to the Statute to accept jurisdiction.

IV. CONCLUSION AND RELIEF SOUGHT

12. The Pre-Trial Chamber will be assisted by a reply focused on these specific issues which will enable the Chamber to have before it all the relevant information and arguments from the parties prior to its determination of the Prosecution's request for Israel's Jurisdiction Challenge to be dismissed *in limine*. Moreover, given the centrality of these issues for determining whether or not the Court is permitted to give substantive consideration to Israel's Jurisdiction Challenge, and in light of Israel's status as the triggering force and main actor in these proceedings, it should be granted leave to reply to them. Accordingly, leave is sought to file a reply on the issues as set out in this request.

Respectfully submitted:



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

Dated this 4th day of October 2024, at Jerusalem, Israel.

¹⁸ Response, paras. 23-26.