

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/18**
Date: **29 November 2024**

THE APPEALS CHAMBER

Before:
Judge Tomoko Akane, Presiding
Judge Luz del Carmen Ibañez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE STATE OF PALESTINE

Public

Prosecution Request to Dismiss *in limine* Israel's "Notice of Appeal of 'Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice' (ICC-01/18-375)"

Source: **Office of the Prosecutor**

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

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Amicus Curiae**REGISTRY**

Registrar

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Section**

I. INTRODUCTION

1. On 27 November 2024, Israel filed a direct appeal before the Appeals Chamber under article 82(1)(a) of the Statute (“Appeal”)¹ against Pre-Trial Chamber I’s “Decision on Israel’s request for an order to the Prosecution to give an Article 18(1) notice” (“Decision”).² Simultaneously, “out of an abundance of caution”,³ Israel also filed an application for leave to appeal before Pre-Trial Chamber I under article 82(1)(d) of the Statute against the same Decision (“Application for Leave”).⁴ In its Appeal, Israel requests that the Appeals Chamber suspend the Pre-Trial Chamber’s arrest warrants against Benjamin Netanyahu and Yoav Gallant pursuant to article 82(3) pending the resolution of the Appeal (“Suspension Request”).⁵

2. The Prosecution respectfully submits that Israel’s Appeal should be dismissed *in limine*.⁶ The Decision is not a decision “with respect to [...] admissibility” and is therefore not directly appealable on this ground pursuant to article 82(1)(a) of the Statute.⁷ Accordingly, these appeal proceedings should be discontinued and Israel’s Suspension Request be rejected while the proceedings before the Pre-Trial Chamber with respect to the same Decision follow their course.⁸

II. SUBMISSIONS

3. Israel’s Appeal should be dismissed *in limine* and the appeal proceedings discontinued.⁹ The Appeal does not satisfy the conditions of article 82(1)(a). Furthermore, as noted, Israel has simultaneously filed before the Pre-Trial Chamber an application for leave to appeal the Decision under article 82(1)(d). If this were to be granted, it would result in an appeal against the same Decision that is the subject of the present proceedings. The Prosecution respectfully

¹ [ICC-01/18-385](#) (“Appeal”).

² [ICC-01/18-375](#) (“Decision”).

³ [Appeal](#), para. 27.

⁴ [ICC-01/18-387](#) (“Application for Leave”).

⁵ [Appeal](#), paras. 30-38.

⁶ This is without prejudice to the Prosecution’s position that Israel had no standing to file the request for the article 18 notice before the Pre-Trial Chamber due to the *ex parte* nature (Prosecution and Pre-Trial Chamber only) of the article 58 proceedings.

⁷ Statute, article 82(1)(a).

⁸ The preliminary resolution of the (in)admissibility of an appeal is not uncommon and ensures the efficient conduct of the Court’s overall proceedings. *See e.g.* [ICC-02/05-01/20-145 OA3](#); ICC-01/13-51 OA (“[Comoros Admissibility AD](#)”).

⁹ This includes the filing of Israel’s appeal brief due on 13 December 2024: *see* [Regulations of the Court](#), regulation 64(2).

submits that the Pre-Trial Chamber is, at this juncture, the proper forum to address Israel's challenge against the Decision.

A. The Decision is not appealable under article 82(1)(a)

4. Israel's purported basis for its Appeal is article 82(1)(a) of the Statute, which provides: "Either party may appeal [...] [a] decision with respect to [...] admissibility". Yet, the Decision is not a "decision with respect to [...] admissibility" under article 82(1)(a) of the Statute. It "did not consist of, nor was it based upon, a ruling on admissibility which could be appealed under article 82(1)(a)".¹⁰

5. As the Appeals Chamber held in *Comoros* and in *Kenya*, there are "strict conditions for appeals of 'decisions with respect to [...] admissibility' under article 82(1)(a) of the Statute, requiring that such decisions consist of or are based on a ruling that a case is admissible or inadmissible."¹¹ Like in *Comoros* and *Kenya*, the Decision does not meet these conditions.¹² This is because "the operative part of the Impugned Decision did not pertain directly to a question of the admissibility of a case"¹³ nor is "the Impugned Decision [...] by its nature a decision determining admissibility".¹⁴

6. Indeed, the operative part of the Decision does not assess whether, pursuant to article 17 of the Statute, Israel is investigating and/or prosecuting the same patterns, criminality and category of persons as the Prosecution, nor whether the cases are of sufficient gravity.¹⁵ Instead, the Decision addressed Israel's multiple complaints regarding the Prosecution's investigation and ultimately rejected Israel's request for an order to the Prosecution to give a further article 18(1) notice and a stay of the proceedings pending such notice. The Pre-Trial Chamber did not (and could not) assess the admissibility of potential cases because Israel had not requested the deferral of the situation under article 18(1) of the Statute.¹⁶ Consequently, as the Chamber noted, in circumstances "[w]here a State is given the opportunity to assert its right to exercise

¹⁰ [Comoros Admissibility AD](#), para. 50.

¹¹ [Comoros Admissibility AD](#), para. 49; see also [ICC-01/09-78](#) ("Kenya Admissibility AD"), paras. 15-17.

¹² In *Comoros*, the Pre-Trial Chamber reviewed the Prosecution's decision not to open an investigation and requested the Prosecution to reconsider it due to its purported erroneous approach to gravity under article 17(1)(d): [Comoros Admissibility AD](#), paras. 14, 51. In *Kenya*, the Pre-Trial Chamber rejected Kenya's request for access to evidence to inform its admissibility challenge: [Kenya Admissibility AD](#), para. 18.

¹³ [Comoros Admissibility AD](#), para. 51; [Kenya Admissibility AD](#), paras. 15, 18.

¹⁴ [Comoros Admissibility AD](#), para. 50.

¹⁵ See similarly [Kenya Admissibility AD](#), para. 18 ("The Pre-Trial Chamber neither decided on the admissibility of any case pursuant to article 19 of the Statute nor issued a preliminary ruling on admissibility pursuant to article 18 of the Statute").

¹⁶ Cf. [ICC-02/18-9-Red](#), para. 14 ("This norm [Article 18] provides the procedural opportunity to submit the type of challenges that are being introduced by Venezuela"); see also paras. 15-16.

jurisdiction, but it has declined, failed or neglected to do so, the investigation may proceed”,¹⁷ as it lawfully did in this situation. The Chamber further noted that States, including Israel, may raise issues of admissibility for cases brought by the Prosecution within the terms of article 19(2)(b) of the Statute.¹⁸

7. Nor does the jurisprudence relied upon by Israel assist it. The *Ntaganda* and *Yekatom* appeals are distinguishable from the present case because both chambers had made an admissibility determination pursuant to article 17.

8. In *Ntaganda*, the Prosecution appealed the Pre-Trial Chamber’s finding that the case against Mr Ntaganda was inadmissible (due to its purported insufficient gravity under article 17(1)(d)), which resulted in the Chamber’s decision not to issue an arrest warrant against Mr Ntaganda.¹⁹ By contrast, in the present Decision, the Pre-Trial Chamber made no such admissibility (gravity) determination that can be directly appealed.²⁰

9. Likewise, in *Yekatom*, the Trial Chamber found that “the CAR authorities, [...], are presently inactive insofar as Mr Yekatom’s Case is concerned [and f]or this reason alone, [...], the Chamber is of the view that the case against Mr Yekatom is admissible”.²¹ Again, this Chamber made no such determination of admissibility in the Decision.²²

10. In line with the Court’s consistent jurisprudence,²³ Israel’s Appeal should be dismissed *in limine* and the appeal proceedings discontinued.

B. The Suspension Request fails as it depends on the admissibility of the appeal

11. Since Israel’s Appeal is inadmissible, it follows that the request for suspensive effect falls away. Israel’s Suspension Request should thus also be rejected *in limine*. In any event, there is no legal basis to suspend the arrest warrants issued by the Pre-Trial Chamber.²⁴

12. Should the Appeals Chamber wish to receive further submissions on the admissibility of the Appeal and/or Israel’s Suspension Request, the Prosecution stands ready to provide them.

¹⁷ [Decision](#), para. 14.

¹⁸ [Decision](#), para. 16.

¹⁹ ICC-01/04-118-Conf-Exp-Corr, para. 89; [ICC-01/04-169](#) (“DRC Arrest Warrant AJ”), para. 9.

²⁰ *Contra* [Appeal](#), para. 21.

²¹ [ICC-01/14-01/18-493](#) (“Yekatom Admissibility Decision”), para. 21.

²² Mr Yekatom argued that the Trial Chamber had procedurally erred by denying the admissibility challenge without seeking observations from the Central African Republican authorities prior to deciding on the admissibility of the case: ICC-01/14-01/18-523 (“[Yekatom Appeal](#)”), paras. 1, 10, 85. *Contra* [Appeal](#), para. 22.

²³ [Comoros Admissibility AD](#), para. 45. There are no convincing reasons to depart from this jurisprudence: [ICC-02/11-01/15-172](#), para. 14, cited in [ICC-01/14-01/21-318](#), para. 45.

²⁴ In addition, the Statute foresees special safeguards for appeals on admissibility properly made: *see* Statute, articles 19(7) and 95.

III. RELIEF REQUESTED

13. For these reasons, Israel's Appeal should be dismissed *in limine*. The Appeals Chamber should likewise dismiss Israel's Suspension Request.



Karim A.A. Khan KC, Prosecutor

Dated this 29th day of November 2024

At The Hague, The Netherlands