



**TIM GRIFFIN**  
ATTORNEY GENERAL

June 26, 2024

*Sent via First Class Mail*

The Honorable Charles Schumer  
Majority Leader  
United States Senate  
S-221, U.S. Capitol  
Washington, D.C. 20510

The Honorable Mitch McConnell  
Republican Leader  
United States Senate  
S-230, U.S. Capitol  
Washington, D.C. 20510

Re: Letter from the State of Arkansas and 19 other States in support of the Illegitimate Court Counteraction Act

Dear Majority Leader Schumer and Republican Leader McConnell:

The States of Arkansas, Alaska, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Missouri, Montana, Nebraska, New Hampshire, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia urge the Senate to promptly pass the Illegitimate Court Counteraction Act (“ICC Act” or “Act”). The ICC Act is necessary to protect American civil and military officials from potential unlawful prosecutions by the International Criminal Court (ICC). The ICC prosecutor has recently claimed to have the authority to prosecute Israeli civilian and military officials even though Israel—like the United States—is not a party to the treaty governing the ICC and has not consented to be bound by such a treaty. If allowed to proceed, the ICC’s prosecution would create a dangerous precedent that would subject Americans to potential prosecution without the protections secured by the Constitution.

The ICC Act was introduced in the Senate and is currently cosponsored (S. 4484) by Senators Tom Cotton (R-AR), Mitch McConnell (R-KY), James Risch (R-ID), Lindsey Graham (R-SC), Tim Scott (R-SC), Marco Rubio (R-FL), Ted Cruz (R-TX), Susan Collins (R-ME), Dan Sullivan (R-AK), Pete Ricketts (R-NE), John Barrasso (R-WY), Mike Crapo (R-ID), and Ted Budd (R-NC), and introduced in the House (H.R. 8282) by Representative Chip Roy (R-TX) and 20 original cosponsors. The ICC Act ultimately gained 76 cosponsors in the House, where it passed with broad bipartisan support. We urge the Senate to also take up and adopt this important legislation.

**Background**

On May 20, 2024, Karim A.A. Khan, the ICC prosecutor, announced that he was filing applications for arrest warrants against Yahya Sinwar and two other Hamas leaders for war

crimes and crimes against humanity committed against Israel since October 7, 2023. Int'l Crim. Ct., *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine* (May 20, 2024), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>. Those heinous crimes include, among others, murder, torture, hostage-taking, rape, and other acts of sexual violence. *Id.*

But in the same announcement, the ICC prosecutor also stated that he was filing applications for arrest warrants against Israeli Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant. *Id.* He preposterously claimed that since October 8, 2023, Israel has committed war crimes and crimes against humanity against what he called the “State of Palestine,” including inflicting starvation and intentionally directing attacks against a civilian population. *Id.* The sole basis for the arrest warrants is the Rome Statute, which is the international treaty that established the International Criminal Court. *See Rome Statute of the Int'l Crim. Ct.*, United Nations Treaty Coll. (July 17, 1998).

The decision to seek arrest warrants for Netanyahu and Gallant has been roundly criticized in the United States. President Biden immediately condemned the move, stating, “The ICC prosecutor’s application for arrest warrants against Israeli leaders is outrageous. And let me be clear: whatever this prosecutor might imply, there is no equivalence—none—between Israel and Hamas. We will always stand with Israel against threats to its security.” The White House, *Statement from President Joe Biden on the Warrant Applications by the International Criminal Court* (May 20, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/20/statement-from-president-joe-biden-on-the-warrant-applications-by-the-international-criminal-court/>.

Indeed, “unlike what Hamas did on the 7th of October, the killing of civilians is not a war aim of Israel.” The White House, *Press Briefing by Press Secretary Karine Jean-Pierre and NSC Coordinator for Strategic Communications John Kirby* (Oct. 31, 2023), <https://www.whitehouse.gov/briefing-room/press-briefings/2023/10/31/press-briefing-by-press-secretary-karine-jean-pierre-and-nsc-coordinator-for-strategic-communications-john-kirby-25/>. The Israel Defense Forces has redoubled its longstanding efforts to minimize civilian casualties in the Gaza strip. John Spencer, *Israel Implemented More Measures to Prevent Civilian Casualties Than Any Other Nation in History*, Newsweek (Jan. 31, 2024), <https://www.newsweek.com/israel-implemented-more-measures-prevent-civilian-casualties-any-other-nation-history-opinion-1865613>; *see* Israel Defense Forces, *How Does the IDF Minimize Harm to Palestinian Civilians?* (Nov. 15, 2012), <https://www.idf.il/en/mini-sites/wars-and-operations/operation-pillar-of-defence/how-does-the-idf-minimize-harm-to-palestinian-civilians/> (discussing tactics to minimize civilian casualties during the 2012 Operation Pillar of Defense in Gaza against Hamas).

This is in stark contrast to the tactics of Hamas, which has a well-documented history of using civilians as human shields in addition to its consistent strategy of deliberately raping,

torturing, and murdering civilians. James Pamment, et al., *Hybrid Threats: Hamas's Use of Human Shields in Gaza*, NATO Strategic Communications Centre of Excellence (June 6, 2019), <https://stratcomcoe.org/publications/hybrid-threats-hamas-use-of-human-shields-in-gaza/87> (“Hamas . . . has been using human shields in conflicts with Israel since 2007.”). Indeed, Hamas Chief Yahya Sinwar has told other Hamas leaders that civilian casualties in Gaza further the terror group’s aims. Summer Said and Rory Jones, *Gaza Chief’s Brutal Calculation: Civilian Bloodshed Will Help Hamas*, *The Wall Street Journal* (June 10, 2024), <https://www.wsj.com/world/middle-east/gaza-chiefs-brutal-calculation-civilian-bloodshed-will-help-hamas-626720e7>. The ICC prosecutor’s unprecedented effort to obtain arrest warrants for Netanyahu and Gallant is outrageous because, unlike Sinwar or others accused of crimes against humanity, they are the democratically elected leaders of a responsible U.S. ally that is exercising its right to defend itself against external aggression.

### **The ICC Prosecutor is Asserting an Unjustifiably Expansive Authority**

Besides implying a false equivalence between Hamas’s atrocities and the operations of the Israel Defense Forces, the ICC prosecutor’s effort to obtain arrest warrants against Netanyahu and Gallant also lacks any proper legal basis under international law. To start, the ICC prosecutor’s action is unlawful because—contrary to his announcement—there is no “State of Palestine,” and because the ICC lacks jurisdiction to prosecute Israeli leaders under Article 17 of the Rome Statute. See Alan Dershowitz, *The ICC Lacks Jurisdiction over Israel in Gaza*, *The Hill* (May 15, 2024), <https://thehill.com/opinion/international/4664475-the-icc-lacks-jurisdiction-over-israel-in-gaza/>.

But, most obviously, the ICC prosecutor’s action is unlawful because Israel is a sovereign state that is not a party to the Rome Statute and has not consented to be bound by it. See *Rome Statute of the Int’l Crim. Ct.*, *supra*, at n.4 (noting communication from Israel that it does not intend to become a party). The ICC prosecutor’s action, therefore, constitutes the unjustified assertion of a new and expansive authority to prosecute *any nation’s* civilian and military officials, regardless of whether those nations have consented to it.

“It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound.” 22 U.S.C. 7421(11). Like Israel, the United States is not a party to the Rome Statute. See *id.* (“The United States is not a party to the Rome Statute and will not be bound by any of its terms.”); *Rome Statute of the Int’l Crim. Ct.*, *supra*, at n.12 (noting communication from the United States that it does not intend to become a party). But if the ICC can unlawfully prosecute Israelis, there is no reason in principle why it cannot also assert such authority to prosecute Americans.

“Any American prosecuted by the International Criminal Court will, under the Rome Statute, be denied procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury.” 22 U.S.C. 7421(7). Further, “senior United States officials may be at risk of criminal prosecution for national

security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression.” 22 U.S.C. 7421(9).

### **The Illegitimate Court Counteraction Act**

The ICC Act takes swift action to deter persons involved with the ICC from furthering efforts to assert unlawful authority. Specifically, as passed by the House, the ICC Act imposes sanctions on any foreign person who the President determines has engaged in, aided, or materially assisted the ICC’s illegitimate prosecutorial actions. Those actions include any effort by the ICC to investigate, arrest, detain, or prosecute any American citizen, any person who is currently or formerly either a member of the armed forces of the United States, an elected or appointed United States government official, or a person employed by or working on behalf of the United States government, as well as any entity organized under the laws of the United States or any jurisdiction within the United States. Sanctions are similarly triggered by ICC actions against any citizen of a NATO ally or major non-NATO ally that has not consented to ICC jurisdiction or is not a party to the Rome Statute.

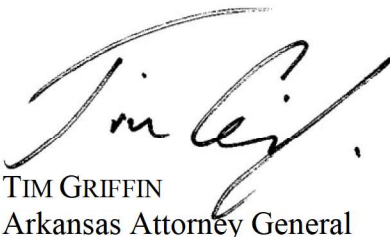
The Act further requires the President to block and prohibit property transactions by persons involved in illegitimate ICC prosecutions and to immediately revoke any U.S. visa held by them or their immediate family members. Such persons are likewise rendered ineligible to receive admission or parole into the United States. Finally, the ICC Act rescinds funding for the ICC and prohibits the use of any funding appropriated for the ICC.

### **Conclusion**

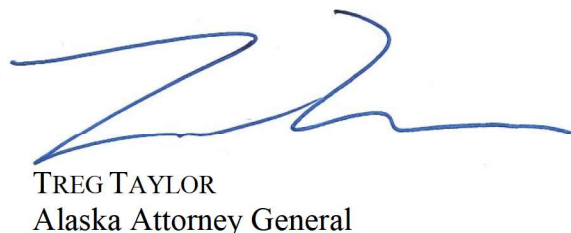
The ICC prosecutor’s effort to prosecute Prime Minister Netanyahu and Defense Minister Gallant for war crimes and crimes against humanity associates those leaders with notorious criminals like Libya’s Muammar Gaddafi and Russia’s Vladimir Putin. That is an outrageous calumny that cannot go unchallenged. If the ICC can unlawfully prosecute Israeli leaders for their defensive actions against Hamas terrorists, then there is no reason why American civil and military officials could not be subject to prosecution as well. Because the ICC prosecutor is seeking to expand the ICC’s authority beyond the bounds permitted by international law, imposing sanctions to deter unlawful prosecutions is the only feasible way to protect Americans from being subjected to it. That is precisely what the ICC Act does.

We urge the Senate to immediately take up and pass the ICC Act.

Sincerely,



TIM GRIFFIN  
Arkansas Attorney General



TREG TAYLOR  
Alaska Attorney General



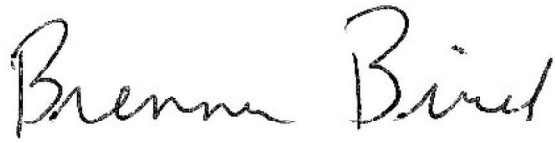
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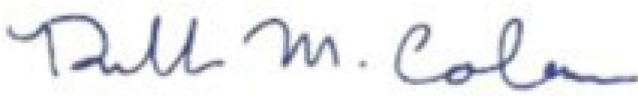
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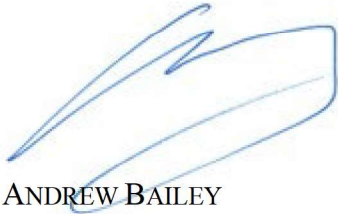
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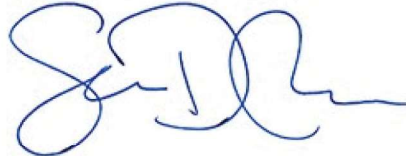
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