

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: **ICC-01/18**  
Date: **03 October 2024**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Iulia Motoc, Presiding Judge  
Judge Reine Alapini-Gansou  
Judge Nicolas Guillou

**SITUATION IN THE STATE OF PALESTINE**

**Public Document**

**Corrected version of Written Observations Pursuant to Rule 103 of United States  
Senator Lindsey O. Graham (Originally Filed on 06 August 2024 - ICC-01/18-304)**

**Source:** United States Senator Lindsey O. Graham

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

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Mr. Karim A.A. 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**  
United States Senator Lindsey O.  
Graham

All other amicus curiae.

## **REGISTRY**

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**Registrar**  
Mr. Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. The Court’s legitimacy begins and ends with its adherence to the agreement that created it. The Court has no power beyond that which was delegated to it by sovereign States, and the power which it has been granted cannot be wielded in ways incompatible with its governing document. When the Court acts within those limits, its edicts may be legitimate for the sovereign States that have assented to be bound by them. Were it to act outside of those bounds, however, it would encroach upon States’ sovereignty and undermine its own authority. The Prosecutor’s request for arrest warrants asks this Chamber to do just that.

2. The majority of Pre-Trial Chamber I previously concluded on 5 February 2021 that the Court had sufficient jurisdiction for the Prosecutor to investigate alleged crimes in Gaza and the West Bank, including East Jerusalem, going back to 2014.<sup>1</sup> This decision was incorrect, and by itself strains the legitimacy of the Court to the breaking point. The decision also left open important jurisdictional questions for later resolution.<sup>2</sup>

3. Years later, on 7 October 2023, the State of Israel was brutally attacked, and its civilians massacred, by Hamas from within Gaza. It is now engaged in a defensive war for its survival.

4. Mere months after this attack, the Prosecutor applied under article 58 for this Chamber to issue warrants of arrest against two of the highest Israeli officials—including the Prime Minister—for alleged crimes in the midst of the recent military operations.<sup>3</sup> These applications are now pending before the Chamber.

5. Given the gravity of the issue and the importance of a resolution that reinforces the rule of law and promotes international stability, Senator Graham requested leave to submit observations on 12 July 2024 to assist the Chamber in examining its jurisdiction and issues of admissibility prior to the determination of the application for arrest warrants.<sup>4</sup> The Chamber granted that request on 22 July 2024.<sup>5</sup>

6. In these observations, Senator Graham presents his view that the International Criminal Court lacks jurisdiction over Gaza and the West Bank (including East Jerusalem), the State of Israel, and Israeli nationals including Benjamin Netanyahu and Yoav Gallant.

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<sup>1</sup> [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’ (“Jurisdiction Decision”), 05 February 2021, paras. 118, 130-131.

<sup>2</sup> *Ibid.*, paras. 129, 131.

<sup>3</sup> [Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine](#), 20 May 2024.

<sup>4</sup> ICC-01/18-203-SECRET-Exp-Anx, Request of United States Senator Lindsey O. Graham for Leave to Submit Written Observations Pursuant to Rule 103, 12 July 2024.

<sup>5</sup> [ICC-01/18-249](#), Pre-Trial Chamber I, Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, 22 July 2024, para. 11.

7. Senator Graham further presents his view that granting the Prosecutor's request for warrants would violate the principle of complementarity enshrined in the Rome Statute.

8. Finally, Senator Graham expresses his deep concern, as a senior member of the legislature of a non-party State, that the Court act only within the bounds of its delegated authority and pursuant to its founding treaty. Issuing these warrants would overstep the Court's authority and irreparably undermine its legitimacy.

## II. Observations

### a. The Court lacks jurisdiction.

9. This Chamber's 5 February 2021 Decision that the Court has territorial jurisdiction over Gaza and the West Bank was incorrect. Moreover, issues left open by that decision, regarding Palestinian statehood<sup>6</sup> and the jurisdictional implications of the Oslo Accords,<sup>7</sup> independently bar the Court's exercise of jurisdiction in this case.

#### i. The International Criminal Court lacks territorial jurisdiction over Gaza and the West Bank because no State has delegated such jurisdiction to it.

10. Because Israel is not a party to the Statute, the Court would have jurisdiction over the Israeli nationals in this case, per article 12, only if "the State on the territory of which the conduct in question occurred" were a party to the Statute. But there is no such State, so the Court lacks jurisdiction.

11. In its 5 February 2021 Decision, the Chamber avoided the question of whether the Palestinian territory genuinely is a State and addressed only the more limited question of whether it was a "State" for the purposes of article 12(2).<sup>8</sup> It found that the term "State" was effectively a reference to "State Party,"<sup>9</sup> and that "Palestine" was a "State Party" because it had acceded to the Statute pursuant to article 125.<sup>10</sup>

12. The Court cannot manufacture jurisdiction for itself by accepting an instrument of accession from a non-State entity and reading the Statute as classifying such an entity as a "State."<sup>11</sup> For the Court to possess jurisdiction, the entity purporting to delegate its jurisdiction

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<sup>6</sup> Jurisdiction Decision, para. 93.

<sup>7</sup> Ibid., paras. 129, 131.

<sup>8</sup> Ibid., paras. 93, 112.

<sup>9</sup> Ibid., para. 109.

<sup>10</sup> Ibid., paras. 100-102.

<sup>11</sup> Cf. [ICC-01/18-143-Anx1](#), Pre-Trial Chamber I, Judge Péter Kovács' Partly Dissenting Opinion ("Judge Kovács' Dissent"), 05 February 2021, para. 13 ("The 'State Party' qualification cannot change this fact. Acrobatics with provisions of the Statute cannot mask legal reality.").

to the Court must genuinely have it and be legally able to delegate it.<sup>12</sup> But the only entities with those capacities are States. Even if the Statute allowed non-State entities to accede to it (a reading difficult to square with the plain text of article 12(1)), the Court could not avoid the substantive question of Palestinian statehood in this case.

13. When the Chamber arrives at that question, it must conclude that the Palestinian territory is not a State. To take one commonly used standard, the Montevideo Convention on the Rights and Duties of States defines States as possessing a permanent population, a defined territory, government, and the capacity to enter into relations with other states.<sup>13</sup>

14. The Palestinian Authority (“PA”)—the body that attempted to accede to the Statute—does not meet these requirements. It lacks a defined territory, and issues regarding the borders of a future Palestinian State remain in dispute.<sup>14</sup> Nor does the PA exercise effective government of its putative territory.<sup>15</sup> This is especially so in Gaza,<sup>16</sup> where the crimes alleged by the Prosecutor are supposed to have taken place and which has been effectively ruled by Hamas since 2007.

15. Statements by the international community confirm that Palestinian statehood remains unrealized. The recent advisory opinion of the International Court of Justice uses characteristically aspirational language: “*the realization of the right of the Palestinian people to self-determination, including its right to an independent and sovereign State...would contribute to regional stability and the security of all States in the Middle East*” (emphasis added).<sup>17</sup>

**ii. Even if the Court had territorial jurisdiction in Gaza (it does not), it lacks jurisdiction over Israeli nationals, because the Oslo Accords declined to confer such jurisdiction on the Palestinians.**

16. The limited jurisdiction conferred on the Palestinians by the Oslo Accords does not extend to Israeli nationals. The 1995 Agreement states: “The territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise

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<sup>12</sup> On the consensus that delegation forms the legal basis of the Court’s jurisdiction, see Monique Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (2020), p. 36.

<sup>13</sup> Montevideo Convention on the Rights and Duties of States, article 1.

<sup>14</sup> See, for example, [ICC-01/18-12](#), Office of the Prosecutor, Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine (“Prosecutor’s 2020 Request”), 22 January 2020, para. 5; Jurisdiction Decision, paras. 60, 130.

<sup>15</sup> Prosecutor’s 2020 Request, para. 5.

<sup>16</sup> *Ibid.* (“The Palestinian Authority does not govern Gaza.”).

<sup>17</sup> Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, [Advisory Opinion](#), 19 July 2024, para. 283.

provided in this Agreement.”<sup>18</sup> Annex IV clarifies that “Israel has sole criminal jurisdiction over...offenses committed in the Territory by Israelis.”<sup>19</sup> The Oslo Accords continue to structure Israeli-Palestinian affairs,<sup>20</sup> and both parties grant them legal significance.<sup>21</sup>

17. Under article 12, the Court may exercise jurisdiction only when either the State “on the territory of which the conduct in question occurred” or “of which the person accused of the crime is a national” has agreed to such jurisdiction. In accordance with these provisions, the Court lacks jurisdiction beyond that which has been given to it.<sup>22</sup>

18. Because the Palestinians lack jurisdiction over Israeli nationals, they cannot grant such jurisdiction to the Court. The Chamber left this question open in its 2021 Decision, finding that the significance of the Oslo Accords could be postponed until a later stage of proceedings.<sup>23</sup> However, in his partial dissent, Judge Kovács explained that “the Oslo Accords could be the key” to understanding the Court’s jurisdiction in the Palestinian territory.<sup>24</sup> Given the limited legal competences granted to the Palestinians, the Prosecutor “cannot pursue” investigations of Israeli nationals until Israel consents to the Court’s jurisdiction.<sup>25</sup>

**b. At this stage of the proceeding and in the present circumstances, the issuance of arrest warrants would violate the principle of complementarity enshrined in the Rome Statute and would result in manifest injustice.**

19. The International Criminal Court is “complementary to national criminal jurisdictions.”<sup>26</sup> States have the primary competence to investigate and prosecute crimes within their jurisdiction, and the Prosecutor and the Court must defer to States’ genuine investigations and allow States to conduct those investigations in the first instance.<sup>27</sup> This principle of complementarity is a cornerstone of the Rome Statute, enshrined in its preamble and incorporated through articles 17, 18, and 19.

20. Notwithstanding this foundational principle, the Prosecutor in this case rushed headlong to apply for arrest warrants against the highest officials of a non-party mature

<sup>18</sup> Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, A/51/889, S/1997/357 (1997), article XVII(2)(c).

<sup>19</sup> Ibid., Annex IV, article I(2).

<sup>20</sup> See, for example, Ariel Oseran, [Analysis: Israeli-Palestinian security coordination continues in West Bank, despite tensions](#), i24news, 27 February 2023.

<sup>21</sup> See, for example, Judge Kovács’ Dissent, paras. 292-294.

<sup>22</sup> See Monique Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (2020), p. 36.

<sup>23</sup> Jurisdiction Decision, paras. 129, 131.

<sup>24</sup> Judge Kovács’ Dissent, para. 320.

<sup>25</sup> Ibid., para. 374.

<sup>26</sup> Rome Statute, article 1.

<sup>27</sup> [Informal Expert Paper: The Principle of Complementarity in Practice](#), Office of the Prosecutor, 2003, para. 1.

democracy—the State of Israel—without respecting or deferring to its robust and independent legal system. The Prosecutor has applied for these warrants alleging recent crimes that occurred in the course of an ongoing, defensive war that is, at the time of this submission, just a few months old. Senator Graham has been informed by the State of Israel that, in the rush to apply for warrants, the Prosecutor failed to give Israel requisite notice of his investigation into the wartime conduct of its leaders, failed to meaningfully engage with Israeli officials who sought to cooperate with his office, and failed to respect Israel’s independent legal system by allowing it the time to conduct its own investigation in the midst of an ongoing war.

**i. The Prosecutor circumvented statutory checks on his power designed to implement the principle of complementarity.**

21. The Rome Statute implements complementarity, in part, through codified checks on the Prosecutor’s power—including during the investigation stage.<sup>28</sup> Indeed, the Prosecutor himself has acknowledged that “[t]he principle of complementarity is the foundation of the Rome Statute system and it remains an important principle *during the investigation stage*” (emphasis added).<sup>29</sup>

22. In this case, the Prosecutor circumvented important procedural checks on his power by unilaterally expanding a previous investigation into unrelated conduct and rushing to apply for arrest warrants without deferring to the independent legal system of the State of Israel. This violation of the required procedures for opening an investigation deprives Israel, without due process, of its statutory right to exercise primary jurisdiction.

23. Article 18(1) requires the Prosecutor to notify States who “would normally exercise jurisdiction over the crimes concerned” when he opens an investigation. Once that notification is received, article 18(2) grants a State one month to inform the Court that it is investigating the persons or crimes concerned itself. If the State does so, article 18(2) imposes an automatic deferral—the Prosecutor “*shall* defer to the State’s investigation” (emphasis added) unless the Pre-Trial Chamber authorizes him to investigate in light of the State’s “unwillingness or inability genuinely to carry out the investigation.”<sup>30</sup>

24. The previous Prosecutor followed this procedure in 2021 when she opened the original investigation into the “Situation in Palestine” pursuant to an (illegitimate) 2018 referral from

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<sup>28</sup> Rome Statute, articles 17-19.

<sup>29</sup> [ICC Prosecutor, Mr Karim A.A. Khan QC, opens an investigation into the Situation in Venezuela and concludes Memorandum of Understanding with the Government](#), 5 November 2021.

<sup>30</sup> Rome Statute, article 18(2)-(3).

the PA.<sup>31</sup> That referral primarily concerned conduct related to Israeli settlement policy in the West Bank and Israel's response to protests in 2018.<sup>32</sup> The Prosecutor's investigation was accordingly focused on those matters, as well as the 2014 Gaza War.<sup>33</sup> As required, the Prosecutor notified Israel of the investigation,<sup>34</sup> giving Israel the opportunity to request a deferral. It did not, and the investigation proceeded.

25. The current Prosecutor, by contrast, has disregarded this procedure. On 17 November 2023, soon after the heinous attacks of 7 October 2023, the Prosecutor announced that he had received a referral from five States Parties concerning alleged crimes since that date.<sup>35</sup> This new referral, which necessarily addressed a starkly different set of facts than those that underpinned the 2021 investigation, accused Israel of using unlawful methods of warfare in Gaza in the weeks after 7 October 2023.<sup>36</sup> Rather than opening a new investigation, the Prosecutor broadened the existing one. Senator Graham has been informed by the State of Israel that the Prosecutor did not issue an article 18(1) notification, depriving it of its statutory right to investigate the allegations in the first instance.

26. This approach to the referral and notification process short-circuits the principle of complementarity. The Prosecutor treats a single referral from 2018 as empowering him to monitor all Israeli-Palestinian relations—unmoored from meaningful control or oversight by the Court. But there are limits on how broadly the Prosecutor can expand an investigation. When an investigation is modified so thoroughly that it constitutes an entirely new investigation, the procedural safeguards on opening an investigation must be followed, including those specified in article 18.<sup>37</sup>

27. The Court regularly recognizes temporal, material, and territorial limits on the scope of investigations.<sup>38</sup> Investigations are constrained by the State referral or Court authorization that

<sup>31</sup> [Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine](#), 3 March 2021.

<sup>32</sup> [Referral by Palestine Pursuant to Articles 13\(a\) and 14 of the Rome Statute](#), 15 May 2018.

<sup>33</sup> [Summary of Preliminary Examination Findings](#), Office of the Prosecutor, 3 March 2021; TOI Staff, [Israel said to receive formal letter from ICC informing of war crimes probe](#), The Times of Israel, 18 March 2021.

<sup>34</sup> [ICC letter triggering deferral deadline sent to Israel, Palestinians](#), Reuters, 19 March 2021.

<sup>35</sup> [Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties](#), 17 November 2023.

<sup>36</sup> [State Party referral in accordance with Article 14 of the Rome Statute of the International Criminal Court](#), 17 November 2023. A further [Referral from Chile and Mexico](#) was submitted on 18 January 2024.

<sup>37</sup> See Yuval Shany & Amichai Cohen, [The Prosecutor's Circumvention of Article 18 Complementarity? A Flaw in the ICC's Palestine Investigation](#), Just Security, 1 June 2024.

<sup>38</sup> See, for example, [ICC-01/09-19-Corr](#), Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras. 201-211; [ICC-01/15-12](#), Pre-Trial Chamber I, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, paras. 60-64.



initiates them, and by the Prosecutor’s article 18(1) notification sent to relevant States.<sup>39</sup> To be sure, investigations are not strictly limited to conduct specifically identified in these initial documents.<sup>40</sup> The Prosecutor lacks complete information at these stages and needs some latitude to investigate related crimes as they come to light.<sup>41</sup>

28. Nonetheless, the Prosecutor does not have an unlimited power to expand investigations unilaterally. The Court has sometimes held that an investigation can include only conduct that occurred before it was requested or authorized.<sup>42</sup> However, it has also allowed an exception to this general bar—the Prosecutor can extend investigations to crimes that are “sufficiently linked”<sup>43</sup> to activity that was ongoing at the time of referral or authorization.

29. The conduct alleged in the Prosecutor’s request for warrants is in no way “sufficiently linked” to the allegations in the PA’s purported referral in 2018. That referral, and the investigation opened pursuant to it, primarily concerned conduct related to Israeli settlement policy in the West Bank and Israel’s response to protests in 2018, as well as the 2014 Gaza War.<sup>44</sup> The conduct alleged here cannot be viewed as sufficiently linked to those matters. Israel’s actions after 7 October 2023 were a response to an unprompted attack, not an element of its settlement policy, its response to protests half a decade prior, or its conduct in a war that had been over for years.

30. If actions performed 5 to 10 years apart, by different governments, in response to different conflicts, were “sufficiently linked,” then any alleged crimes related to the conflict between Israel and Palestinians would fall within the scope of the 2021 investigation. But that cannot be so. A single referral in 2018 cannot give the Court jurisdiction over a region “for eternity”—that result “would be wholly antithetical to the concept of complementarity.”<sup>45</sup>

31. The Court has also explained what article 18(1) notifications must include. These notifications “must be sufficiently specific in order for the State to be able to assert its

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<sup>39</sup> [ICC-02/18-89](#), Appeals Chamber, 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” (“Venezuela Appeal Decision”), 1 March 2024, paras. 218-220, 227-229.

<sup>40</sup> See, e.g., [ICC-01/17-9](#), Pre-Trial Chamber III, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi,” 9 November 2017, para. 193; [Venezuela Appeal Decision](#), paras. 3, 114.

<sup>41</sup> See, e.g., [ICC-01/15-12](#), Pre-Trial Chamber I, Decision on the Prosecutor’s request for authorization of an investigation, 27 January 2016, para. 63; [Venezuela Appeal Decision](#), paras. 106-109.

<sup>42</sup> [ICC-01/09-19-Corr](#), Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 206.

<sup>43</sup> [ICC-01/04-01/10-451](#), Pre-Trial Chamber I, Decision on the “Defence Challenge to the Jurisdiction of the Court,” 26 October 2011, para. 16; see also [Summary of Preliminary Examination Findings](#), Office of the Prosecutor, 3 March 2021, para. 9, and the sources cited therein.

<sup>44</sup> [Referral by Palestine Pursuant to Articles 13\(a\) and 14 of the Rome Statute](#), 15 May 2018.

<sup>45</sup> [ICC-01/04-01/10-451](#), Pre-Trial Chamber I, Decision on the “Defence Challenge to the Jurisdiction of the Court,” 26 October 2011, para. 16.

jurisdiction in the proceedings under article 18(2) of the Statute.”<sup>46</sup> Some level of specificity is necessary to give effect to the constraints established in article 18 on the Prosecutor’s power to open investigations. For a State to assert its primary jurisdiction under article 18, it must show that it is investigating the conduct at issue. But to do that, it must first know what that conduct is. Overly vague notifications, if permitted, would make that showing impossible, rendering the constraints of article 18 “meaningless.”<sup>47</sup>

32. The Prosecutor’s 2021 notification, the only article 18(1) notification Israel has received, did not and could not have encompassed the conduct alleged in the pending request for warrants. Allowing the Prosecutor to expand the investigation far beyond the content of the original notification would render article 18(2) just as “meaningless” as an excessively vague notification would. States obviously cannot show, at the time a notification is issued, that they are investigating alleged crimes that have yet to take place and have little connection to those alleged in the notification. Israel has not had the opportunity “to assert its jurisdiction in the proceedings under article 18(2) of the Statute”<sup>48</sup> concerning these allegations.

**ii. The Prosecutor’s conduct in this case is inconsistent with respecting the principle of complementarity.**

33. In other Situations, the Prosecutor has taken steps to ensure that a State’s own investigation is allowed to develop. Consider his approach to the Situation in Venezuela.<sup>49</sup> Prior to opening an investigation on 3 November 2021, the Prosecutor met extensively with senior Venezuelan officials and diligently sought to understand Venezuela’s domestic legal processes.<sup>50</sup> These meetings culminated in a memorandum of understanding, signed by President Nicolás Maduro and the Prosecutor, agreeing to strive towards enhancing cooperation with the country, facilitating the country’s ability to carry out its own proceedings, and ensuring “that the principle of complementarity has adequate and meaningful effect.”<sup>51</sup> In furtherance of those goals, the Prosecutor not only sent the required article 18(1) notification,

<sup>46</sup> [Venezuela Appeal Decision](#), para. 3.

<sup>47</sup> [ICC-02/18-45](#), Pre-Trial Chamber I, Decision authorizing the resumption of the investigation pursuant to article 18(2) of the Statute (“Venezuela Reauthorization Decision”), 27 June 2023, para. 77.

<sup>48</sup> [Venezuela Appeal Decision](#), para. 3.

<sup>49</sup> See also the Prosecutor’s cooperation with Colombia, described in the Office of the Prosecutor’s [Report on the Situation in Colombia](#), 30 November 2023. In light of an “ongoing armed conflict” and the State’s “efforts to provide victims with genuine redress” (para. 8), the Prosecutor deferred to domestic proceedings.

<sup>50</sup> The Prosecutor himself has acknowledged his duty to satisfy himself “as to the relevance and genuineness of domestic proceedings in the context of an admissibility determination.” See [Policy on Complementarity and Cooperation](#), Office of the Prosecutor, April 2024, para. 20.

<sup>51</sup> [Memorandum of Understanding between the Bolivarian Republic of Venezuela and the Office of the Prosecutor of the International Criminal Court](#), 3 November 2021.

but also sent a subsequent notification containing more detailed information, and even granted Venezuela three additional months to request an article 18(2) deferral.<sup>52</sup>

34. The Prosecutor initially appeared willing to give the principle of complementarity “adequate and meaningful effect” for Israel as well. In direct communications with Senator Graham and his staff in the weeks before applying for arrest warrants—including a personal call between the Senator and the Prosecutor on May 1, 2024—the Prosecutor and his office made assurances that he would collaborate with Israel to investigate these matters and to proceed judiciously. Senator Graham likewise received assurances from Israeli officials that they would engage in good faith with the Prosecutor and his staff. Those expectations were shattered when the Prosecutor abruptly cancelled a planned trip to confer with Israeli officials and instead unexpectedly and improperly applied for arrest warrants on 20 May 2024<sup>53</sup>— the same day, as noted by U.S. Secretary of State Antony Blinken, that members of the Prosecutor’s Office were to arrive in Israel to coordinate the visit.<sup>54</sup>

35. The Prosecutor’s decision to break off planned cooperation with Israel shows a lack of respect for the principle of complementarity and for his own burden to assess Israel’s willingness and ability to investigate these crimes. Had he cooperated with Israel as he has with other States, he would have found a robust, independent legal system and a willingness to investigate these crimes and these individuals. Israel has already opened approximately 70 investigations into conduct after October 7,<sup>55</sup> and its Prime Minister, one of the parties named in the Prosecutor’s request for warrants, is currently facing trial on other domestic charges.<sup>56</sup> Israel is willing and able to seek justice.

### **iii. The Court must remedy the Prosecutor’s overreach.**

36. Before allowing the Prosecutor to investigate conduct in the wake of 7 October 2023, the Court should, at the very least, require him to issue a new article 18(1) notification and give Israel the opportunity to assert its primary jurisdiction under article 18(2). This remedy would treat Israel’s legal system with the same level of respect as other States have recently been shown.

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<sup>52</sup> [Venezuela Reauthorization Decision](#), paras. 4-5.

<sup>53</sup> Anthony Deutsch, Stephanie van den Berg & Humeyra Pamuk, [Exclusive: ICC prosecutor opted for warrants over visit to Gaza](#), Reuters, 5 July 2024.

<sup>54</sup> [Warrant Applications by the International Criminal Court, Press Statement, Antony J. Blinken](#), 20 May 2024.

<sup>55</sup> Julia Frankel & Jack Jeffery, [The Israeli army says it investigates itself. Where do those investigations stand?](#), Associated Press, 3 June 2024.

<sup>56</sup> TOI Staff & Jeremy Sharon, [Court says Netanyahu must begin testimony in his corruption trial in December](#), The Times of Israel, 9 July 2024.

**c. Issuing arrest warrants in this case would undermine the Court's legitimacy.**

37. The Court is a creature of statute, with limited powers delegated to it by the sovereign States that have assented to it. Its exercise of authority is legitimate only when it acts within the limits of that delegation and according to the constraints set by the Rome Statute. Any actions the Court takes outside those bounds would lack legal effect, and indeed would threaten to undermine the agreement that forms the sole basis of the Court's authority.

38. As a non-party to the Rome Statute, the United States has a keen interest in ensuring that the Court does not exceed the limits of its delegated authority. In light of the possibility that the Court would overstep its bounds, the United States has taken measures to protect its citizens from such overreach. These include the initial decision not to ratify the treaty<sup>57</sup> as well as subsequent legislation restricting cooperation and authorizing the President to use all means necessary to secure the release of people wrongly detained by the Court.<sup>58</sup>

39. Issuing warrants in this case would only vindicate these fears. The Court would be arrogating to itself powers that were not delegated to it. And it would do so in service of a rushed, procedurally defective effort by the Prosecutor to arrest the Prime Minister and Defense Minister of a non-party State in the midst of a defensive war for its survival. Such a Court would pose a serious threat to the rights and interests of the American people.

### III. Conclusion

40. For the stated reasons, this Chamber should decline to issue the warrants requested by the Prosecutor for the arrest of Benjamin Netanyahu and Yoav Gallant.

Respectfully submitted,



Lindsey O. Graham  
United States Senator

Dated this 03 October, 2024

At Washington, District of Columbia, United States of America

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<sup>57</sup> [Statement by President William J. Clinton. Signature of the International Criminal Court Treaty](#), 31 December 2000.

<sup>58</sup> American Service-Members' Protection Act, Pub. L. No. 107-206, 116 Stat. 899 (codified at 22 U.S.C. §§ 7421-7433).