



ICC Lacks Moral and Legal Authority to Issue Israel Arrest Warrants

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The International Criminal Court (ICC) is reportedly considering issuing warrants for the arrest of senior Israeli officials, which would make them subject to arrest if they travel to any of the over 120 ICC member states. The ICC lacks the jurisdiction to try cases in or against Israel. If it is allowed to issue arrest warrants for Israeli officials, it would set a precedent that would endanger citizens of countries outside the ICC's jurisdiction, particularly U.S. officials and servicemembers. Fear of future ICC action against them could restrain officials from the United States and Israel from taking lawful actions necessary to protect their citizens.

In keeping with longstanding U.S. policy, codified in U.S. law, to protect the citizens of Major non-NATO Ally states like Israel, the United States must unequivocally convey to ICC prosecutors that issuing arrest warrants for Israeli officials will have boomeranging consequences, including U.S. sanctions, for the ICC should it proceed with the measure. America must also unambiguously state that any country that complies with an ICC arrest warrant for Israeli officials would face a U.S. backlash of serious magnitude, including, but not limited to, sanctions.

What Happened?

- On April 28, *The New York Times* [reported](#), citing five Israeli and foreign officials, that “the International Criminal Court is preparing to issue arrest warrants for senior [Israeli] government officials.”
- On May 1, *Axios* [reported](#), citing Israeli and U.S. officials, that “Israeli officials have grown increasingly concerned over the last two weeks that the International Criminal Court (ICC) is preparing to issue arrest warrants for Israeli Prime Minister Benjamin Netanyahu, Defense Minister Yoav Gallant and Israel Defense Forces chief of staff Herzi Halevi.”
- Several members of both parties in Congress have voiced serious concern in recent weeks about the prospect of warrants being issued, including a bipartisan group of senators who spoke with ICC officials to [caution](#) against such a move.
 - » On April 24, 12 U.S. senators sent a letter to ICC Prosecutor Karim Khan [stating](#) that any warrants will be interpreted “not only as a threat to Israel’s sovereignty but to the sovereignty of the United States. The United States will not tolerate politicized attacks by the ICC on our allies.”
 - » Senate Majority Leader Chuck Schumer (D-NY) [stated](#), “I am urging the Biden administration to send a very strong stance against possible arrest warrants,” and Speaker of the House Mike Johnson (R-LA) [called for](#) the administration to “immediately and unequivocally demand that the ICC stand down” and for the United States to “use every available tool” to prevent warrants from being issued.

Why Is It Important?

- The ICC issuing arrest warrants against Israeli officials would break the ICC's precedent of not pursuing legal action against citizens of countries that do not recognize the court's jurisdiction, setting a dangerous precedent for ICC prosecution against citizens of the United States. It would also clearly violate the legal principles on which the ICC was founded, eroding the court's legitimacy and its ability to carry out necessary prosecutions—such as its arrest warrant for Russian President Vladimir Putin for committing war crimes in Ukraine. Failure to display clear U.S. resolve in the face of the ICC's dangerous judicial activism would undermine U.S. credibility, stated policy, and the security of its citizens from extrajudicial harassment.
 - » Challenges to Israel's right to self-defense in the global court of public opinion benefit Hamas by helping accumulate world pressure on Israel to stop its war efforts in Gaza and sabotage its global standing. Given the ICC's aura of legitimacy in much of the world, issuing arrest warrants for Israeli officials would further embolden Hamas to continue refusing hostage deals and instead wait for public and political pressure to save the terrorist group and its grasp on power in Gaza.

Background on ICC Probe

- Precise details of the ICC's probe into Israel are unknown, though the ICC has said it is [looking into](#) Israel's current offensive in Gaza as well as investigating Hamas for the October 7 attack. The ICC has been investigating Israel for alleged war crimes since 2021, and at least one element of the probe reportedly [stems](#) from alleged Israeli misconduct in the 2014 Israel-Hamas war.
 - » According to an April 29 [report](#) from Reuters, ICC prosecutors have interviewed staff from two hospitals in the Gaza Strip. Reuters reported, citing a source with knowledge of the ICC's probe, that “events surrounding the hospitals could become part of the investigation by the ICC.”
 - » Moreover, the ICC's claim to be investigating [both sides](#) of the war presupposes some degree of moral or legal equivalency between Hamas's massacre on October 7 and Israel's lawful military response in legitimate self-defense and efforts to free its hostages.

The ICC's Purpose and Design

- The U.S. Senate never ratified the Rome Statute that formed the ICC and the United States formally withdrew its signature from the Rome Statute in 2002. However, the ICC is recognized as a legitimate and authoritative institution by 124 countries, including dozens of U.S. treaty allies and partners around the world. ICC member states are statutorily obligated to comply with ICC arrest warrants issued against citizens that come into member states' jurisdiction.
 - » The ICC was [created](#) in 1998 by the Rome Statute, the ICC's founding treaty, which officially entered into force in July 2002.
 - » The Rome Statute designated the court as having jurisdiction “[limited](#) to the most serious crimes of international concern,” and [specifies](#) that the ICC is to “be complementary to,” rather than supersede, countries' sovereign criminal jurisdictions.
 - » In contrast to the International Court of Justice (ICJ), which adjudicates disagreements between states, the ICC was instead set up to try individuals. The ICC is statutorily

[authorized](#) to try individuals for four crimes defined by the Rome Statute: genocide; war crimes; crimes against humanity; and the crime of aggression.

- » If requested to do so by the ICC's Office of the Prosecutor, the Pre-Trial Chamber, a panel of either one or three judges, [decides](#) whether to issue an arrest warrant. Once an arrest warrant is issued, and the alleged perpetrator arrested, a Trial Chamber of three judges is convened by the ICC Presidency to try the case.
- » Outstanding ICC arrest warrants rarely expire and are generally only [rescinded](#) upon the death of a suspect, as [occurred](#) when Libyan leader Muammar Gaddafi was killed in 2011 prior to his arrest warrant being served. This means that Israeli officials could be subject to arrest abroad long after ending their service in government.
- » The threat of ICC arrests against Israeli officials—and potentially against U.S. officials in the future—would create a massive chilling effect that would prevent national security leaders from carrying out their official duties and mandate to protect their citizens above all. U.S. and Israeli national security officials should only worry about protecting their country and abiding by domestic legal requirements, not mollifying foreign legal bureaucrats.
- » The ICC has no police force and thus no independent means of executing arrest warrants, instead relying on member countries to execute warrants using their own law enforcement agencies.

ICC's (Lack of) Jurisdiction

- The ICC's jurisdiction, importantly, is [limited to](#) cases in which the alleged crimes were committed in countries party to the Rome Statute or in cases where the alleged perpetrator is a national of a State Party. A state that is not party to the Rome Statute can also voluntarily choose to [accede](#) to the ICC's jurisdiction.
 - » Under Article 13(b) of the Rome Statute, the United Nations Security Council (UNSC) can also [refer](#) cases to the ICC outside the court's normal jurisdiction, though the UNSC has only done so twice in history: for cases against Sudanese leaders for alleged crimes in Darfur in 2005 and Libyan leaders for alleged crimes in 2011.
 - » However, states which have not ratified the Rome Statute—such as Israel—are [not subject](#) to the ICC's jurisdiction.
- According to the ICC's own founding charter, the court does not have jurisdiction over alleged crimes in the West Bank and the Gaza Strip, as the territories do not constitute a sovereign state and thus are incapable of being a "State Party."
 - » U.S. Secretary of State Antony Blinken has [noted](#) that the ICC "has no jurisdiction" to adjudicate alleged crimes in the West Bank and Gaza, as "[t]he Palestinians do not qualify as a sovereign state and therefore, are not qualified to obtain membership as a state in, participate as a state in, or delegate jurisdiction to the ICC."
 - » To circumvent this issue, in February 2021, the ICC ruled that the Palestinian territories [qualified](#) as a "State Party" for the purposes of investigating war crimes in the West Bank and the Gaza Strip, in contravention of the Rome Statute.
 - Then-ICC Prosecutor Fatou Bensouda's rationale for pushing for this ruling was that since the Palestinian Authority unilaterally [accepted](#) the ICC's jurisdiction in 2015, "the [ICC] [need not](#) conduct a separate assessment of Palestine's status."

- » Moreover, by [citing](#) a 2012 vote in the United Nations General Assembly (UNGA)—a political body—recognizing Palestine as a state in its ruling, the ICC contradicted its own charter, which does not grant the UNGA any ICC-related powers beyond funding.
 - As one international law scholar [noted](#), the Rome Statute recognizes the UNSC as the sole U.N. body with influence over ICC jurisdiction, and that “at most, only [U.N.] Security Council decisions about U.N. membership can conclusively determine ‘statehood’ for ICC purposes.”
- » The ICC’s recognition of “Palestinian Territories” as a State Party for jurisdictional purposes thus further opens the door to the unilateral granting of rights to a Palestinian state without the obligations that accompany statehood, including the cessation of violence against other states (namely, Israel).

The Complementarity Principle

- The ICC’s investigation into Israeli officials also violates a central premise of the Rome Statute, namely complementarity, or the principle that the ICC serves as a complement—not a substitute—to countries’ own sovereign judicial systems. As ICC Prosecutor Karim Khan [stated](#) recently, “the principle of complementarity [is] at the heart of the Rome Statute.”
 - » The complementary principle, as interpreted by legal scholars, intended to limit the ICC’s [involvement](#) to situations in which no well-functioning legal system exists to hear cases in the ICC’s stead, such as for Sudan during the Darfur genocide.
 - » However, as Khan himself [acknowledged](#), “Israel has trained lawyers who advise commanders” and has a “robust system intended to ensure compliance with international humanitarian law.”
 - » JINSA recently [noted](#) that “demonstrating its own capacity for disciplining its forces involved in problematic incidents, the IDF has conducted investigations into, and reprimanded” members of the IDF “found to have committed wrongdoing.”
 - » Israel has, on multiple occasions in recent years, tried, [convicted](#), and [imprisoned](#) its own soldiers for wartime misconduct.

ICC Bias Against Israel

- The ICC has previously displayed an undue interest in, and factually unfounded interpretation of, Israeli conduct in Gaza.
 - » For example, in a 2014 [ruling](#), the court accused Israel, without evidence, of perpetrating a “military occupation” of Gaza due to the “scope and degree of control it has retained over the territory of Gaza following the 2005 disengagement.”
 - In fact, after the 2005 disengagement, in which Israel [forcibly removed](#) some 8,000 of its own citizens from Gaza over their fervent protest, Israel removed all its soldiers inside the Gaza Strip and did not retain any military presence.
 - » In the same ruling, the ICC [alleged](#) that Israel is an occupying power due to its “periodic military incursions within Gaza,” while making no mention of the aggressor— Hamas—in each of the actions that precipitated these incursions.
 - » In a 2019 ICC report, the ICC prosecutor at the time [alleged](#), without citing evidence, that there was a “reasonable basis” to believe Israel intentionally attacked “objects or persons using the distinctive emblems of the Geneva Conventions,” meaning Red Cross personnel or institutions, during the 2014 Israel-Hamas war.

- The report also did not contextualize this accusation by noting that the Red Cross’ ambulances in Gaza have been repeatedly hijacked by Hamas terror operatives to facilitate terror activity, as JINSA has [documented](#).
- In addition to Israel, the United States and the United Kingdom have also been [subject](#) to ICC probes in violation of the complementarity principle.
 - » In 2020, the ICC again [violated](#) the Rome Statute’s complementarity principle by opening a probe into U.S. conduct in Afghanistan for allegedly conducting acts of torture.
 - The United States is a functioning democracy with an independent judicial system, including an extensive military legal apparatus, negating the need for an ICC probe under the complementarity principle.
 - » The ICC [dropped](#) the case when top ICC officials were [subjected](#) to U.S. visa restrictions and then [sanctioned](#) by the United States, demonstrating that firm pressure works to curtail the ICC’s overreach.
 - » After the United States [nullified](#) the sanctions in 2022, the court’s top prosecutors, no longer facing U.S. asset freezes and travel restrictions, [resumed](#) their judicial activism and reopened the investigation.
- The probe into Israel, however, is particularly foreboding for the United States. If Israel can be targeted for investigation, and its leaders potentially subject to arrest warrants despite not acceding to the ICC, the United States and its national security leaders can likely expect to face the same prosecution for alleged misconduct in Afghanistan and elsewhere. Stopping ICC overreach here will help protect U.S. sovereignty from the ICC’s meddling in the future.
- The probe into Israel’s wartime conduct rings hollow considering that the ICC has not seriously pursued action against grievous perpetrators of war crimes in cases where the ICC has clear jurisdiction.
 - » Despite having clear-cut jurisdiction in Afghanistan, which has ratified the Rome Statute, the ICC has yet to issue arrest warrants for members of the Taliban or signal progress in the probe into the “situation” in Afghanistan that the court [announced](#) in October 2022.
 - » The ICC also has jurisdiction in Nigeria, which ratified the Rome Statute in 2001. Yet, the ICC has [not even opened](#) a formal investigation into the Boko Haram terrorist group, let alone issued arrest warrants, despite the numerous and well-documented barbaric crimes the terror group has committed against civilians.
 - » In addition, the ICC has not issued arrest warrants for Hezbollah leaders for Hezbollah’s deadly acts of terrorism in multiple ICC member states, including [Argentina](#) and [Bulgaria](#).
- Issuing manifestly unfounded arrest warrants for Israeli officials would also devalue the ICC’s legitimate arrest warrants, including [those](#) for Russian President Vladimir Putin and [other](#) senior Russian officials, for Russia’s war crimes against Ukraine.
 - » The ICC would, were it to issue arrest warrants for Israeli officials, undermine its own legitimacy by placing the leaders of a democratic country fighting a war of self-defense in the same “[perpetrators](#) of [the most serious] crimes” category as Putin.

ICC Arrest Warrant Enforcement

- Whatever their views of the merits of the ICC’s probe, countries that have ratified the Rome Statute may see themselves as obligated to comply with ICC arrest warrants and arrest Israeli officials for whom the warrants have been issued if the officials step foot on their soil. This could severely impinge on foreign countries’ efforts to mediate and advance peace efforts in the Middle East and beyond.

- Since some states might be unlikely to enforce arrest warrants against Israel, this would further degrade the ICC’s own interest in having member states carry out the more legitimate warrants against warlords and tyrants.
 - » [Jordan](#), [Uganda](#), and [South Africa](#), all member states of the ICC, each ignored their statutory requirement to enforce ICC arrest warrants by hosting the former president of Sudan, Omar al-Bashir, while an active ICC warrant was out for Bashir’s arrest.
 - » However, all three countries faced no ramifications aside from verbal rebuke from the ICC, despite [empty threats](#) to take more serious action.

U.S. Response

- Decades-long U.S. policy, codified in law, is to authorize the executive branch to use any instruments of U.S. power to protect American citizens and citizens of Major non-NATO Allies (MNNAs), including Israel, from being imprisoned due to ICC arrest warrants.
 - » The American Service-Members Protection Act, signed into law in 2002, [authorizes](#) the president to “use all means necessary and appropriate” to secure the release of both U.S. citizens and “covered allied persons” due to an ICC arrest warrant.
 - » The term “covered allied persons” is [defined](#) in the bill as “military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a NATO member country, [or] a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand).”
- However, the Biden administration has only voiced meek public opposition to the potential ICC measure, and has not threatened serious consequences for the ICC if the court does issue arrest warrants for Israeli officials.
 - » According to a U.S. official [quoted](#) in a May 1 report from *Axios*, “we are quietly encouraging the ICC no[t] to do it.”
 - » Asked about reports of arrest warrants, State Department spokesperson Vedant Patel [said](#) on April 30, “at the crux of this for the United States is that we do not believe that the ICC has jurisdiction on this. That being said, we work closely with the ICC on a number of key areas. We think they do important work.”
 - » The same day, White House National Security Communications Advisor John Kirby said that while the United States does not support the ICC investigation into Israel, the United States also [opposes](#) threats and intimidations against the court’s judges, according to an *Axios* report.

What Should the United States Do Next?

- U.S. leaders should reiterate and adhere to the policy directed by the American Service-Members’ Protection Act, namely that the executive branch is authorized to bring all levers of U.S. power to bear to [protect](#) citizens of allied countries, in this case, Israel, from detention on behalf of the ICC.
- Rather than merely “[quietly encouraging](#)” the ICC not to issue arrest warrants for Israeli officials, U.S. leaders on both sides of the aisle should convey unambiguous and stern warnings to the ICC that doing so will result in severe consequences for the ICC’s entire 18-judge panel. Some of these messages are best delivered in private to encourage the ICC to back down in a manner that can save face, but a public position should be stated as well.

- » These consequences should include legislation to sanction ICC officials who prosecute officials in U.S. ally countries or U.S. citizens. Already, such a bill is reportedly [under consideration](#) by members of Congress. Any such legislation should include visa sanctions against all family members of those involved in such prosecutions.
- » Congress should proactively pass a joint resolution expressing that: the ICC issuing arrest warrants for Israel's leaders would be an illegal and extrajudicial act of intimidation against Israel and its leaders, would be deemed a threat to the sovereignty of the United States, stands in violation of the ICC's own stated rules, and that Congress would support severe consequences for the ICC officials responsible.
- » However, the Biden administration has reportedly [signaled](#) its opposition to policy measures to penalize the ICC. Opposing measures to credibly threaten the ICC with consequences for its mendacious and biased legal campaign against Israel sends the wrong message to the court at this [critical juncture](#).
- In the event that ICC warrants are issued, the State Department should initiate a diplomatic campaign to ensure foreign nations do not comply with ICC arrest warrants for Israeli officials, warning of specific consequences for the nation and the specific judicial authorities involved in any extradition efforts.
 - » Congress should mandate the suspension of foreign assistance and arms sales to any nation involved in executing an ICC warrant against Israeli officials. Additionally, Congress should direct the Treasury Department to oppose international financial loans, financial or technical assistance, or the adoption of trade deals with any such nation for a period of at least five years. Congress should extend a prohibition of eligibility for the African Growth and Opportunity Act (AGOA) trade benefits of any African country involved in such efforts as well.
 - » Congress should mandate the executive branch issue sanctions against any foreign person and entity involved in executing extrajudicial efforts against Israeli officials pursuant to ICC arrest warrants.
 - Such sanctions should be carefully drafted in recognition of longstanding executive branch hesitation regarding the sanctioning of foreign judicial officials, which historically has precluded penalties against those deemed to be faithfully carrying out the laws of their land.
 - In order to mitigate problems relating to the United States' obligations to carry out the U.N. Headquarters agreement, sanctions on national leaders involved with approving the execution of illegal ICC warrants should solely be focused on economic penalties on senior officials themselves, with threats of visa restrictions more focused on such officials' direct family members.