Cour Pénale Internationale

International Criminal Court

DISSENTING OPINION OF JUDGE SOLOMY BALUNGI BOSSA

1. I respectfully disagree with the decision of the majority of the Appeals Chamber (hereinafter: "Majority") to confirm the decision of Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber") titled "Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice" of 21 November 2024 (hereinafter: "Impugned Decision"). In particular, I am unable to join the Majority in its conclusion on the second ground of appeal put forward by the State of Israel (hereinafter: "Israel"). In my view, the Pre-Trial Chamber erred in failing to address certain arguments that were put before it in Israel's request for a new notice under article 18(1) of the Statute (hereinafter: "Article 18 Request)".[1] Under its second ground of appeal, Israel submits that the Pre-Trial Chamber "erred in failing to find, and giving no reasons to reject, Israel's submission that a new Situation was triggered by referrals following 7 October 2023".[2] I consider that the Pre-Trial Chamber's failure to duly examine the arguments raised by Israel in the Article 18 Request materially affected the Impugned Decision. As a result, I would have granted Israel's second ground of appeal in part and remanded the matter to the Pre-Trial Chamber in order for it to properly address Israel's arguments and to provide reasons as to the impact of those referrals on its conclusion that no new situation had arisen which could have necessitated a new notification under article 18(1) of the Statute. Having found said error, I would find it unnecessary to examine the remainder of the second ground of appeal, as well as the first and the third grounds of appeal.

2. In today's judgment, the Majority concedes that "the Pre-Trial Chamber did not include an explicit finding discussing the legal implications, or lack thereof", of the two referrals submitted by two groups of States Parties in 2023 and 2024

[1] 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-AnxI-Corr.
[2] Appeal of "Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice" (ICC-01/18-375), 26 May 2025, ICC-01/18-434, with public Annex A, ICC-01/18-434-AnxA.

(hereinafter: "2023 Referral" and "2024 Referral").[3] It then, however, considers that Israel's Article 18 Request, which had led to the Impugned Decision, "focuses on the alleged changes to the 'defining parameters' of the situation" and that it "only relied upon the two referrals to show '[t]he extent of the change following 7 October 2023'".[4] On this basis, the Majority concludes that, "[g]iven the way in which Israel formulated the Article 18 Request, there was no need for the Pre-Trial Chamber to specifically address the general submission that a new situation had been constituted as a result of the 2023 Referral and the 2024 Referral".[5]

3. Like the Majority, I wish first to recall that the extent of "reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion".[6] In this regard, however, I also note that the Appeals Chamber has consistently held that "[t]he Statute and the Rules […] in various places emphasise the importance of sufficient reasoning in decisions of Chambers", and that "[a] Chamber's provision of reasons in decisions also 'enables the Appeals Chamber to clearly understand the factual and legal basis upon which the decision was taken and thereby properly exercise its appellate functions'".[7] Unlike the Majority, I consider that, in light of this jurisprudence, Israel's arguments concerning the 2023 Referral and the 2024 Referral should have been relevant considerations in the Pre-Trial Chamber's determination.

4. In its Article 18 Request, Israel averred that the referrals had a distinct legal effect, namely that they would "identify a new situation of crisis" and that they "triggered an obligation under regulation 45 of the [Regulations of the Court] to 'inform

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[3] Majority Decision, para. 97. The two referrals are: States Parties referral of 17 November 2023 (Republic of South Africa, the People's Republic of Bangladesh, the Plurinational State of Bolivia, the Union of the Comoros, and the Republic of Djibouti) and States Parties referral of 18 January 2024 (the Republic of Chile and the United Mexican States).
[4] Majority Decision, para. 98.
[5] Majority Decision, para. 100.
[6] *See for instance* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773 (OA5), para. 20.
[7] *See* Appeals Chamber, *Situation in the Bolivarian Republic of Venezuela I*, Judgment on the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute", 1 March 2024, ICC-02/18-89 (OA) (hereinafter: "*Venezuela* OA Judgment"), para. 187 and references therein.

the Presidency in writing as soon as a situation has been referred to the Prosecutor by a State Party'".[8] I note that the Impugned Decision mentions the two referrals.[9] In this context, the Pre-Trial Chamber acknowledged that Israel's request for a new notice to be provided under article 18(1) of the Statute was, in part, based on its submission that a new situation had been constituted as a result of the two referrals.[10] However, the Pre-Trial Chamber did not make an express finding in this regard. When determining that it was "not persuaded by Israel's submissions that 'a new situation has arisen', or an 'investigation with new "defining parameters" has been taking place since 7 October 2023'", it confined its analysis to a comparison of certain parameters of the Article 18(1) Notification and the applications for warrants of arrest submitted by the Prosecutor, together with a reference to a finding by the Appeals Chamber issued in a different appeal.[11] The Pre-Trial Chamber thus omitted to expressly rule on Israel's submission based on the aforementioned referrals.

5. In this regard, I recall that

> […] while a referral by a State Party requires the Prosecutor, in principle, to initiate an investigation into the specific situation, the Prosecutor has to first make a determination, pursuant to article 53(1) of the Statute, as to whether there is, as a matter of fact, a reasonable basis to initiate an investigation into the situation. […].[12]

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[8] Article 18 Request, paras 27, 30.
[9] Impugned Decision, paras 3 ("On 17 November 2023, the Prosecution received referrals, pursuant to articles 13(a) and 14 of the Statute, from five State Parties. On 14 January 2024, two more State Parties submitted such a referral to the Prosecution"), 5 ("On 20 September 2024, the Registry transmitted to the Chamber the Request, in which the State of Israel […] requests the Chamber to 'require the Prosecutor to give an article 18(1) notice setting out the new defining parameters of his investigation in this Situation, or in any other Situation that has now been constituted as a result of the two referrals made by a total of seven States Parties following 7 October 2023'").
[10] *See* Impugned Decision, para. 5.
[11] Impugned Decision, para. 15 ("The Chamber notes that the Notification indicated that the investigation concerned alleged crimes in the context of an international armed conflict, Israel's alleged conduct in the context of an occupation, and a non-international armed conflict between Hamas and Israel. In the applications for warrants of arrest, as also explained by the Prosecutor in his public statement at the time of filing the applications, the Prosecution alleges conduct committed in the context of the same type of armed conflicts, concerning the same territories, with the same alleged parties to these conflicts. Therefore, no substantial change has occurred to the parameters of the investigation into the situation. The Chamber notes that Israel's position would effectively mean that the Prosecution's investigation in every situation would be limited to the incidents and crimes addressed during the preliminary examination and described in the article 18 notification. Such interpretation has already been rejected by the Appeals Chamber").
[12] *Venezuela* OA Judgment, para. 219 (footnotes omitted).

6. Pursuant to article 18(1) of the Statute, "[w]hen […] the Prosecutor has determined that 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". A referral by a State Party with respect to an investigation that has already been initiated on the basis of another referral thus raises the question whether the procedure under article 18(1) of the Statute must be initiated. Relevant to the matter before the Pre-Trial Chamber, such a new referral also raises the question of whether a new article 18(1) notification must be issued so as to potentially enable any States concerned to seek deferral.

7. I therefore find that, given the significance of the 2023 and the 2024 referrals to the question of whether the Prosecutor had to issue a new notification and enable States to seek deferral, the Pre-Trial Chamber ought to have duly addressed in the Impugned Decision Israel's arguments relating to those referrals. In particular, the Pre-Trial Chamber ought to have considered whether those two new referrals identify a new situation and, if so, whether they should have given rise to a new notification under article 18(1) of the Statute.

8. Furthermore, in the Article 18 Request, Israel referred to the Prosecutor's duty under regulation 45 of the Regulations of the Court (hereinafter: "Regulations") to inform the Presidency of a referral as soon as a situation has been referred by a State Party. Israel argued that "[t]hese referrals triggered an obligation under regulation 45 of the [Regulations] to 'inform the Presidency in writing […]' [and] [t]his Prosecutor appears to have failed to do so".[13] I am unable to agree with the Majority that this argument merely addressed a formal aspect of the Prosecutor's duty under said regulation.[14] Rather, I would find that, when arguing that the referrals triggered the Prosecutor's obligation under regulation 45(1) of the Regulations to "inform the Presidency in writing", Israel sought to demonstrate that the two referrals had given rise to a new situation. I would therefore find that, given the relevance of the issue of compliance with the referral mechanism enshrined in articles 13(a) and 14 of the Statute

[13] Article 18 Request, para. 30 (footnote omitted).
[14] Majority Decision, para. 99.

and the procedure under regulation 45 of the Regulations, the Pre-Trial Chamber ought to have addressed the aforementioned argument of Israel.

9. In my view, the Pre-Trial Chamber erred by failing to duly address and to provide sufficient reasoning with respect to the aforementioned matters. I consider that this error materially affected the Impugned Decision because I cannot discern the basis upon which the decision was taken.[15] I would have therefore reversed the Impugned Decision.

10. Given the nature of the error which I identified, I would have remanded the matter to the Pre-Trial Chamber for it to properly address Israel's arguments on the 2023 and the 2024 referrals, and provide reasons as to the impact of those referrals on its conclusion that no new situation had arisen which could have given rise to a new notification under article 18(1) of the Statute.

11. In light of this conclusion, I find that there is no need to address the remaining arguments under the second ground of appeal, nor the first and the third grounds of appeal.

Done in both English and French, the English version being authoritative.

Judge Solomy Balungi Bossa

Dated this 15th day of December 2025
At The Hague, The Netherlands

[15] *See* *Venezuela* OA Judgment, para. 187 and references therein.