

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Iulia Motoc, Presiding Judge
Judge Reine Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN THE STATE OF PALESTINE

Public with Annexes A and B

Written Observations by the United States of America Pursuant to Rule 103

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

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I. INTRODUCTION

1. By decision of 22 July 2024, this Chamber granted the United States leave to submit observations relevant to its determination of arrest warrant applications announced on 20 May 2024 (Applications). In these observations, the United States addresses: (1) the effect of the Oslo Accords on the Court's jurisdiction in this Situation over Israeli nationals; and (2) the effect of Israel's 1 May 2024 deferral request on the Prosecutor's authority to submit the Applications, absent authorization by this Chamber to resume his present investigation.¹
2. Though not a Party to the Rome Statute, the United States has pursued where possible a constructive relationship with the Court, including cooperating in certain Situations. As a non-Party and drafter of article 18,² the United States has an interest in proper management of the Statute's complementarity regime, which is fundamental to the Court's role, and of which article 18 is an essential part. The United States has also worked to advance a settlement to the Israeli-Palestinian conflict and continues to engage both parties to facilitate discussions and implementation of their agreements, including the Oslo Accords. The United States remains committed to creation of a Palestinian state as part of a two-State solution, so that Palestinians and Israelis have equal measures of security, freedom, and dignity.

II. STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

3. On 22 May 2018, the Prosecutor received a referral requesting the Office of the Prosecutor (OTP) to investigate "past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine."³ The referral primarily focused on "all matters related to the Israeli settlement regime," and noted alleged killings "during peaceful demonstrations in the Gaza Strip" in March 2018.⁴
4. On 5 February 2021, following a request by the Prosecutor under article 19(3) of the Statute, Pre-Trial Chamber I concluded that "the Court's territorial jurisdiction in the *Situation in Palestine* extends to the territories occupied by Israel since 1967."⁵ That Chamber further concluded that "arguments regarding the Oslo Agreements" were not

¹ These issues implicate longstanding, fundamental U.S. interests and policy in connection with the Court's jurisdictional limitations and complementarity framework. Nothing in this submission constitutes recognition of the Court's jurisdiction in this Situation, or acceptance of the Court's jurisdiction over the United States or its current or former personnel. *See, e.g.,* [Blinken Statement 2021](#); [Blinken Statement 2024](#). Furthermore, the United States is of the view that requesting deferral of an investigation pursuant to article 18 does not constitute acceptance of the Court's jurisdiction, but rather is assertion of the relevant State's exercise of jurisdiction.

² *See* [U.S. Proposal](#).

³ Palestinian Referral, [ICC-01/12-1-Anx1](#), at para. 9.

⁴ *Id.* at paras. 11 and 16(c).

⁵ Decision on Territorial Jurisdiction, [ICC-01/18-143](#), at para. 123.

pertinent “in relation to a question of jurisdiction in connection with the initiation of an investigation,” but could be “raised by interested States based on article 19 of the Statute.”⁶

5. On 9 March 2021, the Prosecutor notified relevant States that on 3 March 2021 she “initiated an investigation with respect to alleged crimes within the jurisdiction of the Court committed in the Situation in Palestine since 13 June 2014.”⁷ The notification stated there was a reasonable basis to believe war crimes were committed by members of the Israel Defense Forces, Hamas, and Palestinian Armed Groups (PAG) “in the context of the 2014 hostilities in Gaza” and by Israeli officials “in the context of Israel’s occupation of the West Bank, including East Jerusalem”; it also noted allegations related to “demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel.”⁸

6. On 7 October 2023, Hamas and other PAG brutally attacked communities in Israel, killing over 1,200 people and taking hostage approximately 240 people. In response, Israel launched military attacks against Hamas in Gaza; Hamas launched further attacks against Israel and its population. Gaza has since seen widespread displacement and suffering, with thousands of Palestinian civilians killed or injured.

7. On 17 November 2023, the Prosecutor received a referral from five States Parties concerning “continuing commission of the crimes detailed in the [2018 Referral]” and stating that, “some of the same crimes appear to have continued to be committed and additional crimes appear to have been committed within the jurisdictional scope of the Court.”⁹

8. On 18 January 2024, the Prosecutor received a referral from two States Parties noting “the latest escalation of violence ... starting with the attack of 7 October 2023 conducted by Hamas militants and the subsequent hostilities in the occupied Palestinian Territory.”¹⁰

9. On 1 May 2024, the State of Israel requested deferral of the OTP’s investigation, relaying information regarding examination and investigation of “a wide range of alleged violations of domestic and international law relating to events in Israel and Gaza” since 7 October 2023; noting its willingness to further engage with the OTP; and requesting that, should the OTP “become aware of specific incidents or issues relating to alleged crimes attributed to Israeli nationals or others within Israel’s jurisdiction,” the OTP “bring those matters to our attention with appropriate specificity and sufficient time” for Israeli authorities to investigate the

⁶ *Id.* at para. 129.

⁷ 2021 OTP Notification (attached as Annex B).

⁸ *Id.* See also [Summary of Preliminary Examination](#) at paras. 2-5.

⁹ South Africa, et. al, [Referral](#), at paras. 1 and 2.

¹⁰ Chile, Mexico [Referral](#) at p. 2.

allegations.¹¹ The United States is not aware of any notification by the Prosecutor to the Chamber of Israel's request, or adjudication of it by the Chamber.

10. On 20 May 2024, the Prosecutor announced the Applications against three Hamas figures and two Israeli officials related to alleged crimes on and following 7 October 2023.¹²

III. OBSERVATIONS

A. The Oslo Accords Directly Affect the Court's Jurisdiction over Israeli Nationals

11. Article 19(1) of the Statute requires the Court to satisfy itself that it has jurisdiction, and the Court's prior decisions demonstrate that this Chamber is required to make an initial determination of jurisdiction in resolving an application for arrest warrants.¹³ Jurisdictional issues related to the Oslo Accords (Accords), as recognized in the Decision on the Prosecution's article 19(3) request on territorial jurisdiction, have not been resolved by this Chamber and remain directly pertinent to the Court's consideration of its jurisdiction.¹⁴

12. Even putting aside other issues, such as whether the "State of Palestine" is capable of acceding to the Rome Statute, the Palestinian Authority (PA) could not delegate to the Court criminal jurisdiction over Israeli nationals that the PA never had. The Palestinians have only ever exercised those powers transferred to the institutions of the PA by agreement with Israel, which at the time of the Accords had been continuously administering the territory since 1967.¹⁵ Jurisdiction with respect to Israeli nationals for alleged criminal acts has never been obtained by any Palestinian governance authority. The United States respectfully submits that the Chamber must take this fact into account in considering whether it is "exercis[ing] its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems, within the confines imposed by international law and the Statute."¹⁶

13. The Accords, which remain foundational to reviving the peace process and achieving a two-State solution,¹⁷ create and define Palestinian governance. The Parties constructed the

¹¹ The United States understands Israel submitted this letter to the Court and does not regard it as confidential.

¹² [Prosecutor Statement](#) on Applications.

¹³ DRC, PTC Decision on Article 58, [ICC-01/04-01/06-1-Corr-Red](#), at para. 18.

¹⁴ Decision on Territorial Jurisdiction, [ICC-01/18-143](#), at para. 129. *See also, id.* at para. 126 and fn. 322 (citing views of *amici* on this point, including, *inter alia*, [ICC-01/18-83](#), [ICC-01/18-94](#), and [ICC-01/18-103](#)).

¹⁵ Israel's occupation in 1967 was of territories controlled by Egypt and Jordan since 1948-49, not by any sovereign state of Palestine. *See, e.g.*, State of Israel, Office of the Attorney General, [The International Criminal Court's Lack of Jurisdiction over the so-called 'Situation in Palestine.'](#) Section D; ICJ, [Israeli Practices in the OPT](#) Advisory Opinion, Section II (describing relevant history post-WWI).

¹⁶ Bangladesh/Myanmar, PTC Decision on Jurisdiction, [ICC-RoC46\(3\)-01/18-37](#), at para. 70.

¹⁷ Partial Dissent in Decision on Territorial Jurisdiction, [ICC-01/18-143-Anx1](#), paras 296-307 (concluding

Accords such that the PA only took on legislative, executive, and judicial functions in the territory provided under the Accords. The second of the Accords, the 1995 “Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip” (the Interim Agreement)¹⁸, and its annexed Protocol concerning Legal Affairs, details the jurisdictional authorities transferred from Israel to the Palestinian self-governance entity being created:

- a. Article I of the Interim Agreement provides that “Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration” to the nascent PA and that “Israel shall continue to exercise powers and responsibilities not so transferred.” Israel did not transfer any criminal jurisdiction over Israeli nationals to the PA as part of the powers transferred – prescriptive, adjudicative, or enforcement.
- b. Article XVII’s allocation of territorial, functional, and personal jurisdiction establishes both that the jurisdiction transferred to the PA excludes jurisdiction over “Israelis” and that the PA’s “territorial and functional jurisdiction . . . will apply to all persons, except for Israelis, unless otherwise provided in this Agreement.”¹⁹
- c. The Protocol Concerning Legal Affairs confirms that the criminal jurisdiction transferred to the PA encompasses “all offenses committed by Palestinians and/or non-Israelis” but “Israel has sole criminal jurisdiction” over “offenses committed in the Territory by Israelis.”²⁰ It then details the bounds of criminal jurisdiction transferred to the PA and retained by Israel consistent with that principle.²¹

14. The Chamber’s decision on territorial jurisdiction established only that, in its view, the “State of Palestine’s” accession was procedurally effective, and that “Palestine” is a “State” for purposes of article 12(2)(a).²² The Chamber was explicit that this conclusion was not a determination on statehood under general international law, and that such a determination would be beyond its competence.²³ The Chamber’s decision on territorial jurisdiction cannot *ipso facto* be presumed to import with it any conclusion that, through “Palestine’s” accession as a State Party, the Court automatically obtained jurisdictional authorities over a category of

Accords remain unchanged); March 2023 [Joint Communiqué](#); February 2023 [Joint Communiqué](#) (Israel and Palestinians affirming commitments to all previous agreements); ICJ, [Israeli Practices in the OPT](#) Advisory Opinion, para. 102, (*inter alia* assessing Accords as relevant, though not determinative of certain issues).

¹⁸ [Interim Agreement](#), at pmb1.

¹⁹ *Id.* at Article XVII(1)(a) and (2)(c).

²⁰ Interim Agreement, [Annex IV](#), at Article I.1.a and 1.2.b.

²¹ *Id.* at Articles 1-2.

²² Decision on Territorial Jurisdiction, [ICC-01/18-143](#), at paras. 111-113.

²³ *Id.* at paras. 106 and 108.

persons who are not subject to Palestinian criminal jurisdiction within that territory.²⁴

15. The Accords remain relevant to how the Parties allocate jurisdiction, and the Accords are clear that Israel retains the sole authority to hold accountable Israelis accused of criminal acts in the territory. The PA has never had the “sovereign ability to prosecute” any crimes committed by Israeli nationals within the territory described.²⁵ Concern about Israel’s execution of its retained criminal jurisdiction does not itself render the allocation agreed to in the Accords unlawful; nor does it provide a basis to interpret the Rome Statute as extending beyond its appropriate jurisdictional reach.

B. The Chamber has been improperly seized with the Applications given Israel’s unadjudicated 1 May 2024 deferral request.

16. Article 18 requires the Prosecutor to notify relevant States of *proprio motu* and State Party referral investigations so that those States may, if they choose, assert their sovereign rights and primary responsibility to prosecute and punish international crimes within their jurisdiction. Article 18 requires the Prosecutor to notify States Parties and those States that would normally exercise jurisdiction over the crimes concerned, recognizing that all States have an interest in ensuring that this essential mechanism in the Court’s complementarity framework operates properly. Article 18 also serves the important purpose of providing judicial oversight over the Prosecutor in the context of *proprio motu* or State Party referral investigations, reflecting an important safeguard under the Statute. That safeguard is at issue before this Chamber given the scope of the present investigation and, to the United States’ knowledge, Israel’s unadjudicated deferral request of 1 May 2024. The proper determination of the Applications, therefore, requires the Chamber to consider significant issues related to the Prosecutor’s fulfilment of his duties under article 18 to (1) sufficiently notify States with jurisdiction over alleged crimes of the scope of his investigation, and (2) defer to the State’s investigation or seek authorization of the investigation from the Pre-Trial Chamber.

i. The Prosecutor’s duty to notify under Article 18(1)

17. The Prosecutor had a duty under article 18(1) to notify States Parties, Israel, and States that would normally exercise jurisdiction over the crimes concerned of his investigation of the attacks of 7 October and the ensuing crisis in Gaza. The Prosecutor’s initial article 18(1)

²⁴ Further, the self-determination considerations that led the majority to disregard the Accords’ allocation of territorial jurisdiction in favor of promoting territorial integrity, *see id.* at paras. 114-123, do not foreclose consideration of, or lead to the same conclusion with respect to, the effect of the Accords on criminal jurisdiction within the territory established as relevant by that Decision.

²⁵ *See* Bangladesh/Myanmar, Prosecution’s Request, [ICC-RoC46\(3\)-01/18-1](#), at para. 49 (noting article 12(2)(1) functions to *delegate* to the Court the States Parties’ own sovereign ability to prosecute covered crimes).

notification on 9 March 2021 (2021 notification) was insufficient to put Israel or other States in a position to exercise their rights with respect to this subsequent investigation.

18. Article 18(1) provides, in relevant part:

When a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined there would be a reasonable basis to commence an investigation ... the Prosecutor shall notify all States Parties and those States which ... would normally exercise jurisdiction over the crimes concerned.

Rule 52 of the Rules of Procedure and Evidence further provides that the “notification shall contain information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2.” The information should be “representative enough of the scope of criminality that [the Prosecution] intends to investigate in any future case(s).”²⁶ As the Appeals Chamber explained in the Situation in Venezuela I:

In order for a State to be able to assert its jurisdiction in proceedings under article 18(2) of the Statute, the Prosecutor’s article 18(1) notification must be sufficiently specific, providing the general parameters of the situation and sufficient detail with respect to the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality that the Prosecutor intends to investigate.²⁷

The Prosecutor thus has a “duty to furnish the relevant States of information specific enough to give effect to their right under article 18(2) of the Statute to seek the deferral.”²⁸ Meeting this duty allows a State the opportunity to demonstrate advancing domestic proceedings that “sufficiently mirror the scope of the Prosecutor’s intended investigation,” a key component of the test for deferral articulated by the Appeals Chamber.²⁹ The Prosecutor’s 2021 notification was insufficient to satisfy this duty. That notification identified three areas of focus of the investigation: war crimes allegedly committed “in the context of the 2014 hostilities in Gaza” and “in the context of Israel’s occupation of the West Bank, including East Jerusalem,” and allegations related to “demonstrations beginning in March 2018.”³⁰

19. The Prosecutor has indicated that the allegations in the Applications relate to an entirely new focus: the attack of 7 October 2023 and the ensuing crisis in Gaza.³¹ The areas of focus in the 2021 notification were not representative of the scope of criminality that is the focus of

²⁶ Venezuela I, PTC Decision, [ICC-02/18-45](#), at para. 77.

²⁷ Venezuela I, Appeals Chamber Judgment, [ICC-02/18-89](#), at para. 8. *See also id.* at paras. 114 and 246.

²⁸ Venezuela I, PTC Decision, [ICC-02/18-45](#), at para. 78. *See also* Venezuela I, Appeals Chamber Judgment, [ICC-02/18-89](#), at para. 114 (affirming “the Pre-Trial Chamber correctly found that the Prosecutor’s information must be ‘specific enough’ for the State concerned ‘to exercise its right under article 18(2) of the Statute.’”).

²⁹ Philippines, Appeals Chamber Judgment, [ICC-01/21-77](#), at para.106.

³⁰ 2021 OTP Notification pp. 1-2.

³¹ *See* [Prosecutor Statement](#) on Applications.

the allegations in the Applications. For example, the 2021 notification does not include allegations of the war crime of starvation of civilians as a method of warfare (article 8(2)(b)(xxv)), the crime against humanity of extermination (articles 7(1)(b) and 7(1)(a)), or the war crime of taking hostages (article 8(2)(c)(iii)). This is because the alleged criminality underlying those charges had not occurred. It would have been impossible for Israel or other States to have met the “sufficiently mirror” test under the 2021 notification; this demonstrates it was insufficient to give effect to the right of Israel or other States to seek a deferral.

20. In prior adjudications of article 18(2) requests, the Court has looked to the parameters of the Situation in evaluating the sufficiency of an article 18(1) notification for purposes of giving effect to a State’s article 18(2) right.³² Here, however, the Prosecutor has articulated the parameters of the Situation in Palestine in the broadest manner possible, limited only by start date, territory, and crimes under article 5.³³ While the Court has emphasized the Prosecutor’s duty to “carry out an investigation into the situation as a whole” under article 54,³⁴ the Chamber should carefully consider how to preserve the complementarity mechanism that article 18 requires in the context of a Situation of such broad scope, where an article 18 notice was not sufficient in relation to future alleged crimes. The notification regime provided under article 18 could otherwise be rendered meaningless.

21. A subsequent article 18 notification, informing relevant States of the new focus of the investigation and providing “detail with respect to the groups or categories of individuals in relation to the relevant criminality,”³⁵ was necessary to protect the interests article 18 enshrines. The Prosecutor’s 2021 notification acknowledges there may be multiple investigations within a Situation: “events and their provisional legal qualifications, which have been identified by my Office for the threshold-setting purpose of opening an investigation, are without prejudice to the future scope of *a subsequent investigation*, which may encompass any alleged crimes within the scope of the situation” (emphasis added).³⁶ When the Prosecutor opened a “subsequent investigation” that was not described in sufficient

³² See, e.g., Philippines, Appeals Chamber Judgment, [ICC-01/21-77](#), at para. 107 (noting that the “general parameters of the situation,” defined by the Pre-Trial Chamber’s Article 15 decision and the Prosecutor’s Article 18(1) notification, “were sufficiently specific to enable the Philippines to provide information in relation to its domestic investigations and prosecutions.”).

³³ See [Prosecutor Statement](#) on Palestine Situation November 2023. (“[M]y Office confirms that it is presently conducting an investigation into the Situation in the State of Palestine. This investigation, commenced on 3 March 2021, encompasses conduct that may amount to Rome Statute crimes committed since 13 June 2014 in Gaza and the West Bank, including East Jerusalem. It is ongoing and extends to the escalation of hostilities and violence since the attacks that took place on 7 October 2023.”).

³⁴ Afghanistan, Appeals Chamber Judgment, [ICC-02/17-138](#), at para. 60.

³⁵ See Venezuela I, Appeals Chamber Judgment, [ICC-02/18-89](#), at para. 8.

³⁶ 2021 OTP Notification p. 2.

detail in a prior article 18(1) notification to give effect to a State's right to seek deferral, the Prosecutor should have sent a subsequent article 18(1) notification to provide sufficient opportunity for relevant States to invoke their rights. This approach could have generated the early dialogue article 18 is meant to foster between the Prosecutor and a relevant State.³⁷

22. In addition, the State Party referrals of 17 November 2023 and 18 January 2024 (subsequent referrals) warranted a subsequent notification by the Prosecutor. As article 18(1) makes clear, the Prosecutor's notification duty is triggered by a State Party referral. Thus, once in receipt of the subsequent referrals, which encompassed a broader scope of criminality than alleged in the 2018 referral, the Prosecutor was required to issue an article 18 notification to States that "would normally exercise jurisdiction over the *crimes concerned*" (emphasis added), once he determined there was "a reasonable basis to commence an investigation." The Prosecutor cannot discharge his legal duty through public statements that the conduct alleged in a subsequent referral is within the scope of a previous investigation.³⁸ Article 18 and the corresponding Rules clearly contemplate formal communications between the Prosecutor and relevant States through official channels, communicating specific information.³⁹ It is incumbent on the Prosecutor to initiate article 18 dialogue through a formal and sufficiently detailed communication to relevant States; this is particularly important to establish clarity given the brief 30-day timeframe for response in Article 18(2).

23. Relatedly, the Chamber itself must also consider whether the crimes alleged in the Applications fall within the Situation's scope such that the Court can exercise its jurisdiction, a question made more acute by the subsequent referrals and the new criminality they allege.⁴⁰

³⁷ See Venezuela I, Prosecution's Response to Appeal, [ICC-02/18-62-Red](#), at para. 44, citing Afghanistan, PTC Decision on Procedure, [ICC-02/17-165](#), at para. 16 (explaining "article 18 of the Statute as a whole is at the heart of the complementarity regime which underpins the Statute and governs the relationship and the sharing of responsibilities between the Court and the States in the investigation and prosecution of the most serious crimes. More specifically, article 18(2) of the Statute...encapsulates the idea of a process of dialogue, between the Court and the Prosecutor on the one hand, and the relevant State.... It is of the essence, for this dialogue to take place and the principle of complementarity to be orderly, meaningfully and effectively implemented....").

³⁸ See [Prosecutor Statement](#) on Palestine Situation Nov. 2023. See also [Prosecutor Statement](#) on Palestine Dec. 2023. Neither statements characterizing the scope of the Situation nor exhortations for those involved in a conflict to adhere to international humanitarian law constitute notification under article 18(1).

³⁹ See Holmes (2001) at p. 339 (explaining that the "addition of the term 'acts' [in Rule 52] indicates that the Prosecutor must do more than just inform a State that an investigation is being contemplated. The notice should include specific information ... on the acts to be examined, their location and possible suspects.").

⁴⁰ See Rastan (2012), at 3 citing DRC, PTC Decision Requesting Clarification, [ICC-01/04-575](#), at para. 12 (considering it "necessary for the Chamber to determine whether such events are sufficiently linked to the situation of crisis that triggered the DRC investigation, so as to fall within its scope and therefore within the Court's jurisdiction"), and explaining that a "negative finding" by the Pre-Trial Chamber considering the arrest warrant application before it "would have necessitated the establishment of a new situation (either by another State Party referral or *proprio motu* authorization) within whose parameters the new case could be brought."

ii. *The Prosecutor's duty to seek authorization of an investigation from the Pre-Trial Chamber when a State has requested deferral*

24. The Prosecutor also had a separate duty, after Israel's deferral request, to seek the Chamber's authorization of the investigation before proceeding with the Applications. This duty is clear in article 18(2): "At the request of that State, the Prosecutor *shall* defer to the State's investigation of those persons *unless* the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation" (emphasis added). A Prosecutor in receipt of a deferral request must either defer the investigation or seek authorization from the Pre-Trial Chamber.⁴¹ Once in receipt of Israel's deferral request, the Prosecutor did not have the authority to continue his investigation and then seize this Chamber with the Applications. The discussion in Section B(i) above demonstrates Israel's deferral request presented significant legal issues that were for the Chamber to adjudicate, not the Prosecutor.⁴² This includes any issues of timeliness, particularly given that the subsequent investigation that is the subject of the Applications should have been notified under article 18(1) and Rule 52(1).

25. The Prosecutor's actions do not appear to be consistent with the directive in article 18(2) and the OTP's past practice in handling deferral requests. This includes full communication with the Pre-Trial Chamber regarding a State's deferral request and ongoing engagement with relevant States;⁴³ an approach of meaningful dialogue with the requesting State, including—as provided for under Rule 53—requesting additional information⁴⁴ and in-person meetings;⁴⁵

⁴¹ See Afghanistan, PTC, Decision Related to Notification, [ICC-02/17-156](#), at para. 23 ("Article 18(2) of the Statute contemplates a Pre-Trial Chamber's intervention only upon the application of the Prosecution, in the event that the Prosecution does not intend to defer to the relevant State's investigations."). See also Philippines, Prosecution's Response to Appeal, [ICC-01/21-68](#), at para. 50 (noting that "the object and purpose of the Statute favours a full and proper assessment whether a request for deferral is justified").

⁴² Even absent significant legal issues, the Prosecutor has a duty to apply to the Chamber to proceed with the investigation. Contrary to assertions in other Situations (see, e.g., Philippines, Prosecution's Request to Resume, [ICC-01/21-46](#), at fn. 50), which Chambers have not adopted, the Prosecutor does not have authority to adjudicate sufficiency of a deferral request. See, e.g., Philippines, PTC Authorisation to Resume, [ICC-01/21-56-Red](#), at paras. 13-14 (describing the Pre-Trial Chamber's task in assessing challenges under article 18(2)).

⁴³ See, e.g., Afghanistan 2021 Status Notification, [ICC-02/17-142](#), at para. 2 (notifying communications with Afghanistan "to keep the Chamber informed, and to be transparent with its analysis of the Deferral Request"; noting it had requested Afghanistan lift confidentiality constraints on material; explaining the Prosecution's assessment process, including as to "whether certain aspects of its intended investigation could be deferred").

⁴⁴ See, e.g., Philippines, Prosecution's Request to Resume, [ICC-01/21-46](#), at para. 9 (explaining "[s]ince the Deferral Request did not contain any supporting material, the Prosecution, in accordance with rule 53 of the Rules, requested the GovPH to provide, within 30 days, substantiating information regarding the investigations and proceedings referenced in the Deferral Request; Philippines, Notification of Deferral Request, [ICC-01/21-14](#), at para. 2 (explaining the "Prosecution will...request additional information from the Philippines under rule 53" and such "information is necessary for the Prosecution to assess the scope and effect of the Deferral Request, and to determine whether to apply to the Pre-Trial Chamber, under article 18(2) of the Statute, for authorisation to continue investigating"); Afghanistan, PTC Order on Observations, [ICC-02/17-194](#), at para. 17 (showing Afghanistan provided materials in support of its Deferral Request for approximately one year).

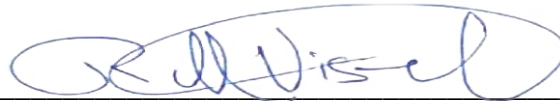
⁴⁵ See Afghanistan 2021 Status Notification, [ICC-02/17-142](#), at paras. 3-4 (noting the Prosecutor had "sought to

and consideration of circumstances that could impact the speed of that dialogue.⁴⁶

26. In the present circumstances, the Chamber should reject the Applications and direct the Prosecutor to properly follow the article 18 process. Following the dialogue envisioned by article 18, if the Prosecutor assesses a deferral is not warranted, he must then apply to this Chamber for authorization of the investigation. If necessary, pending the Chamber's ruling, the Prosecutor may seek authority from the Chamber "to pursue necessary investigative steps" in accordance with article 18(6). This approach could mitigate the prejudice resulting from improper implementation of article 18.

IV. CONCLUSION

27. The United States is of the view that there are fundamental issues of jurisdiction and admissibility relevant to the Chamber's determination of the Applications. First, the Oslo Accords preserved in Israel exclusive jurisdiction over acts committed by Israeli nationals. Therefore, the Palestinians could not have delegated to the Court jurisdiction they never had. Second, the legal issues identified with regard to the article 18 process in this Situation demonstrate that the Prosecutor erred in not sufficiently notifying relevant States and not seeking authorization from the Chamber for his investigation following Israel's deferral request. The Chamber's action, as described above, is necessary to preserve the Court's complementarity framework, of which article 18 is an essential component.



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Dated this 6th day of August 2024 at Washington, D.C., USA

accede to the Government of Afghanistan's request for an in-person meeting to discuss a number of pending issues"); *see also* Venezuela 2022 Notification, [ICC-02/18-16](#), at paras. 6-7 (explaining the Prosecutor agreed to a three-month extension for Venezuela to "inform the Court of its investigation within the meaning of article 18(2)," in part, to allow for a meeting "to engage in a meaningful dialogue with the Venezuelan government.")⁴⁶ *See, e.g.*, Afghanistan, Notification of Deferral Request, [ICC-02/17-139](#), at para. 4 (explaining that "[g]iven the extraordinary circumstances presented by the pandemic, and the importance the Prosecutor places on her proper assessment of complementarity," the Prosecutor granted Afghanistan more time "to enable it to comply fully with article 18(2) and rule 53" and that the "Prosecution has promptly filed this notification to keep the Chamber fully apprised of relevant developments in the application of article 18(2)..."); 2021 Afghanistan Status Notification, [ICC-02/17-142](#), at para. 2 ("Recognising the on-going difficulties Afghanistan faced due to the COVID-19 pandemic, on-going conflict and other logistical matters, the Prosecution asked for as much of the material as possible to be provided within a 60 day time-limit, leaving the door open for further extension.") *See also* Venezuela 2022 Notification, [ICC-02/18-16](#), at para. 6 (explaining that "[i]n a spirit of cooperation, dialogue and fairness" the Prosecutor granted a three-month extension to Venezuela given provision of additional information, unsuccessful attempts to schedule an in-person meeting, and the pandemic).