Cour Pénale Internationale

International Criminal Court

# DISSENTING OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

## I. KEY FINDINGS

**i.** A decision granting or denying a request under article 18 of the Statute constitutes a decision with respect to admissibility and is directly appealable under articles 18(4) and 82(1)(a) of the Statute, as it pertains to a preliminary ruling on admissibility.

**ii.** A pre-trial chamber seized of a request under article 18 of the Statute, by a State that is a not a party to the Court's treaty and has not accepted the jurisdiction of the ICC, before addressing its merits is required to: (i) define the relationship between such a State and the Court, as an international organisation, so as to specify the State's legal standing before the Court; and (ii) establish the legal basis to apply the rights and obligations arising from the Statute, the treaty that created the Court, to such a State.

## II. INTRODUCTION

1. Today, the majority of the Appeals Chamber (hereinafter: "Majority ") dismissed as inadmissible the appeal of the State of Israel (hereinafter: "Israel").[1] This appeal was directed against the decision of Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber") on Israel's request for an order to the Prosecutor to give a new or adjusted notice under article 18(1) of the Statute, following the events of 7 October 2023 (hereinafter: "Article 18(1) Request"[2] and "Impugned Decision"[3]). I wish to

[1] Appeal of "Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice" (ICC-01/18-375), 13 December 2024, ICC-01/18-401 (hereinafter: "Appeal Brief"), with Annex A, ICC-01/18-401-AnxA.
[2] 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.
[3] 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.

respectfully dissent from the Majority's decision (hereinafter: "Majority Decision") for the reasons developed in the present opinion.

2. The Majority has decided to dismiss Israel's appeal on the basis that the Impugned Decision is not a decision with respect to admissibility for the purposes of article 82(1)(a) of the Statute.[4] I cannot agree to this conclusion. The Impugned Decision was rendered pursuant to article 18 of the Statute, which is entitled "[p]reliminary rulings regarding admissibility". Consequently, Israel is entitled to avail itself of the automatic right to appeal under articles 18(4) and 82(1)(a) of the Statute.

3. On the merits of the appeal, I am further of the view that the primary issue arising therefrom is that the Pre-Trial Chamber failed to conduct a critical preliminary analysis before addressing Israel's Article 18(1) Request. The Pre-Trial Chamber limited its assessment to article 18 of the Statute viewed in isolation. However, the Pre-Trial Chamber was, in the concrete circumstances, under the legal obligation to consider the position and standing of Israel, in accordance with the broader framework of public international law. In particular, the Pre-Trial Chamber should have assessed the situation of a State not party to the Statute exercising its sovereign right to interact with the Court for a specific purpose. Accordingly, the Pre-Trial Chamber should have: (i) established, in general, the legal basis of the relationship between a State not party to the Statute and the Court, in order to determine the legal standing of such a State; and (ii) specifically assessed 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"), and any other applicable norms of public international law.

4. In my view, the Pre-Trial Chamber committed an error of law that materially affected the Impugned Decision, primarily by failing to direct itself to the relevant rules and principles of public international law in addressing Israel's request under article 18(1) of the Statute.

5. These determinations are intrinsically linked to Israel's first ground of appeal, which asserts that the Pre-Trial Chamber "erred in law in presupposing that Israel's challenge was untimely, despite nonetheless deciding the request",[5] and consequently,

[4] Majority Decision, paras 33-34.
[5] Appeal Brief, para. 4.

to the second and third grounds of appeal.[6] I consider that the Pre-Trial Chamber was bound to carry out the analysis under public international law, as set out above, prior to determining that Israel's request was untimely. As a result, I would have reversed the Impugned Decision and remanded the matter to the Pre-Trial Chamber for a renewed assessment in accordance with the applicable framework under public international law.

## III. STANDARD OF REVIEW

6. Regarding errors of law, the Appeals Chamber has previously held that it

> will not defer to the [relevant] Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the [first instance] Chamber misinterpreted the law.[7]

7. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.[8] A decision is "materially affected by an error of law" if the chamber "would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error".[9]

8. The appellant is obliged to set out all the alleged errors in the appeal brief and "indicate, with sufficient precision, how [the alleged] error would have materially affected the impugned decision".[10]

9. The above standard of review will guide the analysis of the present opinion.

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[6] Appeal Brief, paras 5-6.
[7] *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 17 February 2012, ICC-02/05-03/09-295 (OA2) (hereinafter: "*Banda and Jerbo* OA2 Judgment"), para. 20. *See also The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals against the decision of Trial Chamber II of 14 July 2023 entitled "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659", 1 November 2024, ICC-01/04-02/06-2908-Red (A6 A7) (hereinafter: "*Ntaganda* A6 A7 Judgment"), para. 14.
[8] *Banda and Jerbo* OA2 Judgment, para. 20; *Ntaganda* A6 A7 Judgment, para. 14.
[9] *Ntaganda* A6 A7 Judgment, para. 14. *See also Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04-169 (OA), para. 84.
[10] *The Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408 (OA3), para. 48.

## IV. RELEVANT PART OF THE IMPUGNED DECISION

10. 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.[11]

11. 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 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.[12]

[11] Impugned Decision, para. 11 (footnotes omitted).
[12] Impugned Decision, paras 13-14.

## V. GROUNDS OF APPEAL

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

i. First: the Pre-Trial Chamber erred in law in asserting that the timing of Israel's request was contrary to the "very object and purpose of the complementarity framework";

ii. Second: the Pre-Trial Chamber erred in law and in fact in concluding that there has been no substantial change in the parameters of the Prosecution's investigation; and

iii. Third: the Pre-Trial Chamber erred in law by providing no reasons and rejecting Israel's submission that a new situation had arisen following two post-7 October 2023 referrals made by seven States Party pursuant to article 14 of the Statute.

## VI. APPLICABLE LAW

13. Article 18 of the Statute provides in relevant part as follows

> 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, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, 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. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.
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> 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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> […]
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> 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.
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> […]

14. Article 21(1) provides that

> 1. The Court shall apply:
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> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
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> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
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> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

## VII. ADMISSIBILITY OF THE APPEAL

15. I respectfully disagree with the outcome of the Majority Decision, which dismisses Israel's appeal as inadmissible. In particular, I am unable to agree with the determinations made by my colleagues in that: (i) "when making the aforementioned 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'], Pre-Trial Chamber I did not rule on the admissibility of any potential case under article 18 of the Statute"; and (ii) "the operative part of the Impugned Decision does not pertain directly to a question on the admissibility of any potential case".[13] I consider that Israel's appeal against the Impugned Decision is admissible under article 18(4) and article 82(1)(a) of the Statute, for the following reasons.

16. Despite its status as a State not party to the Statute, Israel submitted the Article 18(1) Request before the Pre-Trial Chamber "without prejudice to [its] status [as a State not party to the Statute], to Israel's well-known position regarding the Court's manifest lack of jurisdiction over the so-called 'situation in Palestine', as well as its rights under the Rome Statute to bring jurisdictional and/or admissibility challenges before the Court".[14] Accordingly, Israel requested "an order from the Pre-

[13] Majority Decision, para. 33.
[14] Article 18(1) Request, para. 4 (footnote omitted).

Trial Chamber requiring the Prosecutor, *pursuant to article 18(1) of the Statute of the International Criminal Court*, to notify Israel of any investigation that it is now conducting, or intends to conduct, into events in and around Gaza from 7 October 2023 onwards".[15] In its view, "[i]n line with the principle of complementarity, a proper notification *under article 18(1)* would allow Israel to exercise its right to assert its primary jurisdiction, and would facilitate its ability to respond to the Prosecutor *in accordance with article 18(2)*".[16]

17. The Pre-Trial Chamber ruled on concrete aspects of Israel's Article 18(1) Request. It specifically held that: (i) the notification provided by the Prosecution under article 18(1) of the Statute in 2021 "was sufficiently specific";[17] (ii) "filing of the [Article 18(1) 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";[18] and (iii) "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", in comparison with the Prosecutor's 2021 notification under article 18(1) of the Statute and, therefore, there is no obligation "to provide a new notification to the relevant States pursuant to article 18(1) of the Statute, and as such to provide a new one-month timeline for requests for deferral".[19] In the operative part, 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".[20]

18. Accordingly, Israel expressly approached the Pre-Trial Chamber under article 18 of the Statute with a view to obtaining a new or revised notice from the Prosecutor under article 18(1) of the Statute, so as to be able to invoke article 18(2) of the Statute. Israel, therefore, specifically sought to exercise the rights set up under article 18 of the Statute for complementarity purposes. The Pre-Trial Chamber explicitly ruled on Israel's application for an order to the Prosecutor to provide a new notice under

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[15] Article 18(1) Request, para. 1 (emphasis added).
[16] Article 18(1) Request, para. 6 (emphasis added).
[17] Impugned Decision, para. 11.
[18] Impugned Decision, para. 14.
[19] Impugned Decision, para. 15.
[20] Impugned Decision, p. 9.

article 18(1) of the Statute and, in the operative part, directly rejected it with reference to the same provision. This means that the Impugned Decision was undeniably grounded in article 18 of the Statute, which is entitled "[p]reliminary rulings regarding admissibility". As a result, I consider that the conclusions reflected in paragraphs 33 and 34 of the Majority Decision do not withstand scrutiny and that the appeal is admissible.

19. I am further of the view that the jurisprudence cited in paragraphs 30-31 of the Majority Decision is inapposite to the present proceedings. In my view, article 82(1)(a) of the Statute encompasses appeals brought against decisions alike the present one rendered under article 18 of the Statute.

20. The jurisprudence cited by the Majority instead is all based on scenarios of challenges to concrete cases under article 19 of the Statute, which are different to the present one. In the *Situation in the Republic of Kenya*, the Appeals Chamber noted that the impugned decision was neither a ruling on admissibility pursuant to article 18 of the Statute, nor a decision on the admissibility of the case under article 19 of the Statute.[21] In the *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, the Appeals Chamber found that the impugned decision "is not by its nature a decision determining admissibility" and that "it does not determine admissibility".[22] In the case of *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, the Appeals Chamber considered that the impugned decision could not be "characterised as a decision that consisted of, or was based on, a ruling that the case against Mr Gaddafi was admissible or inadmissible".[23] In the cases of *Germain Katanga* and *Ali Muhammad Ali Abd-Al-Rahman*, the appeals were dismissed because the impugned decision did not pertain to a question of jurisdiction of the ICC

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[21] *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), paras 18, 21.
[22] *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", 6 November 2015, ICC-01/13-51 (OA), paras 50-51.
[23] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on "Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi'" of 10 April 2012, 25 April 2012, ICC-01/11-01/11-126 (OA2), para. 14.

and were unrelated to questions of admissibility under article 18 of the Statute.[24] The only exception can be found in the *Situation in the Democratic Republic of the Congo*, where the Appeals Chamber found the Prosecutor's appeal to be admissible under article 82(1)(a) of the Statute because the impugned decision was based on a ruling of the admissibility of the case.[25]

21. I also disagree with the Majority's reference to article 19(2)(b) of the Statute in paragraph 38 of the Majority Decision. In my view, there is a fundamental distinction between articles 18 and 19 of the Statute.

22. Article 18 of the Statute concerns rulings on admissibility in the context of the preliminary examination by the Prosecutor and for the purposes of complementarity. Indeed, complementarity is one of the fundamental features of the Rome Statute. It enshrines the obligation of States Parties to exercise their primary jurisdiction in respect of atrocious crimes. Article 18 challenges can only be made at this stage of the proceedings.

23. In this respect, commentators have underlined that article 18 of the Statute serves four purposes: (i) it underlines the primary responsibility and right of States to investigate and prosecute crimes within the jurisdiction of the ICC; (ii) it allows for States to assert their jurisdiction at a very early stage when individual suspects usually have not been identified yet and neither the exact conduct nor its legal classification has been defined; (iii) it ensures that the Prosecutor, in the exercise of his discretionary power, is accountable to a superior authority; and (iv) the involvement of the Pre-Trial Chamber protects the Prosecutor from unfounded accusations of bias and from political manipulations.[26] Such decisions are envisaged by the Rome Statute as preliminary rulings regarding admissibility under article 18 of the Statute and, as such, the scope of

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[24] See *The Prosecutor v. Germain Katanga*, Decision on the admissibility of the appeal against the "Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350", 20 January 2014, ICC-01/04-01/07-3424 (OA14), paras 34, 39; *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Decision on the admissibility of the appeal, 4 September 2020, ICC-02/05-01/20-145 (OA3), para. 9.

[25] *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04-169 (OA), para. 18.

[26] D. Ntanda Nsereko and M. Ventura, 'Article 18: Preliminary rulings regarding admissibility' in K. Ambos (ed.) *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck *et al*., Fourth Edition, 2022) (hereinafter: "Ambos Commentary"), p. 1015.

admissibility challenges under this provision concern the context of the preliminary examination stage of proceedings before the Court.

24. On the other hand, article 19 of the Statute is confined to the case stage. As such, the analysis and ruling adopted under this provision are connected to the test envisaged by article 17 of the Statute. Thus, it has to be, *inter alia,* determined if, in comparison with the proceedings before the ICC, the investigations and/or prosecutions on the domestic level pertain to the same individual and substantially the same conduct, and if the State concerned is unwilling or unable to genuinely carry out the investigation or prosecution. In this regard, commentators have discussed that article 19 of the Statute applies to admissibility challenges made by States and accused persons pursuant to the provisions of article 17 of the Statute and in the context of concrete cases involving investigations against identified individuals.[27]

25. In view of these differences, rulings under article 18 of the Statute should not be confused with and are not a substitute for the possibility to raise an admissibility challenge pursuant to article 19 of the Statute. Further challenges under article 19 of the Statute do not cure the failure to dispose an admissibility challenge under article 18 of the Statute at the appropriate stage of the proceedings. Therefore, in my view, the Majority's consideration in this regard is not adequate for the purposes of the case at hand.

26. In sum, the Impugned Decision effectively rejected Israel's request pursuant to article 18(1) of the Statute. A decision granting or denying a request under article 18 of the Statute constitutes a decision with respect to admissibility and is directly appealable under articles 18(4) and 82(1)(a) of the Statute, as it pertains to a preliminary ruling on admissibility. I, therefore, consider that the requirements to admit the appeal have been met.

## VIII. MERITS

27. Having found that the appeal is admissible under articles 18(4) and 82(1)(a) of the Statute, I am further of the view that the Pre-Trial Chamber committed an error of law. Before analysing the merits of the request made by Israel, a State not party to the

[27] D. Ntanda Nsereko and M. Ventura, 'Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case', Ambos Commentary, p. 1036, fn. 3.

Statute, the Pre-Trial Chamber was, because of the concrete circumstances of the present case, legally required under article 21(1)(b) of the Statute to carry out a two-pronged analysis. These concrete circumstances are that (i) Israel had submitted the Article 18(1) Request to the Pre-Trial Chamber while asserting that it is not a State-Party to the Rome Statute and that it does not recognise the Court's jurisdiction; and (ii) Israel submitted the Article 18(1) Request because the Prosecutor denied Israel's request for a deferral under article 18(2) of the Statute considering that "[h]aving expressly declined to make an application for deferral of the investigation within the prescribed time limit [in 2021], Israel has no standing now, under the Statute, to make such application".[28] The two-pronged analysis that would have impacted the analysis of the merits of the request consists of: (i) determining the relationship between Israel, as a State not party to the Statute, and the Court, as an international organisation; and (ii) defining the procedural position and legal standing of Israel before the Court, including the timing of a valid relationship.

## A. The relationship between a State not party to the Rome Statute and the ICC

28. First, as a general matter, the Pre-Trial Chamber failed to define the relationship between Israel, as a State not party to the Statute, and the Court, as an international organisation, under the framework of public international law.

29. The Statute, as a multilateral treaty,[29] is a binding agreement between the States Parties and, as such, falls within the framework of the international law of treaties.[30] Treaties are one of the primary sources of public international law in conformity with article 38(1)(a) of the Statute of the International Court of Justice (hereinafter: "ICJ Statute" and "ICJ"). Moreover, the relationship between subjects of international law is governed by public international law.[31] The ICC, which is both an international organisation and a court of law, is vested with international legal

[28] Annex B to Prosecution response to Israel's "Appeal of 'Decision on Israel's request for an order to the Prosecution to give an article 18(1) notice' (ICC-01/18-375)", 13 January 2025, ICC-01/18-407-Conf-AnxB, p. 9.
[29] W. Rückert, 'Article 4: Legal status and powers of the Court' in Ambos Commentary, p. 99.
[30] M. N. Shaw, 'The Law of Treaties' in *International Law* (Essex Court Chambers/Lauterpacht Centre for International Law, University of Cambridge, Ninth Edition, 2021), pp 788, 1149.
[31] J. Crawford, 'International organizations' in *Brownlie's Principles of Public International Law* (Oxford University Press, Ninth Edition, 2019), p. 180.

personality and has the capacity to interact with States and other subjects with legal standing under public international law.

30. On this basis, I am of the view that a pre-trial chamber seized of a request under article 18 of the Statute, by a State that is a not a party to the Court's treaty and has not accepted the jurisdiction of the ICC, before addressing its merits is required to: (i) define the relationship between such a State and the Court, as an international organisation, so as to specify the State's legal standing before the Court; and (ii) establish the legal basis to apply the rights and obligations arising from the Statute, the treaty that created the Court, to such a State.

## B. The rule of *pacta tertiis nec nocent nec prosunt*

31. Second, and more specifically, the Pre-Trial Chamber ignored an essential rule arising from the aforementioned framework of public international law, within which the Court interacts with a State that is not party to its Statute. The essential rule ignored by the Pre-Trial Chamber is the rule of customary international law regarding the relative effect of treaties (*pacta tertiis nec nocent nec prosunt*), as codified in article 34 of the VCLT.

32. The relative effect of treaties is expressed by the maxim *pacta tertiis nec nocent nec prosunt*, which entails that treaty agreements neither impose obligations nor confer rights upon third parties, and is the counterpart to the principle of *pacta sunt servanda*.[32] It ensures that only those States that have expressed their consent to be bound by a treaty can incur rights and obligations pursuant to the terms of that treaty, while safeguarding the right of third States not to be so bound.[33]

33. As determined by the Permanent Court of International Justice (hereinafter: "PCIJ"), "[a] treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States".[34] In the *Anglo-*

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[32] *See* International Law Commission, Yearbook of the International Law Commission, A/CN.4/SER. A/1966/Add. 1, 1966, vol. II (hereinafter: "ILC 1966 Yearbook"), p. 226. *See also* A. Proells, 'Article 34 General rule regarding third States' in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (Springer, Second Edition, 2018) (hereinafter: "*Proells* Article 34 VCLT Commentary"), pp 655-656.
[33] ILC 1966 Yearbook, p. 226; *Proells* Article 34 VCLT Commentary, p. 655.
[34] PCIJ, *Case concerning certain German interests in Polish Upper Silesia (The Merits), Germany v. Poland*, Judgment, 25 May 1926, Series A, no. 7 at p. 29. *See similarly* PCIJ, *Case of the Free Zones of Upper Savoy and the District of Gex, France v. Switzerland*, Judgment, 7 June 1932, Series A/B, no. 46

*Iranian Oil Company* case, the ICJ similarly ruled that "[a] third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*".[35]

34. Article 34 VCLT, which provides that "[a] treaty does not create either obligations or rights for a third State without its consent", codifies the rule of *pacta tertiis nec nocent nec prosunt*. This provision applies not only as a matter of treaty law, but also as a rule of customary international law. According to the International Law Commission, "there appears to be almost universal agreement that, in principle, a treaty creates neither obligations nor rights for third States without their consent" and "there is abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals, as well as in the writings of jurists".[36]

35. I further note that articles 35 to 37 of the VCLT substantiate the general rule laid down in article 34 of the VCLT with regard to obligations and rights provided by a treaty to States not party. In addition, article 38 of the VCLT provides an exception to these norms, which is nevertheless governed by specific rules of customary international law and other relevant norms of public international law.

36. As a result, article 34 of the VCLT applies either as treaty rule or a rule of customary international law in respect of the Statute.[37] Indeed, Pre-Trial Chamber I has appropriately invoked this provision in its previous jurisprudence, concluding that "it is only with the State's consent that the Statute can impose obligations, or confer rights, on a State that is not party to it".[38]

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at p. 49 ("[…] Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it").

[35] ICJ, *Anglo-Iranian Oil Company Case*, *United Kingdom v. Iran*, Judgment, 22 July 1952, I.C.J. Reports 1952, p. 93 at p. 20. *See similarly* ICJ, *North Sea Continental Shelf Cases*, *Federal Republic of Germany v. Denmark; Federal Republic of German v. Netherlands*, Judgment, 20 February 1969, I.C.J. Reports 1969, p. 3 at para. 27 ("[i]t is admitted on behalf of Denmark and the Netherlands that in these circumstances the [1958 Convention on the Continental Shelf] cannot, as such, be binding on the Federal Republic [of Germany], in the sense of the Republic being contractually bound by it").

[36] ILC 1966 Yearbook, p. 226. *See also Proells* Article 34 VCLT Commentary, p. 656. The European Court of Justice has also qualified this rule as a "principle of general international law [that] finds particular expression in Article 34 of the [VCLT]". *See* European Court of Justice, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, 25 February 2010, C-386/08 [2010], European Court Reports 2010 I-01289, para. 44.

[37] *See* W. Rückert, 'Article 4: Legal status and powers of the Court' in Ambos Commentary, p. 104.

[38] Pre-Trial Chamber I, *The Prosecutor v. Saifal-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania an d refer the matter to the Security Council, 28 August 2013, ICC-01/11-01/11-

37. In the proceedings at hand, Israel repeatedly expressed its position that it does not recognise the jurisdiction of the ICC. Following the Prosecution's notification under article 18(1) of the Statute in 2021, Israel sent a letter to the Prosecution on 8 April 2021, indicating its "firm […] view that the Court manifestly lacks jurisdiction" over the Situation, and submitting that 'Israel's robust legal system […] has and will continue to examine and investigate rigorously all allegations of misconduct or crimes […] and to hold to account those persons within its jurisdiction found to be responsible'".[39] After the Prosecutor requested Israel to indicate whether it intended to invoke article 18(2) of the Statute, Israel reiterated its position that "the Court manifestly lacks jurisdiction" over the Situation on 26 April 2021.[40]

38. Israel requested a deferral to the Prosecutor in May 2024, which was denied by the Prosecutor on the basis that the notice provided under article 18(1) of the Statute in 2021 was valid and Israel lacked standing to make such a request in May 2024. Following this denial, Israel submitted its Article 18(1) Request in September 2024, thereby triggering judicial proceedings. Despite Israel's interaction with the Court, it persisted in its position that the ICC lacks jurisdiction over its nationals and other individuals falling within its jurisdiction. Israel indicated as follows, in the Article 18(1) Request:

> Israel is not a Party to the Rome Statute. This filing is without prejudice to that status, to Israel's well-known position regarding the Court's manifest lack of jurisdiction over the so-called 'situation in Palestine', as well as its rights under the Rome Statute to bring jurisdictional and/or admissibility challenges before the Court.[41]

39. Israel's interaction with the ICC is based on article 18 of the Statute, which is available to States Parties and States not party to the Statute alike. This is evident from

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420, para. 12. *See also* Pre-Trial Chamber I, *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37, para. 36 ("[t]he Chamber recognizes the paramount importance of the principle of *pacta tertiis nec nocent nec pro sunt*. It should be recalled though that this principle is not without exceptions (see, for example, article 38 of the Vienna Convention on the Law of Treaties, as well as other exceptions)" (footnotes omitted)); Partly Dissenting Opinion of Judge Péter Kovács, 5 February 2021, ICC-01/18-143-Anx1 annexed to Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', para. 375 (the principle of *pacta tertiis nec nocent nec prosunt* is an "elementary [rule] of international law and at the same time [forms] part of the general principles of law on which the complementary principle of article 21(1)(c) of the Statute is based").

[39] Impugned Decision, para. 10.

[40] Impugned Decision, para. 10.

[41] Article 18(1) Request, para. 4 (footnote omitted).

the Prosecutor's obligation under sub-paragraph 1 of this provision to "notify all States Parties *and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned*".[42] In addition, article 18(2) of the Statute generally refers to "a State" without setting forth any limitation to States Parties. Nevertheless, as noted above, judicial proceedings were triggered on the basis of Israel's Article 18(1) Request because of the concrete denial by the Prosecutor to issue a new notice under article 18(1) of the Statute on the basis of, *inter alia*, Israel's lack of standing.

40. In these circumstances, it was incumbent on the Pre-Trial Chamber to consider pursuant to article 21(1)(b) of the Statute how the principle of *pacta tertiis nec nocent nec pro sunt* applied in respect of the relationship between Israel, as a State not party to the Statute, and the Court, as an international organisation, as well as the procedural position and standing of Israel in the context of its Article 18(1) Request. As part of this analysis, the Pre-Trial Chamber also could have had recourse to article 36 VCLT, which regulates rights provided to third States in a treaty, as well as other applicable norms of public international law.

41. In this regard, it was of particular relevance for the Pre-Trial Chamber to determine the precise moment from which the time limit under article 18(2) of the Statute starts to apply to a State not party to the Statute that decides to interact with the Court. However, the Pre-Trial Chamber in applying the Rome Statute directly to a State not party assessed in isolation Israel's request with reference exclusively to the effects arising from the Article 18(1) Notification. Specifically, it took the view that "Israel's 8 April 2021 Letter and 26 April 2021 Letter did not constitute a deferral request under article 18(2) of the Statute" and that "the statutory time limit had passed in April 2021 without Israel having requested a deferral under article 18(2) of the Statute".[43] This approach fails to take into account the legal framework of public international law relevant to Israel's status as a State not party to the Statute at the moment of those communications. A profound analysis in conformity with the aforementioned principles and rules of public international law would have required the Pre-Trial Chamber to assess: (i) whether it was possible to apply to Israel Rome Statute obligations and consequences in 2021; (ii) whether Israel's decision to formally interact with the Court

[42] Article 18(1) of the Statute (emphasis added).
[43] Impugned Decision, paras 12-13.

as of 2024 had an effect on its procedural position under article 18 of the Statute; and (iii) what is the legal standing of Israel before the Cour for the purposes of the current Article 18(1) Request.

42. This was a necessary step to preserve the fairness of the proceedings and make evident the legitimacy and universal character of the ICC. The failure of the Pre-Trial Chamber clearly constitutes an error of law.

### C. The error materially affected the Impugned Decision

43. The Pre-Trial Chamber's error of law materially affected the Impugned Decision. Had the Pre-Trial Chamber directed itself to the applicable rules of public international law, it would have had to issue a different decision. Such decision would have fully taken into account the legal ramifications arising from the interaction between the Court and Israel, as a State not party to the Statute, from the viewpoint of public international law and the timing of the valid interactions between that State and the Court. The outcome of the Impugned Decision would have been impacted by the Pre-Trial Chamber's determination of the legal basis regarding Israel's legal standing and the applicability of obligations and consequences arising from the Statute, as well as the moment from which it could have been validly and legally analysed.

### D. Appropriate Relief

44. I further consider that, in the circumstances of the present appeal, the appropriate remedy would have been to reverse the Impugned Decision and remand the matter for the Pre-Trial Chamber to issue a new decision. Considering that the Impugned Decision does not contain any reasoning on the aforementioned rules and principles, I do not believe it necessary to otherwise address Israel's grounds of appeal on the merits. For the same reason, I consider that it is not appropriate to set out any further directions as to the new decision that would have had to be issued by the Pre-Trial Chamber.

45. As I would have remanded the matter to the Pre-Trial Chamber, I would have also dismissed Israel's request for suspensive effect as moot.

## IX. CONCLUSION

46. In light of the foregoing, I reach the following conclusions:

i. **First**, the appeal at hand is admissible under articles 18(4) and 82(1)(a) of the Statute, as it concerns a preliminary ruling of admissibility;

ii. **Second**, the Pre-Trial Chamber erred in law in so far as it assessed Israel's Article 18(1) Request on the merits without: (i) establishing, in general, the legal basis of the relationship between a State not party to the Statute and the Court, so as to determine the legal standing of such a State; and (ii) assessing Israel's position against the rule of customary international law of *pacta tertiis nec nocent nec prosunt*;

iii. **Third**, the Pre-Trial Chamber's error materially affected the Impugned Decision because, had the Pre-Trial Chamber conducted the above analysis, it would have had to issue a decision that fully takes into account the legal ramifications arising from the interaction between the Court and a State not party to the Statute, from the viewpoint of public international law;

iv. **Fourth**, the appropriate remedy would have been to reverse the Impugned Decision and remand the matter for the Pre-Trial Chamber to issue a new decision in conformity with the applicable rules of public international law, before addressing Israel's Article 18(1) Request on the merits; and

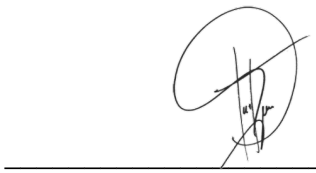
v. **Fifth,** given that the Pre-Trial Chamber failed to conduct the aforementioned analysis, I am not in a position to make an assessment of Israel's grounds of appeal on the merits.

47. I wish to emphasise that the present opinion is limited to this specific issue before the Appeals Chamber to the extent that it has been developed above. It is not to be understood as predetermining any questions arising from the present Situation that are not before the Appeals Chamber at present and, in particular, those pertaining to the ICC's jurisdiction or individual criminal responsibility. Furthermore, this dissenting opinion is without prejudice to the unwavering right of the victims of atrocious international crimes to seek justice before the Court.

48. The Court has a vocation of universality and a strong commitment to ending impunity for the most serious crimes of concern to the international community as a whole. To this end, it has the obligation to ensure fairness to all parties and participants,

including States Parties and States not party to the Statute, at all stages of the proceedings.

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



**Judge Luz Del Carmen Ibáñez Carranza**

Dated this 24th day of April 2025

At The Hague, The Netherlands