

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/18**
Date: **22 January 2025**

THE APPEALS CHAMBER

Before: Judge Tomoko Akane, Presiding Judge
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE STATE OF PALESTINE

Public

Prosecution response to Israel's "Request for leave to reply to Prosecution Response to Israel's "Appeal of 'Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice' (ICC-01/18-375)" and to reject the Prosecution's submissions concerning suspensive effect *in limine*"

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I. Introduction

1. Israel's request for leave to reply to the Prosecution's response to its appeal of the "Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice" ("Request")¹ should be rejected. None of the three issues that Israel identifies is a new issue arising from the Prosecution's response that would merit a reply, let alone one that Israel could not reasonably have anticipated. Israel instead seeks to utilise a reply to supplement and elaborate on certain arguments that were already raised in its appeal. These are not grounds to justify a reply. Moreover, the proposed reply is not necessary for the Appeals Chamber's adjudication of the matters before it in the present appeal.

2. Israel's request to dismiss *in limine* the Prosecution's submissions on suspensive effect should also be rejected.

II. Submissions

3. The Appeals Chamber has granted leave to reply in circumstances where the reply addresses new issues that could not reasonably have been anticipated, or that the Appeals Chamber considered otherwise necessary for the adjudication of the matter before it.² Ordering a reply lies within the Appeals Chamber's discretion.³ In line with these principles, an appellant should not be permitted to utilise a reply merely in an attempt to strengthen arguments previously advanced,⁴ or to repeat submissions already made in the appeal brief.⁵

4. Israel seeks leave to reply on the following three issues:

- a. The Prosecution's reference to recent State referral practice, which Israel submits could not reasonably have been known to it when filing its appeal⁶ and which had not occurred at the date of the impugned Decision ("First Issue");⁷

¹ [ICC-01/18-409 OA](#) ("Request for Leave to Reply").

² See e.g. [ICC-02/18-66](#) ("Venezuela Leave to Reply Decision"), paras. 10-11; [ICC-01/21-72](#) ("Philippines Leave to Reply Decision"), paras. 6-7; [ICC-02/17-206](#) ("Afghanistan Leave to Reply Decision"), paras. 7-8; [ICC-01/04-02/06-1994](#) ("Ntaganda July 2017 Leave to Reply Decision"), para. 9.

³ [ICC-01/14-01/18-799](#) ("Yekatom Leave to Reply Decision"), para. 8; [Ntaganda July 2017 Leave to Reply Decision](#), para. 9; [ICC-01/04-02/06-1813](#) ("Ntaganda March 2017 Leave to Reply Decision"), para. 8.

⁴ [ICC-01/04-02/12-296-tENG](#) ("Ngudjolo Leave to Reply Decision"), para. 7.

⁵ [ICC-01/04-02/06-2488](#) ("Ntaganda March 2020 Leave to Reply Decision"), para. 8.

⁶ See [ICC-01/18-385 OA](#) ("Article 18(1) Notice of Appeal"); [ICC-01/18-401 OA](#) ("Article 18(1) Appeal Brief"). See also [ICC-01/18-375](#) ("Decision").

⁷ [Request for Leave to Reply](#), paras. 1, 9 (citing [ICC-01/18-407 OA](#) ("Prosecution Response to Article 18(1) Appeal"), paras. 46, 49).

- b. The Prosecution’s reference to information about Israeli military operations prior to October 2023 (“Second Issue”);⁸ and
- c. Israel’s claim that the Prosecution attempted “to insert arguments concerning timeliness that were not adopted by, and are irrelevant to, the Pre-Trial Chamber’s reasoning concerning timeliness” (“Third Issue”).⁹

5. None of these issues is new, nor beyond what Israel could reasonably have anticipated.¹⁰ Nor is the proposed reply necessary for the Appeals Chamber’s adjudication of the matters before it in this appeal.¹¹ The Request should be rejected for the reasons elaborated below.

a. Israel could reasonably have anticipated the First Issue, which was not new

6. Israel could reasonably have anticipated that the Prosecution would refer to the practice in recent State party referrals in *Afghanistan* and *Venezuela*.¹² The Prosecution cited this practice in response to Israel’s arguments concerning the alleged absence of examples where the Prosecution “has not notified the Presidency of a State referral on the basis of its own determination that there was an overlap with an existing situation”.¹³ Given the public nature of the referrals by six States on 28 November 2024 in the *Afghanistan* situation, and by Uruguay on 6 September 2024 in the *Venezuela* situation,¹⁴ it was foreseeable that the Prosecution would refer to them in responding to Israel’s suggestion that the Prosecution’s practice in *Palestine* was unprecedented and unique. In particular:

- With regard to *Venezuela*, Uruguay’s referral of 6 September 2024¹⁵ not only pre-dated the filing of Israel’s notice of appeal and appeal brief in these proceedings, but even the filing of Israel’s original request before the Pre-Trial Chamber (of 23 September 2024);¹⁶

⁸ [Request for Leave to Reply](#), paras. 1, 13-15 (citing [Prosecution Response to Article 18\(1\) Appeal](#), paras. 37, 41).

⁹ [Request for Leave to Reply](#), paras. 1, 17-18 (citing [Prosecution Response to Article 18\(1\) Appeal](#), paras. 58-60).

¹⁰ *Contra* [Request for Leave to Reply](#), para. 8.

¹¹ *Contra* [Request for Leave to Reply](#), para. 8.

¹² *Contra* [Request for Leave to Reply](#), para. 10.

¹³ *See* [Article 18\(1\) Appeal Brief](#), fn. 83.

¹⁴ [Prosecution Response to Article 18\(1\) Appeal](#), fns. 123-124. On 9 January 2025, the Office of the Prosecutor received a further referral of the *Situation in Venezuela I* from the Republic of Ecuador: [Venezuela I, Referral by Ecuador](#).

¹⁵ *See* [Venezuela I, Referral by Uruguay](#).

¹⁶ *See e.g.* [ICC-01/18-355-AnxI-Corr](#) (“Abridged Article 18(1) Request”). *Contra* [Request for Leave to Reply](#), para. 10 (“Two of these referrals post-date the Impugned Decision”).

- With regard to *Afghanistan*, not only was the referral (on 28 November 2024) made before the filing of Israel’s appeal brief (on 13 December 2024) but the approach of the Prosecution was explicitly outlined in a press statement of 29 November 2024.¹⁷

7. There was no reason for Israel not to have addressed these matters if it had wished to do so in its appeal.¹⁸

8. Moreover, a reply on the First Issue is not otherwise necessary for the Appeals Chamber’s adjudication of the matter on appeal.¹⁹ The Appeals Chamber is well placed to assess whether the Prosecution’s reaction to the 2023 and 2024 referrals in *Palestine* was consistent with its practice in other situations. Nor is it necessary for the purposes of *this* appeal to receive submissions on “whether the content of [the November 2024 referral in the *Afghanistan* situation] could, arguably, extend beyond the scope of the existing situation and/or the article 18 notification”.²⁰ The Prosecution’s fact-specific assessment in another situation is not the subject of the present litigation in these proceedings. Further submissions from Israel on these matters will not assist the Appeals Chamber.

b. Israel could reasonably have anticipated the Second Issue, which was not new

9. Israel could reasonably have anticipated that the Prosecution would refer to Israeli military operations prior to October 2023.²¹ Israel had criticised the Pre-Trial Chamber’s assessment that the conduct presently at issue was “committed in the context of the same type of armed conflicts, concerning the same territories”.²² In this context, it was foreseeable that the Prosecution would refer to prior hostilities between the same parties before October 2023 in order to demonstrate the continuities with the conduct in Gaza after that date.²³ There was nothing novel in such submissions, which the Prosecution had already advanced in the course of litigation before the Pre-Trial Chamber.²⁴ Nor is it surprising that the Prosecution’s Article 18 Notification did not refer to hostilities pre-dating the Court’s temporal jurisdiction in this

¹⁷ ICC, ‘[Statement of ICC Prosecutor Karim A.A. Khan KC on the Situation in Afghanistan: receipt of a referral from six States Parties](#)’, 29 November 2024 (“In receiving the referral, my Office confirms that it has been and continues to conduct an active investigation in the Situation in Afghanistan which already encompasses the alleged crimes described in this referral”).

¹⁸ *Contra* [Request for Leave to Reply](#), para. 9.

¹⁹ *Contra* [Request for Leave to Reply](#), para. 12.

²⁰ [Request for Leave to Reply](#), para. 11.

²¹ *Contra* [Request for Leave to Reply](#), paras. 13-15.

²² [Decision](#), para. 15. *See e.g.* [Article 18\(1\) Appeal Brief](#), paras. 42, 58, 60.

²³ [Prosecution Response to Article 18\(1\) Appeal](#), paras. 37, 41.

²⁴ [ICC-01/18-346](#) (“Prosecution Response to Interveners”), para. 101.

situation, which started on 13 June 2014.²⁵ For these same reasons, a reply on the Second Issue is not otherwise necessary for the adjudication of the matter on appeal, and will not assist the Appeals Chamber.

c. Israel could reasonably have anticipated the Third Issue, which was not new

10. Israel could reasonably have anticipated that the Prosecution would defend the untimely nature of the Abridged Article 18(1) Request.²⁶ Israel had challenged the correctness of the Pre-Trial Chamber’s observations on this consideration.²⁷ In this context, it was foreseeable that the Prosecution would point out that Israel’s request was untimely even if a new situation had arisen on 7 October 2023, and that in any event the Chamber had not dismissed this request on the basis of its untimeliness.²⁸ As Israel itself acknowledges, the Prosecution made similar submissions in response to Israel’s application for leave to appeal the Decision.²⁹ For these same reasons, a reply on the Third Issue is not otherwise necessary for the adjudication of the matter on appeal, and will not assist the Appeals Chamber.

d. Israel’s request to dismiss the Prosecution’s submissions on suspensive effect should be rejected

11. Israel submits that the “only proper vehicle” for the Prosecution to respond to Israel’s request for suspensive effect of the impugned Decision was a response to Israel’s notice of appeal—in which Israel made its request for suspensive effect³⁰—and not the Prosecution’s response to Israel’s appeal brief.³¹ As such, Israel requests that the Prosecution’s submissions on this matter are dismissed *in limine*.³² This request should be rejected.

12. The Appeals Chamber’s general preference, as a matter of practice, that suspensive effect is raised in the notice of appeal and expeditiously decided does not entail that the Prosecution’s response in this case was out of time or procedurally improper.³³ The Court’s legal texts do not set a specific or shorter deadline for such responses. In any event, the Prosecution at all times

²⁵ *Contra* [Request for Leave to Reply](#), para. 14.

²⁶ *Contra* [Request for Leave to Reply](#), paras. 17-19.

²⁷ [Decision](#), para. 14. *See e.g.* [Article 18\(1\) Appeal Brief](#), paras. 15-21.

²⁸ [Prosecution Response to Article 18\(1\) Appeal](#), para. 60.

²⁹ [Request for Leave to Reply](#), para. 18; [ICC-01/18-394](#) (“Prosecution Response to Request for Leave to Appeal the Decision”), para. 20.

³⁰ [Article 18\(1\) Notice of Appeal](#), paras. 30-37.

³¹ [Request for Leave to Reply](#), para. 22. *See* [Prosecution Response to Article 18\(1\) Appeal](#), paras. 62-68.

³² [Request for Leave to Reply](#), para. 22.

³³ *Contra* [Request for Leave to Reply](#), para. 22. *See e.g.* [ICC-01/05-01/08-499 OA2](#) (“*Bemba* Suspensive Effect Decision”), paras. 9-10; [ICC-01/11-01/11-387 OA4](#) (“*Gaddafi and Al-Senussi* Suspensive Effect Decision”), para. 13.

acted expeditiously and in accordance with the Court's procedure.³⁴ The Prosecution squarely opposed suspensive effect when it first requested the Appeals Chamber to dismiss Israel's notice of appeal *in limine*,³⁵ and further explained that it nonetheless remained ready to provide further submissions if required.³⁶ Since the Appeals Chamber did not issue further instructions on the matter, and the appeal proceedings continued without resolution of the question, the Prosecution duly provided further submissions in response to Israel's appeal brief.³⁷

III. Conclusion

13. For all the reasons above, Israel's Request for Leave to Reply should be dismissed in its entirety.



Karim A. A. Khan KC, Prosecutor

Dated this 22nd day of January 2025

At The Hague, The Netherlands

³⁴ *Contra* [Request for Leave to Reply](#), para. 22.

³⁵ [ICC-01/18-391 OA](#) ("Prosecution Request to Dismiss Article 18(1) Notice of Appeal"), paras. 1, 11-12.

³⁶ [Prosecution Request to Dismiss Article 18\(1\) Notice of Appeal](#), para. 12.

³⁷ *See* [Prosecution Response to Article 18\(1\) Appeal](#), paras. 62-68. *See also* [ICC-01/18-403 OA OA2](#) ("Extension of Time Decision").