

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 "Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice"  
– ICC-01/18-355-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**

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**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 response<sup>1</sup> regarding Israel's request that the Prosecution be required to issue a new or revised notification pursuant to article 18(1) of the Statute.<sup>2</sup>
2. Leave is sought in respect of three specific issues only: (i) whether, as argued by the Prosecution, Israel was informed of the parameters of the Prosecution's post-7 October investigations through "the multiple engagements that both parties had, up to the date of the filing of the Article 58 Applications" and, if so, whether Israel had a consequent right to inform the Court and act in accordance with article 18(2);<sup>3</sup> (ii) whether the framework of article 58 deliberations provides the Pre-Trial Chamber with a sufficient opportunity to ensure, as asserted by the Prosecution, that it "acts in accordance with article 18(1)";<sup>4</sup> and (iii) whether the *Philippines* and *Venezuela* jurisprudence, as argued by the Prosecution, requires it to "enumerate every act" and "exactly match the perpetrators"<sup>5</sup> in order to be sufficiently specific. 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 Request, which had been submitted by Israel as a public document, to 'Secret'. The Prosecution submits in its Response that "there seems to be no basis for this classification."<sup>6</sup> Israel respectfully reiterates that it wishes for the Request, and all related filings, to be reclassified as 'Public' in their entirety.

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<sup>1</sup> Prosecution's Response to Israel's "Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice" – ICC-01/18-355-Secret-Exp-AnxI-Corr, 27 September 2024, ICC-01/18-360-SECRET-Exp ("Response").

<sup>2</sup> Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice, 23 September 2024, ICC-01/18-355-SECRET-Exp-AnxI-Corr ("Request"). 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. In addition, 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.

<sup>3</sup> Response, para. 26.

<sup>4</sup> Response, para. 9.

<sup>5</sup> Response, para. 27.

<sup>6</sup> Response, para. 3.

### 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 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.<sup>7</sup> 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”;<sup>8</sup> and (ii) “explain why a reply to the aforementioned issues is otherwise warranted.”<sup>9</sup>

5. Leave to reply is sought in respect of three issues only, which should not be taken as reflecting any agreement with the many other mischaracterizations of Israel's Request, or misstatements of law or practice, contained in the Response.

6. **First**, the Prosecution makes a new factual assertion in its Response that the sufficiency of its article 18(1) notification should be assessed by the Pre-Trial Chamber not only on the basis of its 2021 letter, but also “the multiple engagements that both parties had, up to the date of the filing of the Article 58 Applications.”<sup>10</sup> This argument constitutes a highly significant and unanticipated concession by the Prosecution. Not only does this argument acknowledge the principle that an article 18(1) notification may need to be supplemented through subsequent communications, but also purports that this is what occurred in *this investigation*. If granted leave to reply, Israel will argue: (i) that the “engagements” referred to by the Prosecution in its Response were manifestly insufficient in content for the purposes of article 18(1), and required a more formal and definite notification; and (ii) that any post-7 October notification of the scope of the Prosecution's investigation that can be taken into account for the purposes of article 18(1) necessarily triggers anew a State's right pursuant to article 18(2) to assert its primary jurisdiction over those matters.

7. **Second**, the Prosecution asserts that Israel should be denied standing “because the Court itself ensures that the Prosecution acts in accordance with article 18.”<sup>11</sup> The Prosecution then tries

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<sup>7</sup> *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.

<sup>8</sup> [Ntaganda Appeal Decision on Replies](#), para. 13.

<sup>9</sup> [Ntaganda Appeal Decision on Replies](#), para. 14.

<sup>10</sup> Response, para. 26.

<sup>11</sup> Response para. 9.

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to characterize the Request as a “disguised jurisdictional challenge”,<sup>12</sup> and that the Pre-Trial Chamber “will satisfy itself that the Court has jurisdiction over the cases before it, including whether they are sufficiently linked with the situation that triggered the jurisdiction of the Court through Palestine’s referral.”<sup>13</sup> Israel could not have foreseen that the Prosecution would attempt to mischaracterize the Request as a jurisdictional challenge. If granted leave, Israel would explain concretely why a Pre-Trial Chamber, in an *ex parte* procedure and without submissions from a potentially aggrieved State, could not possibly be in position to know whether an article 18(1) notification (let alone a sufficient article 18(1) notification) had been provided, especially given the parameters set forth in the *Philippines* and *Venezuela* jurisprudence.

8. **Third**, the Response argues that Israel’s position requires the Prosecution to “enumerate every act” and “exactly match the perpetrators”<sup>14</sup> in order to be sufficiently specific. The Prosecution goes further, asserting that this is the “intended”<sup>15</sup> consequence of Israel’s submissions, thus implying that Israel’s submission to the contrary is dishonest and made in bad faith (a sentiment reflected in various other aspersions cast in the Response). This is an egregious misrepresentation of Israel’s position. If granted leave to reply, Israel would explain that the Prosecution’s reliance on *Afghanistan* is inapposite,<sup>16</sup> and that the *Philippines* and *Venezuela* jurisprudence lays out a reasonable middle ground that is faithfully reflected in the parameters identified in the Request, which must be read holistically.

#### IV. CONCLUSION AND RELIEF SOUGHT

9. The Pre-Trial Chamber will be assisted by a reply focused on these specific issues. Accordingly, leave is sought to file a reply on the issues as set out in this request.

Respectfully submitted:



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

Dated this 4<sup>th</sup> day of October 2024, at Jerusalem, Israel.

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<sup>12</sup> Response, para. 12.

<sup>13</sup> Response, para. 9.

<sup>14</sup> Response, para. 27.

<sup>15</sup> Response, para. 27.

<sup>16</sup> Response, para. 27.