

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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*No.: ICC-01/18
Date: 6 August 2024*

PRE-TRIAL CHAMBER I

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

SITUATION IN PALESTINE

Public

Observations Pursuant to Rule 103(1) 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
Mr Karim Khan KC

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 and Procedural History

1. On 27 June 2024, this Chamber granted the request by the United Kingdom to provide written *amicus curiae* observations under Rule 103(1) of the Rules of Procedure and Evidence (the 'Rules'). The Chamber also indicated that other requests for leave to file *amicus curiae* observations should be made by 12 July 2024.
2. On 12 July 2024, Germany requested leave to submit observations in accordance with Rule 103(1) of the Rules to assist this 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 Rome Statute in relation to certain Israeli nationals.
3. On 22 July 2024, the Court permitted Germany – and other States, organisations and persons – to provide *amicus curiae* observations and ordered that those observations be filed publicly and no later than 6 August 2024.

II. Observations

1. Germany is a founding State Party of the International Criminal Court and has always made clear its long-standing commitment to international criminal justice. At the national level, Germany has recently further developed its Code of Crimes against International Law, on the basis of which groundbreaking judgments have been handed down in recent years on crimes against humanity and genocide in various conflict zones around the world. At the international level, Germany is not only one of the biggest supporters of and contributors to the Court, but also a staunch defender of the independence of the Court and its procedures. Germany recognises the importance of the Court, whose decisions contribute to upholding the peace, security and well-being of the world, which are threatened by grave crimes, as stated in the preamble of the Rome Statute. Germany is mindful of the crucial role that the Court plays in the prosecution

and prevention of the most serious crimes of concern to the international community as a whole, and is steadfastly committed to ending impunity for such crimes. It is in this context of unwavering support that Germany welcomes the opportunity to present *amicus curiae* observations in accordance with Rule 103 of the Rules of the Court following this Chamber's decision of 22 July 2024.

2. Having regard to the Prosecutor's application for arrest warrants pursuant to Article 19 of the Rome Statute, the Pre-Trial Chamber shall satisfy itself that it has jurisdiction; it may also treat questions of admissibility. Germany would like to focus its submission on the principle of complementarity as one aspect of the admissibility of a case.
3. Article 19(1) of the Rome Statute bestows upon the Pre-Trial Chamber the discretionary power to determine, on its own motion, the admissibility of a given case. The Pre-Trial Chamber should exercise this discretion when appropriate in the circumstances of the case in question.¹ Germany respectfully submits that the circumstances of the present case are such that it is appropriate for this Chamber to examine the admissibility of the proceedings at this stage. Germany believes that this case raises fundamental questions under international criminal law which could affect the future development of the international criminal justice system, in particular questions pertaining to the principle of complementarity.
4. Germany wishes to submit observations on three questions that arise under Articles 17 and 18 of the Rome Statute regarding the case at hand.

a) Observations on whether Article 17 (1) of the Statute requires the Prosecutor to take into account specific circumstances, such as when the State concerned has a

¹ 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.

functioning and independent judicial system that is operating while there is still an ongoing armed attack upon that State, i.e. circumstances which may require the Prosecutor to allow for more time for national investigations

5. According to Article 17(1) of the Statute, a case is inadmissible where “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”.
6. Germany submits that Article 17(1) of the Statute should be interpreted in a way that takes account of the fundamental importance of the principle of complementarity to the overall architecture of the Statute. The Pre-Trial Chamber has described the principle of complementarity as one of the “cornerstones”² of the Statute, explaining that this principle “is based on the premise that the investigation and prosecution of the crimes provided for in the Statute lies primarily with national jurisdictions”.³ The Prosecutor, too, in his recently published Policy on Complementarity and Cooperation, characterised the principles of complementarity and cooperation as “core principles” that stand “at the heart”⁴ of the Statute.
7. 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 (action/inaction analysis) and, only if the first step is answered in the positive, (b) whether those domestic

² ICC-01/04-01/06, Pre-Trial Chamber, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, footnote 38.

³ ICC-01/04-01/06, Pre-Trial Chamber, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, footnote 38.

⁴ Office of the Prosecutor, Policy on Complementarity and Cooperation, April 2024, page v.

proceedings have been or are vitiated by an unwillingness or inability on the part of the State to carry them out genuinely (genuineness analysis).⁵

8. Germany submits that, in determining whether there are or have been relevant proceedings at the domestic level with respect to the same case or potential cases, the Court should take into account specific circumstances of the situation at hand.
9. Germany is of the view that, when assessing how much time should be given to a State to undertake its own investigation or prosecution, the Court should take into account whether the State is committed to the rule of law, whether it has a robust and independent legal system and whether that system is actively examining, investigating and reviewing a wide range of issues and allegations relating to potential violations of international humanitarian law.
10. Germany believes that only the State concerned can provide concrete evidence of ongoing investigations or prosecutions at the national level and thus show that it is genuinely engaged in investigating a given situation or case. In particular, where a State – such as Israel – is subject to an ongoing armed attack and faces serious threats from additional actors, this State should be given an appropriate and genuine opportunity to put its accountability mechanisms into action before the Prosecutor may request warrants for arrest under Article 58 of the Statute.

b) Observations on whether Article 17(1) of the Statute requires the State concerned to be given an appropriate and genuine opportunity to present its domestic investigation and legal review mechanisms with regard to the allegations at hand

⁵ ICC-01/04-01/07 OA 8, The Appeals Chamber, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 78.

11. Germany respectfully submits that the principle of complementarity was introduced in the Rome Statute in order to protect the sovereign interest of all States in exercising their own investigatory powers. As explained before, the principle of complementarity is premised on the idea “that the investigation and prosecution of the crimes provided for in the Statute lies primarily with national jurisdictions”.⁶ It is not only the duty and primary responsibility but also the right of all States to investigate and prosecute the crimes that occur within their jurisdiction and/or are committed by their nationals.
12. This observation supports an interpretation of Article 17(1) according to which a State and its judicial system must be presented with an appropriate and genuine opportunity to present to the Prosecutor their domestic investigation and legal review mechanisms with regard to the allegations at hand. In this connection, the Prosecutor explained in his recently published Policy on Complementarity and Cooperation that the principles of complementarity and cooperation are inextricably linked and mutually dependent.⁷ More specifically, the Prosecutor argues that he seeks information from States in order “to verify the existence and scope of national proceedings to reach a well-informed assessment on the admissibility of relevant cases or potential cases that are under review”.⁸ In other words, where a State is willing to cooperate with the Prosecutor in a given situation – and it is our understanding that Israel had indicated a willingness to do so in the situation at hand – Article 17 should be interpreted, based on the principle of good faith, as required under Article 31(1) of the Vienna Convention on the Law of Treaties, with a view to ensuring that this State receives an appropriate and genuine opportunity to present its domestic investigation and legal review mechanisms with regard to the allegations at hand. Such an interpretation would ensure a well-informed

⁶ ICC-01/04-01/06, Pre-Trial Chamber, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, footnote 38.

⁷ Office of the Prosecutor, Policy on Complementarity and Cooperation, April 2024, page v.

⁸ Office of the Prosecutor, Policy on Complementarity and Cooperation, April 2024, para. 155.

assessment on the admissibility of relevant cases or potential cases that are under review.

c) Observations on whether Article 18 of the Statute requires the Prosecutor to notify the relevant States of new allegations in the course of investigations and to provide those States with an appropriate and genuine opportunity to share information about their accountability mechanisms

13. Article 18 of the Statute strikes a sensible balance between the competences of the Prosecutor and the duty and right of States to investigate and prosecute crimes that occur under their jurisdiction. When the Prosecutor commences an investigation, he must inform those States that would normally exercise jurisdiction over the crimes concerned. These States may in turn notify the Court that they are undertaking investigations. At the request of the State concerned, the Prosecutor shall defer to the State's investigation, unless the Pre-Trial Chamber decides otherwise. The State concerned may appeal to the Appeals Chamber. The procedural avenues contained in Article 18 therefore present an important check on the commencement of new investigations.

14. 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, taking into account the fundamental importance of the principle of complementarity. When an initial investigation is subject to significant change over time due to a fundamental change in the factual situation – thus making it, in substance, a *new* investigation – the State concerned 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 heinous attack by Hamas on Israel on 7 October 2023. The Prosecutor's application for arrest warrants, however, regards action taken after 7 October. Germany is of the view that the attack by Hamas brought about such a fundamental change in the situation that a new notification was required,

which would have given the State concerned the procedural opportunity to request that the Prosecutor defer to the State's investigation.

III. Conclusions

15. Germany reiterates its view that, when assessing whether relevant national proceedings are taking place within the meaning of Article 17, the Court should take into account whether a State – such as Israel – has been and remains subject to an ongoing armed attack. In such a situation, the Court should provide the State, if it has a functioning independent justice system, is principally committed to the rule of law and is indeed undertaking investigations into the situation, with an appropriate and genuine opportunity to put its accountability mechanisms into effect.
16. Furthermore, where a State is willing to engage with the Prosecutor in a given situation, this State should be provided with the opportunity to present its investigations and accountability mechanisms. This understanding seems to follow from the principles of complementarity and cooperation which the Prosecutor rightfully stresses in his Policy on Complementarity and Cooperation.
17. Finally, where the nature of an investigation is fundamentally changed by new factual developments, the Prosecutor should notify the States Parties and States concerned as set out in Article 18 of the Statute, thus preserving the careful balance put in place by the States Parties under said provision. The International Criminal Court was established as a court of “last resort”⁹ – Germany submits that the proposed interpretations of Articles 17 and 18 of the Statute are very much in line with that characterisation.

⁹ See the Court's description of itself at <https://www.icc-cpi.int/about/the-court>.

Tania v. Uslar-Gleichen

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

Berlin, 6 August 2024