



## **DISSENTING OPINION OF JUDGE SOLOMY BALUNGI BOSSA**

### **I. INTRODUCTION**

1. This appeal arises from the decision of Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) to reject a request made by the State of Israel (hereinafter: “Israel”) for an order to the Prosecutor to give a notice pursuant to article 18(1) of the Statute (hereinafter: “Impugned Decision”).<sup>1</sup>

2. In today’s decision, the majority of the Appeals Chamber (hereinafter: “Majority”) dismisses, as inadmissible, Israel’s appeal against the Impugned Decision (hereinafter: “Majority Decision”).<sup>2</sup> While I agree with paragraphs 21 to 25 and 30 to 31 of the Majority Decision, I dissent from the analysis and determination in paragraphs 33 and 34 of the Majority Decision.

3. In my view, the decision of the Pre-Trial Chamber on whether the Prosecutor executed his obligation to provide a notice pursuant to article 18(1) of the Statute is a preliminary ruling regarding admissibility. As such, it is directly appealable before the Appeals Chamber under articles 18(4) and 82(1)(a) of the Statute.

### **II. RELEVANT PARTS OF THE IMPUGNED DECISION**

4. The Pre-Trial Chamber determined that:

[...] [D]espite the Prosecution’s Clarification Request, Israel did *not* proceed to request a deferral under article 18(2) of the Statute in 2021. Instead, it merely repeated its previous arguments on the Court’s alleged lack of jurisdiction and stated that it continued investigating all relevant crimes. In this regard, the Chamber recalls that ‘[f]or a State to be successful in seeking a deferral [...], it is [neither] enough for it to make a blanket statement that the Court lacks [...] jurisdiction [...]’; nor to simply assert that it is investigating or prosecuting crimes which may constitute crimes under article 5 of the Statute and that relate to the notification under article 18(1) of the Statute. Therefore, Israel’s 8 April 2021

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<sup>1</sup> [Decision on Israel’s request for an order to the Prosecution to give an Article 18\(1\) notice](#), 21 November 2024, ICC-01/18-375.

<sup>2</sup> Majority Decision, para. 37.

Letter and 26 April 2021 Letter did not constitute a deferral request under article 18(2) of the Statute.<sup>3</sup>

5. The Pre-Trial Chamber also held that:

[P]ursuant to article 18(2) of the Statute, a State may inform the Court that ‘it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States [provided by the Prosecution under article 18(1) of the Statute]’ within a period of one month of receipt of said notification. In light of this, the statutory time limit had passed in April 2021 without Israel having requested a deferral under article 18(2) of the Statute.<sup>4</sup>

6. The Pre-Trial Chamber found that filing the request for a notice pursuant to article 18(1) of the Statute “after the Prosecution announced it had filed applications for warrants of arrest and three years after the passing of the statutory time limit [...] appears to go against the very object and purpose of the statutory complementarity framework”.<sup>5</sup>

7. Finally, the Pre-Trial Chamber held that:

[It] is also 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’. 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.<sup>6</sup>

### III. SUMMARY OF THE SUBMISSIONS

8. Israel submits that its appeal is admissible under article 82(1)(a) of the Statute.<sup>7</sup> In particular, Israel argues that the admissibility prong of article 82(1)(a) of the Statute is not limited to decisions based on article 18(2) of the Statute.<sup>8</sup> Israel argues that the Impugned Decision “pertains directly to a question on [...] the admissibility of a case” and that the operative part of the Impugned Decision states that it “[rejects] Israel’s

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<sup>3</sup> [Impugned Decision](#), para. 12 (footnotes omitted).

<sup>4</sup> [Impugned Decision](#), para. 13.

<sup>5</sup> [Impugned Decision](#), para. 14.

<sup>6</sup> [Impugned Decision](#), para. 15 (footnotes omitted).

<sup>7</sup> [Notice of Appeal of “Decision on Israel’s request for an order to the Prosecution to give an Article 18\(1\) notice” \(ICC-01/18-375\)](#), 27 November 2024, ICC-01/18-385 (hereinafter: “Notice of Appeal”), paras 18-27.

<sup>8</sup> [Notice of Appeal](#), para. 21.

request for an order to the Prosecution to give an Article 18(1) notice and staying proceedings pending such a notice”.<sup>9</sup> According to Israel, the Impugned Decision is “by its very nature, a ‘decision with respect to [...] admissibility’”.<sup>10</sup>

9. The Prosecutor submits that Israel’s Appeal should be dismissed *in limine* on the ground that it does not satisfy the conditions of article 82(1)(a) of the Statute.<sup>11</sup> The Prosecutor’s argument is that the operative part of the Impugned Decision does not assess whether, pursuant to article 17 of the Statute, “Israel is investigating and/or prosecuting the same patterns, criminality and category of persons as the Prosecution, nor whether the cases are of sufficient gravity”.<sup>12</sup>

#### IV. APPLICABLE LAW

10. Article 82(1)(a) of the Statute provides as follows:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility [...].

11. Article 18 of the Statute, entitled “Preliminary rulings regarding admissibility” provides, in its relevant part:

1. When a situation has been referred to the Court pursuant to article 13 (a) and 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, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. [...].

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. 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.

[...]

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<sup>9</sup> [Notice of Appeal](#), para. 24.

<sup>10</sup> [Notice of Appeal](#), para. 24.

<sup>11</sup> [Prosecution Request to Dismiss \*in limine\* Israel’s ‘Notice of Appeal of ‘Decision on Israel’s request for an order to the Prosecution to give an Article 18\(1\) notice’ \(ICC-0118-375\)’](#), 29 November 2024, ICC-01/18-391 (hereinafter: “Prosecutor’s Request”), para. 3.

<sup>12</sup> [Prosecutor’s Request](#), para. 6.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

[...]

## V. ANALYSIS

12. In the view of the Majority, when the Pre-Trial Chamber made the findings that “Israel had not requested a deferral pursuant to article 18(2) of the Statute when it had the opportunity to do so” and that “in the absence of a ‘new situation’ or ‘an investigation with new defining parameters’, the Prosecutor was under no obligation to provide a new notification to the relevant States pursuant to article 18(1) of the Statute”, it “did not rule on the admissibility of any potential case under article 18 of the Statute”.<sup>13</sup> The Majority also noted that “the operative part of the Impugned Decision does not pertain directly to a question on the admissibility of any potential case”.<sup>14</sup>

13. I underscore my disagreement with the Majority Decision as, in my view, it is incorrect to refer to the exact same determinations relied upon by the Pre-Trial Chamber to rule on the merits of the request – which, by its very nature, is a preliminary ruling regarding admissibility – and use them to affirm precisely that the Impugned Decision is not a decision regarding admissibility under article 82(1)(a) of the Statute.

14. Article 18 of the Statute is meant to safeguard the well-established principle of complementarity, which is the cornerstone of the regime set out in the Rome Statute. The Court’s system is to be distinguished from the jurisdiction of earlier international tribunals, which had primacy of jurisdiction with regard to international crimes including genocide, war crimes, and crimes against humanity. The Court’s complementarity principle holds that every State has the primary responsibility to exercise its sovereign criminal jurisdiction over those responsible for international crimes specified in article 5 of the Statute.<sup>15</sup> It is for this reason that States are given an opportunity to assert their jurisdiction first, at the preliminary stage of investigations under article 18(2) of the Statute.

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<sup>13</sup> Majority Decision, para. 33.

<sup>14</sup> Majority Decision, para. 33.

<sup>15</sup> See Preamble and article 1 of the Statute.

15. I note that the Pre-Trial Chamber ruled on several aspects of Israel’s request. Most significantly, the Pre-Trial Chamber dismissed Israel’s argument that a new situation has arisen or that an investigation with new defining parameters has been taking place since 7 October 2023.<sup>16</sup> On this basis, it concluded that the Prosecutor was under no obligation to provide a new notification to the relevant States pursuant to article 18(1) of the Statute.<sup>17</sup> In the view of the Majority, when the Pre-Trial Chamber made its findings it “did not rule on the admissibility of any potential case under article 18 of the Statute”.<sup>18</sup> I consider that this conclusion is untenable. By recalling the Pre-Trial Chamber’s findings before adopting the aforementioned conclusion, the Majority effectively concedes that the Impugned Decision concerns a question of admissibility. Indeed, considering that the Impugned Decision engages with the merits of Israel’s request under article 18(1) of the Statute, I find that it “consisted of or ‘was based on’ a ruling that a case was admissible or inadmissible”.<sup>19</sup>

16. Furthermore, in the operative part of the Impugned Decision, the Pre-Trial Chamber rejected “Israel’s request for an order to the Prosecution to give an Article 18(1) notice and staying proceedings pending such notice”.<sup>20</sup> The Impugned Decision was, therefore, adopted pursuant to a request under article 18 of the Statute, which is entitled “Preliminary rulings regarding admissibility”.<sup>21</sup> As a result, the Impugned Decision specifically arises from a pivotal provision explicitly enshrining an essential facet of the Court’s complementarity mechanism. The Majority overlooks this implication when concluding, without supporting reasoning, that “the operative part of the Impugned Decision does not pertain directly to a question on the admissibility of any potential case”.<sup>22</sup> In my view, it follows from the foregoing that “the operative part of the decision itself [pertains] directly to a question on the jurisdiction of the Court or the admissibility of a case”.<sup>23</sup>

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<sup>16</sup> [Impugned Decision](#), para. 15.

<sup>17</sup> [Impugned Decision](#), para. 15.

<sup>18</sup> Majority Decision, paras 33-34.

<sup>19</sup> See *Situation in the Republic of Kenya*, [Decision on the admissibility of the “Appeal of the Government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93\(10\) of the Statute and Rule 194 of the Rules of Procedure and Evidence’”](#), 10 August 2011, ICC-01/09-78 (OA) (hereinafter: “Kenya OA Decision”), para. 15.

<sup>20</sup> [Impugned Decision](#), p. 9.

<sup>21</sup> Emphasis added.

<sup>22</sup> Majority Decision, para. 33.

<sup>23</sup> [Kenya OA Decision](#), para. 15.

17. In addition, I am of the view that the right to appeal enshrined in article 18(4) of the Statute does not limit the subject-matter of such appeals to a decision under article 18(2) of the Statute, regarding a request by the Prosecutor to resume an investigation notwithstanding a deferral request by a State. Article 18(4) of the Statute broadly refers to “*a ruling of the Pre-Trial Chamber*” [emphasis added] without limitation to a decision adopted under the last sentence of article 18(2) of the Statute. This is further confirmed by the close linkages between the first two sub-paragraphs of this provision. A pre-trial chamber seized of a request under article 18(2) of the Statute must assess whether or not the domestic investigations and/or prosecutions of a State requesting a deferral sufficiently mirror the Prosecutor’s investigation.<sup>24</sup> As part of this assessment, a pre-trial chamber has to identify the scope of the Prosecutor’s investigation on the basis of the notice provided under article 18(1) of the Statute and related information, so as to compare it to the requesting State’s investigations and/or prosecutions.<sup>25</sup> A notice under article 18(1) of the Statute providing sufficiently specific information is, thus, an essential precondition for a State to exercise its right to seek a deferral under article 18(2) of the Statute.

18. In these circumstances, a judicial remedy must of necessity be available to a State with an interest in seeking a deferral, including the right to appeal under articles 18(4) and 82(1)(a) of the Statute. There is no reason to consider that judicial recourse only becomes available *after* the Prosecutor’s submits an application under article 18(2) of the Statute. The preceding considerations equally apply to a State assessing whether or not it has a sufficient basis to request a deferral.

19. Accordingly, the decision of the Pre-Trial Chamber, following the request by Israel, examining the alleged failure to give such notice is, in my view, a preliminary ruling concerning the issue of the admissibility of any potential cases by the Prosecutor and falls squarely within the purview of article 18(1) of the Statute, which renders it appealable under articles 18(4) and 82(1)(a) of the Statute.

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<sup>24</sup> See *Situation in the Republic of the Philippines*, [Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I’s “Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation”](#), 18 July 2023, ICC-01/21-77 (OA), paras 106-110.

<sup>25</sup> See *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), paras 114-118.

20. In conclusion, I would have found Israel's appeal admissible. Since the Majority has found the appeal to be inadmissible, it will be now for the Pre-Trial Chamber to decide on the pending request for leave to appeal the Impugned Decision under article 82(1)(d) of the Statute. Accordingly, I am not in a position to assess Israel's grounds of appeal on the merits.

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



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**Judge Solomy Balungi Bossa**

Dated this 24th day of April 2024

At The Hague, The Netherlands