

United States Senate

WASHINGTON, DC 20510

June 18, 2024

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice 950
Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Dear Attorney General Garland:

We write to you today regarding the International Criminal Court's (ICC) unprecedented action regarding the situation in Gaza. As you know, on May 20, 2024, ICC Prosecutor Karim A.A. Khan KC announced that he was filing applications for warrants of arrest before the ICC for Israeli Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant.¹

We, along with many other members of Congress, are of the opinion that this extraordinary action by Prosecutor Khan violates the mandate on which the ICC is premised. This action is especially troublesome considering the bipartisan conversation held between members of the Senate and Prosecutor Khan last month in which Khan assured senators that a complete and thorough investigation would be conducted before any action was taken. These assurances were untrue, and the decision to proceed so recklessly and rapidly cannot be justified in light of the ICC's other investigations—such as the one into crimes against humanity in Venezuela—that have been under investigation for years. There are also several rogue nation states that routinely and brazenly commit horrific violations of international law, including China, Iran, and North Korea, which the ICC has summarily ignored.

To protect American officials and service members from similar unlawful actions by the ICC, our government must firmly reject this overreach.

As an initial matter, the ICC lacks jurisdiction over the situation in Gaza because the purported accession of a Palestinian state to the Rome Statute cannot satisfy the jurisdictional requirements under Article 12. Any government authority in Gaza besides Israel does not meet the criteria for statehood under international law and thus a precondition to the ICC's jurisdiction over Gaza is not satisfied by the Rome Statute's own language under Article 12(2).

Additionally, the ICC's conduct clearly violates the principle of complementarity. In its preamble, the Rome Statute states that the ICC shall be “complementary to national criminal jurisdictions.”² The ICC acknowledges this commitment in its description of its own jurisdiction: “The ICC is intended to complement, not to replace, national criminal systems; it prosecutes

¹The International Criminal Court, *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>.

²Rome Statute of the International Criminal Court pmb., opened for signature July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

cases only when States are unwilling or unable to do so genuinely.”³ Complementarity is not simply an idealistic aspiration in the Rome Statute. Rather, it is one of the cornerstone principles.⁴

Furthermore, Article 17 of the Rome Statute provides that the ICC shall deem a case “inadmissible” where it is being, or already has been, “investigated or prosecuted by a State” unless that effort is not or was not genuine.⁵ Article 17 goes on to say that the ICC may proceed in circumstances where “[t]here has been an unjustified delay in the proceedings” and the delay is “inconsistent with an intent to bring the person concerned to justice.”⁶

In light of the principle of complementarity, the ICC has no jurisdiction to prosecute officials in a mature democracy with a robust and independent legal system. It is clear from the Rome Statute that the ICC was designed to provide for accountability in areas of the world in which the rule of law does not exist or is not adequately applied. The Rome Statute was never intended to create universal jurisdiction for the ICC in States where competent legal systems exist, let alone in non-party States like Israel.

Notwithstanding the ICC’s lack of jurisdiction, Israel has a robust and independent legal system, and is not “unwilling or unable” to genuinely investigate and prosecute crimes within its jurisdiction. Israeli military law enshrines that a member of the Israeli Defense Force (IDF) “who knows or has reasonable grounds to believe that another soldier committed an offense” must prepare a complaint and present it to a competent officer.⁷ The Israeli military justice system is also subject to civilian oversight because decisions of the Military Advocate General are subject to review by both the Attorney General and the Supreme Court of Israel.⁸ Moreover, as an open and democratic society, Israel has a free press and an active community of non-governmental organizations ready and willing to report misconduct for domestic forums to investigate and prosecute. The Israeli justice system has already shown a willingness to hold its highest ranking officials accountable.

Considering the Department of Justice’s role in protecting freedom and liberty, it is paramount that Congress understand the Department’s position regarding the ICC’s actions. In furtherance of that goal, we request answers to the following questions:

³ The International Criminal Court, *How the Court Works*, <https://www.icc-cpi.int/about/how-the-court-works>.

⁴ Prosecutor v. Lubanga, Case No. ICC 01/04-01/06, “Decision on the Practices of Witness Familiarisation and Witness Proofing”, para. 34 n.38 (Nov. 8, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc243711.pdf>.

⁵ See Rome Statute, *supra* note 1, art. 17(1)(a)-(b).

⁶ See Rome Statute, *supra* note 1, art. 17(2)(b).

⁷ Military Justice Law 5715–1955, LA 189, § 225. See “Israel’s Investigation of Alleged Violations of the Law of Armed Conflict” at https://www.gov.il/BlobFolder/generalpage/operation-protective-edge-full-report/en/English_Terrorism_DOCS_IsraelInvestigations.pdf at p. 223.

⁸ Israel Defense Force, *The IDF Military Justice System* (September 12, 2018), <https://www.idf.il/en/mini-sites/military-advocate-general-s-corps/the-idf-military-justice-system/>.

1. Do you agree that Prosecutor Khan has not adequately considered the principle of complementarity in his request for warrants against Israeli leaders? If the principle of complementarity has been violated, is the ICC acting unlawfully?
2. Do you believe that the ICC is in violation of the Rome Statute with their recent recognition of a Palestinian state as a sovereign entity?
3. Do you have concerns that the ICC's breach of precedent will be used to target U.S. servicemembers in the future?

The ICC could act upon Prosecutor Khan's request at any moment. In consideration of this timeline, we ask that you deliver a response to these questions as soon as possible, but no later than July 1, 2024.

Sincerely,



Lindsey O. Graham
United States Senator



John Cornyn
United States Senator



Thom Tillis
United States Senator



Marsha Blackburn
United States Senator



Josh Hawley
United States Senator



Katie Boyd Britt
United States Senator



James Risch
United States Senator



Susan M. Collins
United States Senator



John Thune
United States Senator