

Situation in the State of Palestine

Annex

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/18
Date: 12 July 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN PALESTINE

Confidential

**Request by the Federal Republic of Germany for Leave to Submit Written
Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence**

Source: Federal Republic of Germany

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

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr. Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. By order of 27 June 2024, this Pre-Trial Chamber authorized the United Kingdom to file written observations pursuant to Rule 103 of the Rules of Procedure and Evidence (the 'Rules'). The Chamber also acknowledged that this may result in other requests to submit observations. The Chamber indicated that any such request pursuant to rule 103 (1) of the Rules must be received by 12 July 2024.
2. Germany seeks leave pursuant to Rule 103 (1) of the Rules to submit written observations to assist this Pre-Trial Chamber in the proper determination of the case brought before it by the Prosecutor's application for the issuance of warrants of arrest under Article 58 of the Statute in relation to Israeli nationals.
3. Germany has been advised to classify this Request as confidential in order to comply with a decision of the Pre-Trial Chamber. Nothing in this Request requires to be kept confidential. As set out below, Germany requests that it be reclassified as public.

II. Procedural History

4. On 20 May 2024, the Prosecutor publicly announced that he had made applications for arrest warrants in the Situation in Palestine pursuant to Article 58 of the Statute. The Prosecutor's statement indicated that he had applied for arrest warrants against on the one hand Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, Ismail Haniyeh, and on the other hand Benjamin Netanyahu and Yoav Gallant. It provided further details including identifying the charges, the relevant time period and locations, and the alleged modes of responsibility.
5. In its decision of 5 February 2021, this Pre-Trial Chamber has ruled that the Chamber would be in a position to examine further questions of jurisdiction

a warrant of arrest.¹ In its order of 27 June 2024, this Pre-Trial Chamber acknowledged, that leave may be requested to file observations on any issue for the proper determination of the case. Pursuant to Article 19 (1) of the Statute, one of the issues which the Court may address, is the question of admissibility.

III. Submissions

6. Germany is a founding member of the International Criminal Court and has always made clear its long-standing commitment to international criminal justice. Germany is not only one of the biggest supporters of and contributors to the Court. It is also a staunch defender of the independence of the Court and its procedures. Germany acknowledges the important role of the Court which, as stated in the Statute's preamble, contributes through its decisions to upholding peace, security and well-being of the world. It is against this background that Germany welcomes the decision by this Pre-Trial Chamber to allow for requests by States to submit written observations in this situation. This case raises fundamental questions under international criminal law which will potentially affect the future development of the international criminal justice system.
7. Having regard to the Prosecutor's application for arrest warrants, the Pre-Trial Chamber shall satisfy itself that it has jurisdiction and may determine the admissibility (Article 19 of the Statute). While Germany considers that both the questions of jurisdiction and of admissibility are to be examined by this Chamber at this stage of the proceedings, Germany would like to focus its submission on the question of admissibility and the principle of complementarity.

¹ ICC-01/18-143, Pre-Trial Chamber I, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', para 131.

8. Germany respectfully submits, that in the situation at hand the Court is called

upon to assess the admissibility of this case in accordance with Article 17 of the Statute. The Court has decided, that a Pre-Trial Chamber may on its own motion address admissibility in various stages of the proceedings, in particular as regards the stage of warrants of arrest. In exercising its discretion, the circumstances of the case need to be considered.²

9. In Germany's view it is therefore desirable for the Court to receive written observations from States party to the Statute with regard to the principle of complementarity.

10. Germany respectfully submits, that the principle of complementarity was introduced in the Rome Statute in order to protect the sovereign interests of all States to exercise their own investigatory powers. It is the primary responsibility and right of States to investigate and prosecute the crimes that are within the Court's jurisdiction if such alleged crimes occur within their national jurisdiction.

11. According to Article 17 (1) of the Statute a case is inadmissible if the case is being investigated by a State which has jurisdiction, unless the State is unwilling or unable genuinely to carry out the investigation.

12. Article 17 has been interpreted by the Court at all stages of the proceedings in accordance with the two-step admissibility process, that requires the Court to:
(a) determine whether there are or have been relevant proceedings at domestic level with respect to the same case or potential cases and, only if the first step is answered in the positive, (b) whether those domestic proceedings have been or

² ICC-01/04, The Appeals Chamber, 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', 13 July 2006, para. 52.

out genuinely (genuineness analysis).

13. In Germany's view, this established two-step-approach should be further evolved and clarified in particular by taking into appropriate consideration in the current situation the fact that Israel has a robust and independent legal system that is at present actively examining, investigating and reviewing a wide range of issues and allegations relating to Israel's obligations pursuant to international humanitarian law. Germany recalls the recent political discussions on a justice reform in Israel which was proposed by the current government because it considers the justice sector to be too independent.
14. In order to determine, whether there are or have been relevant proceedings at domestic level with respect to the same case or potential cases, Germany is of the view, that the specific circumstances of this situation need to be taken into account. At the same time, Germany acknowledges that only the State concerned can provide concrete evidence revealing ongoing investigations at the national level.
15. However, Germany is of the view, that a State must be given an appropriate and genuine opportunity to present its accountability mechanisms and to put them into action. To Germany's knowledge, Israel was willing to cooperate and to receive the Prosecutor.
16. Moreover, when assessing the question, whether there are or have been relevant proceedings at domestic level, the specific circumstances of a still ongoing armed conflict unleashed by a terrorist attack need to be taken into account.
17. Article 18 of the Statute stipulates a dialogue between the Prosecutor and the State which would normally exercise jurisdiction over the crimes concerned.

Although the wording of Article 18 relates to the initiation of an investigation, it

should, in Germany's view, be read in a substantive sense. Whenever an initial investigation over time is subject to significant changes due to a fundamental change in the factual situation, the affected State should anew be given an appropriate and genuine opportunity to inform the Court about its accountability mechanisms. With regard to the Situation in Palestine, the investigations were opened long before the attack by Hamas on Israel on 7 October 2023. The Prosecutor's application for arrest warrants, however, is based on allegations about actions taken after 7 October. Therefore, the question arises whether the Prosecutor has indeed exhausted all avenues available to his Office to ensure adequate compliance with the principle of complementarity.

18. Summing up, Germany indicates that, if permission is granted, at this stage of the proceedings its observations would seek to assist the Court in the determination of the following issues:

- a) Whether Article 17 (1) of the Statute requires the affected State to be given an appropriate and genuine opportunity to present its domestic investigation and legal review mechanisms with regard to the allegations at stake;
- b) Whether Article 17 (1) of the Statute requires the Prosecutor to take into account the specific circumstances of a situation, i.a. the restrictions imposed by an ongoing armed conflict and the fact that the affected State has a functioning and independent judicial system and is committed to the rule of law, which may require the Prosecutor to allow for more time for national investigations;
- c) Whether Article 18 of the Statute requires the Prosecutor to notify the relevant States regarding new allegations in the course of investigations and to provide those States with an appropriate and genuine opportunity about its accountability mechanisms.

19. Germany reserves the right to seek permission to file observations pursuant to

Rule 103 on other issues, at the appropriate stage in the proceedings.

IV. Request for Reclassification

20. Germany is cognisant of the sensitive nature of the situation and the need for careful handling of confidential information. This specific Request, however, does not need to be confidential and it should therefore be reclassified as public.

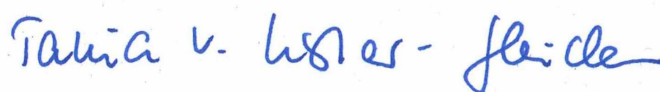
21. This Request primarily addresses the legal threshold defined in Rule 103 in the context of arrest warrant proceedings. Rule 103 requests and written observations are normally filed publicly, including in this situation.

22. Importantly, this Request does not make submissions about victims, witnesses, substantive evidence, or any other matter which would require secrecy or confidentiality. It can be resolved without disclosing the content of the Prosecutor's Application or any other secret or confidential information.

23. There is a strong public interest in open justice. The sensitivity of the situation and the need for secrecy in certain aspects do not mean that this particular Request needs to be confidential. It should be reclassified as public.

V. Relief Requested

24. Germany therefore respectfully requests permission to submit written observations pursuant to Rule 103 on the issues identified above.



Tania von Uslar-Gleichen
Legal Adviser to the Federal Foreign Office of
The Federal Republic of Germany

Berlin, 12 July 2024