Cour
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Court

DISSENTING OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

I. KEY FINDINGS

i. A referral under article 14 of the Statute imposes a number of duties on the Court and gives effect to the States Parties' prerogative to trigger the exercise of the Court's jurisdiction over crimes under the Statute. The Prosecutor's duty under regulation 45(1) of the Regulations of the Court to inform the Presidency of a State Party referral is one such duty and must be exercised with due diligence.

ii. The proper administration of justice requires strict application of the relevant legal norms, respect for the principle of legality, and compliance with due process of law. A decision can only be considered reliable if it complies with these requirements. A decision needs to be issued in conformity with the procedural requirements established by the norms governing the issuance and "production" of the decision.

iii. The judicial duty to provide a sufficiently reasoned decision requires that all decisions reflect the reasoning of the Judges in a clear, complete, and unambiguous manner. This duty serves two indispensable purposes: (i) to allow the parties to avail themselves of their right to appeal; and (ii) to enable the Appeals Chamber to exercise its appellate functions.

II. INTRODUCTION

1. Today, the majority of the Appeals Chamber (hereinafter: "Majority") has delivered the judgment confirming 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: "Majority Decision" and "Impugned Decision"). For the reasons that follow, I respectfully

disagree with my colleagues' reasoning and conclusion regarding the second ground of appeal and with the Majority's decision to confirm the Impugned Decision.[1] Given that the second ground of appeal contains cross-cutting issues affecting the resolution of the first and third grounds of appeal, I have confined the present Opinion to the issues raised under the second ground of appeal.

2. In the second ground of appeal, the State of Israel (hereinafter: "Israel") submitted 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 [two] referrals following 7 October 2023".[2]

3. The Majority rejected the above assertion made by Israel.[3] They observed that, "whilst the Pre-Trial Chamber did not include an explicit finding discussing the legal implications, or lack thereof, of the two referrals, it nonetheless explicitly noted the 2023 Referral and the 2024 Referral".[4] The Majority further noted that the Pre-Trial Chamber "acknowledged that, in its request for a new notice to be provided under article 18(1) of the Statute, Israel referred to these two referrals as having constituted a new situation".[5] The Majority also found that "Israel only relied upon the two referrals to show '[t]he extent of the change following 7 October 2023'".[6]

4. The Majority found that, in its Article 18 Request, Israel only addressed the formal aspect of the Prosecutor's duty under regulation 45 of the Regulations of the Court (hereinafter: "Regulations") and that "this argument was not meant to support Israel's main proposition that a new situation had arisen".[7] The Majority further rejected Israel's assertion that "the [Pre-Trial Chamber] erred in law by […] failing to find that the 2023 Referral required the registration of a new situation before the Court; and failing to find that a new article 18(1) notification had to be provided to Israel if the

[1] Majority Decision, paras 94-106.
[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: "Appeal Brief"), paras 40-45.
[3] Majority Decision, para. 95.
[4] Majority Decision, para. 97.
[5] Majority Decision, para. 97.
[6] Majority Decision, para. 98.
[7] Majority Decision, para. 99.

Prosecutor were to conclude, on the basis of the second condition in article 18(1) that 'there would be a reasonable basis to commence an investigation'".[8]

5. I am unable to agree with these conclusions and determinations. I am of the view that the Pre-Trial Chamber erred in law, by failing to consider the procedure established in regulation 45 of the Regulations. I am also of the view that the Pre-Trial Chamber committed a procedural error, by failing to expressly address a relevant argument raised by Israel in its request for a new notification under article 18(1) of the Statute (hereinafter: "Article 18 Request").[9]

6. In its Article 18 Request, Israel asserts that the Prosecutor had a duty under regulation 45 of the Regulations to inform the Presidency of the two sets of referrals submitted by seven States Parties.[10] 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".[11] For reasons which I will develop further in this opinion, this argument is critical to the assessment of whether the applicable procedure was correctly followed in this instance. A deficient procedure may vitiate the entire process. It was therefore the Pre-Trial Chamber's duty to address and duly reason its findings on this pertinent submission. It was an error for the Pre-Trial Chamber not to do so. It was also an error for the Pre-Trial Chamber not to consider the applicable law regarding the Prosecutor's obligation to inform the Presidency upon receipt of a referral.

7. Having found these errors under the second ground of appeal, which materially affected the Impugned Decision, I would have remanded the matter to the Pre-Trial Chamber for a new examination.

8. Furthermore, I cannot agree with the Majority's determination of the remaining part of the second ground of appeal.[12] The Pre-Trial Chamber failed to address Israel's argument that the two referrals submitted by two groups of States Parties in 2023 and

[8] Majority Decision, para. 101.
[9] 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.
[10] Article 18 Request, para. 30.
[11] Article 18 Request, para. 30 (footnote omitted).
[12] Majority Decision, paras 102-105.

2024 (hereinafter: "2023 Referral" and "2024 Referral", collectively "Referrals")[13] had given rise to a new situation. Therefore, it is not for the Appeals Chamber to determine *de novo* whether or not the States concerned intended their communications to the Court to constitute referrals within the meaning of article 14 of the Statute. The matter should have been remanded to the Pre-Trial Chamber.

9. I am of the view that in the circumstances of the present situation, compliance with the referral procedure should have been assessed as a matter of priority, especially in light of the specific concerns in this regard expressed by Israel and because such compliance is directly linked to the complementarity regime.

10. For the reasons that follow, I disagree with my colleagues' determination and conclusion on the second ground of appeal and on the outcome of the judgment. I reiterate that the present opinion is confined to the second ground of appeal. The first and third grounds of appeal are, in my view, intrinsically linked to the second ground of appeal. However, I am unable to meaningfully address them in the present opinion because the resolution of issues arising from the second ground of appeal is a prerequisite for any determination on the other two grounds. I would be in a position to make a determination on the first and third grounds of appeal only once the issues raised under the second ground of appeal have been duly considered. Therefore, I cannot agree with the outcome of the Majority Decision.

11. Furthermore, the issues at stake are directly linked to the principle of complementarity. This is a core feature of the Rome Statute system, with the judicial duty to comply with the guarantees of due process of law, and to the need to ensure predictability of the law and judicial certainty.

12. I take this opportunity to reiterate my concerns about the Pre-Trial Chamber's failure to address the legal ramifications of Israel's non-adherence to the Statute. This matter has a bearing on the determination and conclusions made in relation to the second ground of appeal. Indeed, the issue of applicability of the Statute to non-State Parties, like Israel, and a determination of how and since when Israel was required to

[13] 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).

comply with the obligations arising from the Statute, are relevant to the question of Israel's ability to adhere to the procedure set out in article 18 of the Statute.

13. I also wish to emphasise that nothing in the present Opinion should be understood as affecting the rights of the victims. I reaffirm my acknowledgment and solidarity with all victims of atrocious crimes in the present situation.

III. RELEVANT PART OF THE IMPUGNED DECISION

14. In the Impugned Decision, the Pre-Trial Chamber found as follows:

> 11. In its Request, Israel *inter alia* submits that, in its 8 April 2021 Letter, it asserted that the Notification was not 'sufficiently specific' and that it reiterated this assertion in its 26 April 2021 Letter. Israel does not indicate what the consequence of its contention would be, but to the extent it intends to argue that the Notification was deficient and as such cannot have served as a notification pursuant to article 18(1) of the Statute, this argument fails. Based on the material before it, the Chamber considers that the Prosecution complied with its statutory obligations when it provided Israel and other States with the Notification. As explained by the Appeals Chamber, a notification under article 18(1) of the Statute 'shall contain information "relevant for the purposes of article 18 paragraph 2" of the Statute', namely: 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 Prosecution intends to investigate. The Chamber specifically notes that the Notification included the types of alleged crimes, potential alleged perpetrators, the starting point of the relevant timeframe, as well as a reference to further relevant information, including the summary of the Prosecution's preliminary examination findings. Therefore, the Notification was sufficiently specific.[14]

15. The Pre-Trial Chamber also made the following determinations:

> 13. The Chamber further notes that, pursuant 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.
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> 14. In any case, filing of the Request at this point in time – namely 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. The purpose of

[14] Impugned Decision, para. 11 (footnotes omitted).

> Article 18(2) proceedings is to allow for complementarity-related admissibility challenges to be brought at the initial stage of the investigation and not at a point in time when the investigation has substantially advanced. Where a State is given the opportunity to assert its right to exercise jurisdiction, but it has declined, failed or neglected to do so, the investigation may proceed.[15]

IV. GROUNDS OF APPEAL

16. In its appeal against the Impugned Decision, Israel raises three main grounds of appeal:

i. First: the Pre-Trial Chamber erred in finding that the Prosecution's post-7 October 2023 investigations fall within the scope of its pre-existing investigation on the basis that it concerns the "same type of armed conflicts" and "same alleged parties to these conflicts";[16]

ii. Second: 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;[17] and

iii. Third: the Pre-Trial Chamber erred in failing to consider other defining parameters of the Prosecution's Article 18(1) notification in assessing whether it encompassed post-7 October 2023 events.[18]

V. PRELIMINARY ISSUES

A. The status of a non-State Party in its relations with the Rome Statute system and with the Court

17. As a preliminary matter, I consider it essential to recall my views expressed in my dissenting opinion to the Appeals Chamber's decision on the admissibility of the appeal of the State of Israel against Pre-Trial Chamber I's "Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice".[19]

18. Fundamentally, as indicated in my previous dissenting opinion, the Pre-Trial Chamber omitted to conduct a two-pronged analysis. First, in my view, the Pre-Trial

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[15] Impugned Decision, paras 13-14.
[16] Appeal Brief, pp. 7-15.
[17] Appeal Brief, pp. 15-17.
[18] Appeal Brief, pp. 17-21.
[19] Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, 24 April 2025, ICC-01/18-423-OPI (OA) (hereinafter: "*Palestine* OA Dissenting Opinion").

Chamber should have established, in general, the legal basis of the relationship between a non-State party to the Statute and the Court, in order to determine the legal standing of such a State.[20] Second, I considered that the Pre-Trial Chamber failed to assess Israel's procedural position against the rule of customary international law of *pacta tertiis nec nocent nec prosunt*, as codified in article 34 of the Vienna Convention on the Law of Treaties (hereinafter: "VCLT"). Articles 35 to 38 of the VCLT substantiate and provide for exceptions to the rule in article 34 of the VCLT, as well as any other applicable norms of public international law.[21]

19. I note that the legal problem which I previously identified persists. The Impugned Decision does not address this issue. Its resolution was crucial for the determination of the present appeal because the Impugned Decision rests on the assumption that the notification pursuant to article 18(1) of the Statute provided by the Prosecutor to Israel in March 2021, was valid and that the Court was in a position to impose statutory obligations on a non-State Party to the Statute without further justification. Judges have the duty to articulate the legal basis of their determinations. Therefore, in my view, it was incumbent upon the Pre-Trial Chamber to provide reasons and the legal basis under which Israel, a non-State Party to the Statute, was obliged: (i) to comply with a deadline set out in article 18(2) of the Statute and the associated legal implications arising therefrom, and (ii) to request deferral in April 2021.[22]

20. Notwithstanding the above, given the nature of the proceedings on appeal, the Appeals Chamber should not intervene in this regard. Indeed, the Appeals Chamber has previously held that appellate proceedings "are corrective in nature, conducted with the purpose of reviewing the proceedings before the [first instance] [c]hamber".[23] Furthermore, I note that the parties have not been afforded an opportunity to present their views on the matter. Nor has the Pre-Trial Chamber made a determination or conclusion on the matter that would enable the Appeals Chamber to engage in its review.

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[20] *Palestine* OA Dissenting Opinion, para. 28.
[21] *Palestine* OA Dissenting Opinion, para. 31.
[22] Impugned Decision, para. 13.
[23] Appeals Chamber, *Situation in the Republic of Kenya*, Decision on the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility", 28 July 2011, ICC-01/09-01/11-234 (OA), para. 12.

21. For the above reasons, I consider that, given the Pre-Trial Chamber's failure to address the issue of Israel's status as a non-State Party and the ensuing legal implications of this, it is in my view inappropriate for the Appeals Chamber to engage in a determination of this issue, as it falls outside the scope of the proceedings that led to the Impugned Decision.[24]

B. The principle of complementarity

22. The grounds of appeal raised by Israel entail essential issues dealing directly with the complementarity process. I consider that any issue bearing on the principle of complementarity must be carefully considered. It is a core principle that governs the exercise of the Court's jurisdiction and it is expressly stated in the Preamble of the Statute. This principle establishes that the Court complements, and does not substitute, national jurisdictions, which have the primary responsibility to investigate and prosecute the most serious crimes of concern to the international community.[25]

23. I wish to note that the complementarity regime is the product of a delicate balancing exercise. In the course of the negotiations for the Statute, some States highlighted the need for ensuring respect for national sovereignty and the primacy of domestic proceedings, and only accepted the complementarity provisions in the Statute when satisfied that these concerns were carefully addressed.[26] The Statute ensures respect for national sovereignty by clearly and objectively defining the criteria on which the Court's interventions can be based.[27]

24. One of the provisions enshrining this principle is article 14 of the Statute. Pursuant to this provision, "[a] State Party *may* refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been

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[24] *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. 53; Appeals Chamber, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 21 May 2014, ICC-01/11-01/11-547-Red (OA4), para. 43.
[25] Rome Statute, p. 1.
[26] J. T. Holmes, 'The Principle of Complementarity' in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) (hereinafter: "J. T. Holmes"), p. 74.
[27] J. T. Holmes, p. 74.

committed" (emphasis added). In this respect, I note that the right of States to initiate proceedings before the Court was never disputed during the drafting process of this provision, even though early proposals intended to limit this right to States having a "direct interest". The final version of this provision shows that the intention of the drafters was to broaden the States' right to submit a referral, essentially because "crimes under the Statute concern the international community as a whole"[28]. This version was retained and is currently part of article 14 of the Statute. States Parties serve as primary guardians of the Rome Statute system. They assume a vital role in ensuring its effective implementation, in accordance with the Preamble of the Statute.

25. As commentators have pointed out, referrals serve three fundamental purposes: (i) to enable States to trigger the Court's intervention, insofar as referrals constitute a sovereign decision of the States Parties;[29] (ii) to require the Prosecutor to consider their content in the framework of a preliminary examination;[30] and (iii) to protect the Prosecutor by limiting the possibility for States to influence the Prosecutor's choices once referrals are submitted.[31]

26. Through the referral mechanism, the States Parties can use their prerogative to trigger the exercise of the Court's jurisdiction. The primary legal consequence of a referral is the activation of the Court's operation in a particular situation.[32] It concerns the entire Rome Statute system and the Court, where the Prosecutor is but one of its organs and eventually a party in the judicial proceedings. In this system, in determining the Court's jurisdiction, it should be noted that "[t]he referral, once submitted to the

[28] The 1992 Working Group limited the right to initiate proceedings to States Parties that had accepted the jurisdiction of the Court or held the suspect in custody. The 1993 Draft Statute reflected similar conditions. The ILC Draft restricted this right to States Parties. Negotiations considered broad proposals, allowing any State Party to refer any crime, and restrictive proposals, limiting referrals to States with a "direct interest". The latter was rejected on the grounds that crimes under the Statute concern the international community as a whole. At the diplomatic conference, a provision extending the right of referrals to all States Parties was adopted without much opposition. *See* E. Chaitidou, 'Article 14: Referral of a situation by a State Party' in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck et al., Fourth Edition, 2022) (hereinafter: "E. Chaitidou"), pp. 854-858.
[29] E. Chaitidou, pp. 869-870.
[30] E. Chaitidou, p. 870.
[31] E. Chaitidou, p. 871.
[32] E. Chaitidou, pp. 870-871.

Prosecutor, is binding insofar as it definitely requires the Prosecutor to act",[33] in accordance with the legal framework of the Rome Statute.

27. Another provision that reflects the principle of complementarity is precisely article 18 of the Statute, whereby States are provided with early notice of the Prosecutor's determination that a reasonable basis exists to commence an investigation.[34] The importance of this provision lies in the need to ensure that States are aware of any investigation being conducted by the Prosecutor and to allow them to request the Prosecutor to defer investigations where the same matter is being investigated by their national judicial systems, thereby giving effect to the principle of complementarity.

28. The Assembly of States Parties (hereinafter: "Assembly"), the legislative body of the Rome Statute system, has repeatedly stressed the importance of the principle of complementarity, and recalled that

> the primary responsibility of States [is] to genuinely investigate and prosecute the most serious crimes of international concern and that, to this end, appropriate measures need to be adopted at the national level, and international cooperation and judicial assistance need to be strengthened, in order to ensure that national legal systems are willing and able genuinely to carry out investigations and prosecutions of such crimes.[35]

29. Similarly, as the President of the Assembly has consistently underscored, a more comprehensive understanding of the Court's complementary jurisdiction is critical to enhancing its acceptance. Such understanding is expected to encourage broader adherence, thereby advancing the objective of universality.[36]

30. It is the Court's duty to uphold the principle of complementarity as envisaged by the Rome Statute system. It is not for the Prosecutor alone, and on his or her own accord, to make determinations that could undermine or otherwise affect this principle and regime.

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[33] E. Chaitidou, p. 870.
[34] J. T. Holmes, p. 74.
[35] *See for instance*, Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, 6 December 2024, ICC-ASP/23/Res.1, pp. 2, 15-16.
[36] Assembly of States Parties, *Report of the Bureau on Complementarity, Annex I: Contributions from complementarity stakeholders*, 21 November 2024, ICC-ASP/23/24, p. 5.

VI. MERITS

31. As noted above, whilst I consider that all three grounds of appeal raised by Israel are inherently linked, in this Opinion I only set out the reasons for my disagreement with my colleagues' findings on the second ground of appeal and the outcome of the Majority Decision. In my view, this ground of appeal raised fundamental issues and questions that need to be resolved before the assessment of the first and third grounds of appeal, namely: (i) whether it was correct for the Prosecutor not to have followed the procedure established in regulation 45 of the Regulations when he received two sets of referrals submitted by seven States Parties pursuant to article 14 of the Statute and its legal implications and consequences; and (ii) whether the substantive content of the referrals, purportedly amounting to a new situation, required prior consideration.

32. In the present case, where a non-State party is involved, the principle of complementarity must be observed with particular rigour. For the reasons set out below, in my view, it was incumbent upon the Pre-Trial Chamber to carefully consider the States' submissions, rather than confining their examination to the making of one simple reference in the procedural history of the Impugned Decision.[37]

A. Whether Israel raised the issue of the Referrals' significance in its Article 18 Request

33. Turning to the second ground of appeal, I note the Majority's interpretation of Israel's argument, raised in the Article 18 Request, 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".[38] The Majority finds that in this submission Israel only addressed a formal aspect of the Prosecutor's duty under regulation 45 of the Regulations.[39] I respectfully disagree. It is not a mere formality that Israel sought to bring to the attention of the Pre-Trial Chamber. Israel expressed its concern about a possible breach of the referral procedure and its impact on Israel's ability to seek a deferral under article 18(2) of the Statute. Israel submitted that "[a] new situation has arisen since 7 October 2023, as reflected in the subsequent referrals

[37] Impugned Decision, para. 5.
[38] Article 18 Request, para. 30 (footnote omitted).
[39] Majority Decision, para. 99.

by seven States, requiring a new article 18(1) notice".[40] Hence, it requested that the Prosecutor provide a notification pursuant to article 18(1) of the Statute "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".[41]

34. The above arguments are central to Israel's Article 18 Request. By putting them forward, Israel sought to highlight the importance of compliance with the referral procedure and the adverse consequences of the Prosecutor's alleged failure to follow that procedure on Israel's ability to seek deferral.

35. Therefore, this concern was clearly expressed in the Article 18 Request. It was not irrelevant, but central to the Article 18 Request, and ought to have been considered in the Impugned Decision.

B. Whether the Referrals were a relevant consideration in the Pre-Trial Chamber's determination on the Article 18 Request

36. Having found that Israel clearly raised in its Article 18 Request the issue of compliance with regulation 45 of the Regulations, I would have proceeded to examine the relevance of that issue to the matter under the Pre-Trial Chamber's consideration. I note that regulation 45(1) of the Regulations sets out a procedure to follow when a State Party requests that the Prosecutor investigate a situation. Importantly, this regulation provides for a division of responsibilities in the referral procedure. It is the Prosecutor's duty "to inform the Presidency in writing as soon as a situation has been referred". The Presidency may then proceed to the assignment of a situation to an existing or newly constituted pre-trial chamber.[42] None of this occurred in the present proceedings, despite: (i) the clear labelling of the two Referrals as "referrals"; (ii) their express reliance on articles 13(a) and 14 of the Statute;[43] and (iii) their explicit reference to the "escalation of violence, including against civilians, and the alleged ongoing

[40] Article 18 Request, p. 7.
[41] Article 18 Request, para. 61 (emphasis added).
[42] E. Chaitidou, p. 871.
[43] 2023 Referral, pp. 1, 3; 2024 Referral, pp. 1-2.

commission of crimes within the jurisdictional scope of the Court", and to the alleged commission of "additional crimes" such as the crime of genocide.[44]

37. At this juncture, I also wish to highlight the importance of the referral procedure, whereby the Court has a duty to act upon a State referral. As the Appeals Chamber held, "a referral by a State Party requires the Prosecutor, in principle, to initiate an investigation into the specific situation".[45] Furthermore, pursuant to article 53(2)(c) of the Statute, if the Prosecutor concludes that there is not a sufficient basis for a prosecution, "the Prosecutor shall inform the Pre-Trial Chamber and *the State making a referral* under article 14 […] of his or her conclusion and the reasons for the conclusion" (emphasis added). This requirement demonstrates how a referral under article 14 of the Statute imposes a number of duties on the Court and gives effect to the States Parties' prerogative to trigger the exercise of the Court's jurisdiction over crimes under the Statute. The Prosecutor's duty under regulation 45(1) of the Regulations to inform the Presidency of a State Party referral is one such duty and must be exercised with due diligence.

38. Furthermore, I note the Pre-Trial Chamber's acknowledgement of the submission by Israel that another situation "has now been constituted as a result of the two referrals".[46] Despite its awareness of this submission by Israel, the Pre-Trial Chamber appears to have dismissed it as part of its overall conclusion that "[it] [was] not persuaded by Israel's submissions that 'a new situation has arisen'".[47] However, the Pre-Trial Chamber did not explain why its overall conclusion obviated the need to examine whether the referral procedure had been complied with.

39. I also note that the Prosecutor addressed Israel's submission as follows:

> The Prosecution did not notify the Presidency pursuant to regulation 45 of the [Regulations] of the referrals of South Africa, Bangladesh, Bolivia, Comoros and Djibouti, as well as Chile and México, because there was a pre-existing situation already assigned to [the Pre-Trial] Chamber encompassing the most recent events cited in those State referrals. […] This is consistent with the past practice of the Prosecution, in notifying the Presidency of State referrals when there was not a situation that encompassed the events referred. This is necessarily a situation-

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[44] 2023 Referral, pp. 3-4; 2024 Referral, pp. 1-2.
[45] *Venezuela* OA Judgment, para. 219.
[46] Impugned Decision, para. 5 *referring to* Article 18 Request, para. 61.
[47] Impugned Decision, para. 15.

> specific determination. In certain situations, where the Prosecution has not been able to make an immediate determination at the time of receiving the referral, whether the referral relates to an ongoing situation or to a new situation […] it has erred on the side of caution and notified the Presidency […].[48]

40. Whilst the Prosecutor acted on his own initiative and authority when dispensing with the procedure required under the Court's legal framework, the Pre-Trial Chamber appears to have accepted the Prosecutor's submission that there was no need to notify the Presidency because "there was a pre-existing situation already assigned to [the Pre-Trial] Chamber encompassing the most recent events cited in those State referrals".[49] The Pre-Trial Chamber did so, however, without providing any reasons and without regard to the Prosecutor's additional submission that in previous situations the Prosecutor had chosen to "[err] on the side of caution and notif[y] the Presidency".[50] In my view, the Prosecutor's failure to inform the Presidency of the situation referred to him by two groups of States vitiated any subsequent procedural steps.

41. Even though the Prosecutor did not follow the procedure set out in the Statute and the Regulations and provided no legal basis for this departure, the Pre-Trial Chamber did not expressly engage with the aforementioned submission of the Prosecutor. Given the serious concerns, as expressed above, about the Prosecutor's compliance with the referral procedure in this instance, I consider that the Pre-Trial Chamber ought to have addressed this issue and set out its findings clearly, bearing in mind the importance of the complementarity regime and the rights of States.

42. For these reasons, I am of the view that the Pre-Trial Chamber erred by focusing on the parameters of the Prosecutor's ongoing investigation, without expressly considering Israel's argument concerning the Prosecutor's failure to inform the Presidency of the Referrals potentially constituting a new situation. The Pre-Trial Chamber had a duty to address and resolve any uncertainties Israel submitted for resolution. In this context, the Pre-Trial Chamber failed to take into consideration the procedure established in regulation 45 of the Regulations, which provides that "[t]he

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[48] 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 (hereinafter: "Prosecutor's Response to Article 18 Request"), para. 22, fn 29.
[49] Prosecutor's Response to Article 18 Request, para. 22, fn 29.
[50] Prosecutor's Response to Article 18 Request, para. 22, fn 29.

Prosecutor *shall* inform the Presidency in writing as soon as a situation has been referred to the Prosecutor by a State Party under article 14 or by the Security Council under article 13, sub-paragraph (b)" (emphasis added). As a result, the Impugned Decision lacks sufficient reasoning on a relevant matter. Accordingly, the Pre-Trial Chamber's failure to engage in the above analysis and to provide reasons, rendered the outcome of the Impugned Decision unreliable.

43. I note that the Majority examined the substantive part of the second ground of appeal and concluded that, rather than identifying a new situation, the Referrals were submitted with a view to urging the Prosecutor to advance the investigation in respect of the alleged crimes committed before 7 October 2023, as well as those committed on and after that date, as forming part of a single situation arising from the initial referral.[51] Unlike the Majority, I would not have engaged *de novo* in any substantive assessment of the intended effect of the Referrals, nor in making findings and conclusions. Again, consistent with the corrective nature of the Appeals Chamber's review, I find that such assessment is more appropriately made by the Pre-Trial Chamber upon its re-examination of the matter.

44. It is imperative that judicial decisions be fully and sufficiently reasoned in order to ensure that the parties be apprised of the outcome of the proceedings and the reasons therefor. By so doing, judicial certainty and legal predictability are upheld. Any departure from these duties needs to be sufficiently explained.

45. Finally, I am of the view that in the present circumstances the issue of compliance with the referral procedure is of paramount importance. It ought to have been considered prior to any determination of substance.

C. The requirement of sufficient reasoning in the Court's decisions

46. I consider that the Pre-Trial Chamber's failure to expressly address Israel's submissions regarding the legal effect of the Referrals and the Prosecutor's obligations arising therefrom, amounts to an error of law and procedure for the following reasons.

[51] Majority Decision, para. 105.

47. At the outset, I recall that "the obligation to provide a reasoned, complete and self-explanatory decision is inherent to the guarantees of due process of law".[52]

48. This requirement arises as a corollary of the duty to ensure judicial certainty, which is connected with fairness and due process of law. As I have previously stated, the proper administration of justice requires strict application of the relevant legal norms, respect for the principle of legality, and compliance with due process of law.[53] A decision can only be considered reliable if it complies with these requirements.[54] A decision needs to be issued in conformity with the procedural requirements established by the norms governing the issuance and "production" of the decision.[55]

49. The judicial duty to provide a sufficiently reasoned decision requires that all decisions reflect the reasoning of the Judges in a clear, complete, and unambiguous manner.[56] This duty serves two indispensable purposes: (i) to allow the parties to avail themselves of their right to appeal; and (ii) to enable the Appeals Chamber to exercise its appellate functions.

50. On the one hand, judicial decisions should provide sufficient reasoning so as to enable the parties to effectively exercise their right to appeal.[57] In this regard, the ECtHR has repeatedly affirmed that "courts must indicate with sufficient clarity the grounds on which they based their decision. It is this, *inter alia*, which makes it possible for the accused to exercise usefully the rights of appeal available to him".[58] It is thus not only an established principle but also a reflection of the proper administration of justice that judgments of courts and tribunals should adequately state the reasons on which they are based.[59] Although typically articulated in the context of decisions

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[52] Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Separate Opinion of Judge Luz Del Carmen Ibáñez Carranza, 1 November 2024, ICC-01/04-02/06-2908-OPI (A, A6, A7) (hereinafter: "*Ntaganda* A, A6, A7 Separate Opinion"), para. 10.
[53] *Ntaganda* A, A6, A7 Separate Opinion, para. 25.
[54] *Ntaganda* A, A6, A7 Separate Opinion, para. 25.
[55] *Ntaganda* A, A6, A7 Separate Opinion, para. 25.
[56] *Ntaganda* A, A6, A7 Separate Opinion, para. 26.
[57] ECtHR (Fourth Section), *Hirvisaari v. Finland*, Application no. 49684/99, Judgment (Merits and Just Satisfaction), 25 December 2001, para. 30.
[58] Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Annex 1 to the Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence", 15 December 2022, ICC-02/04-01/15-2023-Anx1 (A2) (hereinafter: "*Ongwen* A2 Partly Dissenting Opinion"), para. 41, *referring to* ECtHR (Chamber), *Hadjianastassiou v. Greece*, Application no. 12945/87, Judgment (Merits and Just Satisfaction), 16 December 1992, para. 33.
[59] *Ongwen* A2 Partly Dissenting Opinion, para. 41, *referring to* ECtHR (Grand Chamber), *García Ruiz v. Spain*, Application no. 30544/96, Judgment (Merits), 21 January 1999, para. 26.

involving the rights of the accused, I consider that this principle applies to all judicial decisions.[60] In the same vein, the IACtHR has recalled that "[t]he duty to state grounds is a guarantee linked to the proper administration of justice, protecting the right of citizens to be tried for the reasons provided by Law, and giving credibility to the legal decisions adopted in the framework of a democratic society".[61] The importance of the requirement to give reasons is accentuated in instances where a party's submission is determinative of the outcome of the proceedings.[62]

51. On the other hand, as noted above, the Appeals Chamber's review is corrective in nature. Thus it can only carry out its functions if it is in the position to understand and review the first-instance Chamber's reasoning and findings. In this respect, I 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'".[63]

52. In the same vein, the Appeals Chamber has held that "in the absence of any further reference by the Trial Chamber to the relevant arguments of the Defence […], and any substantial findings of the Trial Chamber on the […] issues raised by the Defence, it is unclear whether and, if so, why and how, the Trial Chamber rejected the [Defence's] submissions".[64]

53. In my view, whilst Israel expressly raised the question of whether the two sets of Referrals had given rise to a new situation and to related duties of the Prosecutor,[65] the Pre-Trial Chamber erred in failing to provide sufficient reasoning that would both

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[60] *Ongwen* A2 Partly Dissenting Opinion, para. 43.
[61] IACtHR (First Court of Administrative Disputes), *Apitz Barbera et al. v. Venezuela*, Judgment, 5 August 2008, para. 77.
[62] ECtHR (Chamber), *Ruiz Torija v. Spain*, Application no. 18390/91, Judgment (Merits and Just Satisfaction), 9 December 1994, paras 29-30. *See also* ECtHR (Chamber), *Hiro Balani v. Spain*, Application no. 18064/91, Judgment (Merits and Just Satisfaction), 9 December 1994, paras 27-28; ECtHR (Second Section), *Petrović and Others v. Montenegro*, Application no. 18116/15, Judgment (Merits and Just Satisfaction), 3 December 2018, para. 41.
[63] *Venezuela* OA Judgment, para. 187.
[64] Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 12 September 2022, ICC-01/04-02/06-2782 (A4, A5), para. 491.
[65] Article 18 Request, paras 19-30.

enable the parties to effectively exercise their right to appeal and the Appeals Chamber to exercise its appellate functions.

D. The error materially affected the Impugned Decision

54. For these reasons, I find that the Pre-Trial Chamber erred in law and procedure, by failing to address Israel's submissions and give reasons for its rejection of Israel's argument that the Referrals gave rise to a new situation and triggered the Prosecutor's duty under regulation 45(1) of the Regulations. In my view, these errors materially affected the Impugned Decision. Had the Pre-Trial Chamber duly considered Israel's arguments, it would have had to address the impact of the Referrals on the determination of whether a new situation was established and whether the Prosecutor's duty to give a new notification pursuant to article 18(1) of the Statute was triggered. Furthermore, had the Pre-Trial Chamber considered the relevant law establishing the procedure to be followed when a situation is referred to the Prosecutor, the Pre-Trial Chamber would have had to issue a different decision.

VII. FINAL CONCLUSIONS

55. For the foregoing reasons, in the second ground of appeal, I find that

i. The Pre-Trial Chamber erred in failing to address and provide reasons in relation to the legal impact of the Referrals and the Prosecutor's failure to follow the legal procedure established in regulation 45(1) of the Regulations. This issue is important as it concerns compliance with the Court's duties *vis-à-vis* States Parties making referrals and has a direct impact on the complementarity regime established in the Statute;

ii. The referral procedure is clearly set out in the Court's legal texts and must be followed. Non-compliance with that procedure may have legal implications;

iii. In the case at hand, there were doubts as to whether the aforementioned procedure was complied with and it was the Pre-Trial Chamber's duty to assess the veracity of those doubts and to provide reasons for its conclusions, and, if found to be substantiated, to assess the legal impact of any departure from the applicable procedure;

iv. By failing to do so, the Pre-Trial Chamber committed errors of law and procedure that materially affected the Impugned Decision;

v. Following the procedure set out in regulation 45(1) of the Regulations to inform the Presidency in writing when a situation is referred to the Prosecutor by States not only ensures compliance with the law, but also with the principle of complementarity, which is a core feature of the Rome Statute system. It further safeguards judicial certainty and legal predictability;

vi. A chamber providing sufficient reasoning is a guarantee of due process of law and fairness. Judicial decisions must observe this requirement in order to be reliable; and

vii. Given its vocation of universality, it is crucial for the Court to carefully observe the procedure set out in the Statute and to duly address the legal questions submitted for its determination. This is all the more necessary when non-States parties are involved.

56. I wish to point out that nothing in this Opinion should be seen as undermining the victims' recourse to international justice. I acknowledge the suffering of victims and express my unwavering support for their right to seek justice. I wish to recall that victims are at the heart of the Rome Statute. However, justice can only be rendered in accordance with the applicable procedure. If it is not, its value will be questioned. Only by duly following the procedure set out in the Court's legal texts, can the Prosecutor and the Court ensure the prompt, proper, and fair administration of justice. The interests of victims and justice are better served with a process that is procedurally unassailable.

VIII. THE APPROPRIATE RELIEF

57. In view of the foregoing considerations, I find that the Pre-Trial Chamber erred in failing to expressly address the relevant question of whether the Referrals gave rise to a new situation and triggered the Prosecutor's duty under regulation 45(1) of the Regulations. Unlike my colleagues, I would not have addressed the substance of the intended effect of the Referrals. Given the corrective function of the Appeals Chamber and the nature of the error identified above, I would have remanded the matter to the Pre-Trial Chamber for a new examination.

58. In light of the aforementioned errors under the second ground of appeal and having remanded the matter to the Pre-Trial Chamber, I am unable to examine the first and third grounds of appeal.

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

Judge Luz del Carmen Ibáñez Carranza

Dated this 15th day of December 2025

At The Hague, The Netherlands