



ICC Prosecutor Requests Arrest Warrants for Israeli Leaders

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On May 20, International Criminal Court (ICC) Prosecutor Karim Khan announced that he requested warrants for the arrests of Israel's Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant, which, if issued by the court's Pre-Trial Chamber, would make the leaders subject to arrest if they travel to any of the over 120 ICC member states. By requesting such warrants, Khan has set a precedent that poses a risk to U.S. officials and servicemembers by exposing them to potential ICC prosecution whenever U.S. forces conduct operations on the territory of an ICC member state. This risk of the assertion of international criminal prosecution of U.S. armed forces and leaders may impact future decisions to employ U.S. armed forces for important missions.

In keeping with longstanding U.S. law and policy to protect the citizens of Major non-NATO Ally states—including Israel—the United States must unequivocally convey to ICC prosecutors that issuing arrest warrants for Israeli officials is inconsistent with the spirit of the Rome Statute and the interests of international peace and security. This should include considering U.S. sanctions in response to this prosecutorial effort. It must also unambiguously state that any country that complies with an ICC arrest warrant for Israeli officials may face adverse consequences imposed by the United States.

What Happened?

- On May 20, ICC Prosecutor Karim Khan [announced](#) in a *CNN* interview that he has requested that the ICC issue arrest warrants for Israel's Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant as well as senior Hamas leaders.
- In a statement released that day, Khan [alleged](#) that Netanyahu and Gallant “bear criminal responsibility” for a number of alleged “war crimes and crimes against humanity” committed in the Gaza Strip “from at least 8 October 2023,” including (emphases added):
 - » **“Starvation of civilians as a method of warfare as a war crime** in violation of article 8(2)(b)(xxv) of the [Rome] Statute”;
 - » **“Wilfully (sic) causing great suffering, or serious injury to body or health** contrary to article 8(2)(a)(iii), or **cruel treatment as a war crime** in violation of article 8(2)(c)(i);”
 - » **“Wilful killing (sic)** contrary to article 8(2)(a)(i), or **Murder as a war crime** in violation of article 8(2)(c)(i);”
 - » **“Intentionally directing attacks against a civilian population as a war crime** in violation of articles 8(2)(b)(i), or 8(2)(e)(i);”
 - » **“Extermination and/or murder** contrary to articles 7(1)(b) and 7(1)(a), including in the **context of deaths caused by starvation, as a crime against humanity;**”

- » “**Persecution as a crime against humanity** in violation of article 7(1)(h);” and
- » “**Other inhumane acts as crimes against humanity** in violation of article 7(1)(k).”
- President Joe Biden [said](#) in a statement that day that the ICC prosecutor’s application for arrest warrants against Israeli leaders is “outrageous,” and Secretary of State Antony Blinken [said](#) that “we reject the prosecutor’s equivalence of Israel with Hamas. It is shameful.”
- **What happens now:** Having been requested to do so by the ICC’s Office of the Prosecutor, the Pre-Trial Chamber, a [select panel](#) of three judges from the ICC’s 18-judge panel will now [decide](#) whether to issue an arrest warrant. The ICC’s procedure [requires](#), as Israel’s *Ynetnews* outlet noted in a May 20 article, the panel “to review the prosecutor’s requests and may involve requesting additional evidence.”
 - » An Israeli legal scholar [cited](#) by *Ynetnews* stated that the panel will now “assess whether there are reasonable grounds to believe the crimes were committed and whether the arrest warrant is necessary for the judicial process. The suspects do not have the right to representation in the judicial approval process which, based on past experience, may take from several days to a few weeks.”
 - » This standard for issuing arrest warrants is analogous to the U.S. criminal law standard of probable cause: Is there objectively reasonable information that supports the allegations proposed?
 - » Like probable cause to arrest, this is a relatively low standard and a burden not difficult to satisfy. Notably, it is permissible to rely on inferences based on circumstantial evidence (just as it is for satisfying any burden of proof).
 - » It is highly unlikely the Office of the Prosecutor would have sought these arrest authorizations unless it was confident that the information available will satisfy this burden.
 - » This is likely why *Ynetnews* [reported](#) that, “in Israel, it is anticipated that the Pre-Trial Chamber will approve Khan’s request and issue the arrest warrants.”

Why Is It Important?

- The ICC Prosecutor’s request for the warrants of the arrest of Netanyahu and Gallant is troubling for a number of reasons. First, it seems based primarily on the adverse effects of hostilities to support the inference of the criminal intent to kill, starve, or otherwise harm civilians necessary to prove the alleged violations. Second, it contributes to the perception of [equality of condemnation](#) between Israel and Hamas, a phenomenon that seems to have gained consistent momentum since October 7 but one that should play no role in the assessment of criminal responsibility. Third, it exposes the risk that armed forces and national security officials of states that have chosen not to join the ICC—most notably the United States—are now exposed to when compelled to engage in military operations in the territory of a member state or party to the treaty.
- Khan’s request also implicates one of the [fundamental principles](#) on which the ICC was founded, that of complementarity—the principle that the ICC’s [involvement](#) is intended to be limited to situations of genuine impunity—where there is no national well-functioning and credible legal system to impose accountability for serious violations of international law. Hamas obviously falls into this category; Israel does not.
- These considerations undoubtedly inspired the swift and aggressive condemnation of this move by President Biden and Secretary Blinken. There is also no question that this move,

even if it does not result in arrest warrants or convictions, will have a profound “naming and shaming” impact on Israel.

- » Challenges to Israel’s right to self-defense in the global court of opinion benefit Hamas by helping accumulate world pressure on Israel to prematurely terminate its efforts to eliminate Hamas as a military threat and sabotage its global standing. By requesting arrest warrants for both Israeli and Hamas leaders, Khan has also obfuscated the true facts of the war, namely that Hamas is not only the aggressor but has consistently sought to [impede](#) Israel’s humanitarian efforts in Gaza.
- » Given the ICC’s aura of legitimacy in much of the world, even requesting arrest warrants for Israeli officials further emboldens Hamas to continue to deliberately hide behind civilians, expose civilians to mortal risks of hostilities, and refuse hostage deals and instead wait for public and political pressure to save the terrorist group from defeat.
- 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 to free its hostages.
 - » Israel’s Opposition Leader Yair Lapid [observed](#) on May 20 that Khan’s decision represented a “complete moral failure” and noted the implicit “outrageous comparison between Netanyahu and [Hamas’s leader in Gaza Yahya] Sinwar.”
- The ICC is recognized as a legitimate and authoritative institution by nearly 125 countries, including dozens of U.S. treaty allies and partners around the world. ICC member states may feel obligated to comply with ICC arrest warrants issued against individuals that come into member states’ jurisdiction.
 - » 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.
 - » Though the Pre-Trial Chamber is [authorized](#) to cancel arrest warrants, in practice, this has not happened while a suspect is still alive. This means that Netanyahu and Gallant could be liable for arrest abroad long after ending their service in government.
- Issuing ICC arrest warrants for Israeli officials – and potentially against U.S. officials in the future – undermines the credibility of a Court that should be singularly focused on pursuing only the most culpable war criminals. It may also have a chilling effect on the willingness of the United States to employ force for important reasons in order to avoid exposing U.S. personnel to prosecutorial risk.
- The ICC’s investigation into Israeli officials violates a central premise of the Rome Statute that established the ICC, namely complementarity, or the principle that the ICC serves as a complement to—not a substitute for—countries’ own sovereign judicial systems. As Khan [stated](#) recently, “the principle of complementarity [is] at the heart of the Rome Statute.”
 - » The complementary principle, as interpreted by legal scholars, is intended to limit the ICC’s [involvement](#) to situations where impunity for serious violations of international law is the result of the absence of a well-functioning national legal system to pursue accountability, such as for Sudan during the Darfur genocide.
 - » The Rome Statute designates 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.
 - » However, as Khan himself [acknowledged](#), Israel has a “robust system intended to ensure compliance with international humanitarian law.”

- » With hundreds of ongoing investigations into possible criminal acts by IDF personnel, an independent Attorney General, Military Advocate General, and judiciary, and a system that has in the past tried and [convicted](#) former Prime Ministers, Israel is the antithesis of a nation that is unable or unwilling to hold its own citizens accountable for international crimes.
- » JINSA Distinguished Fellow and military legal expert LTC Geoffrey Corn, USA (ret.) has [noted](#) that “the excellence of [Israel’s] legal corps, or Military Advocate General’s Corps, is widely recognized among military legal peers throughout the world.”
- In addition, a number of the allegations the ICC’s chief prosecutor has levied against Israel seem speculative and unfounded by anything other than the *effects* of hostilities, which are not necessarily indicative of the required criminal intent.
 - » Alleging that Israel has engaged in methods of warfare *intended* to cause starvation of the civilian population, deprive civilians of essential resources, or intentionally direct attacks against civilians overlooks the extensive measures Israel has taken to facilitate humanitarian assistance into the Gaza Strip—including over [425,000](#) tons worth of food—and [move](#) civilians out of combat zones.
 - From the inception of operations in Gaza, Israel has [utilized](#) a specialized entity of the IDF to assess essential humanitarian needs and ensure those needs have been met.
 - In the first month of the war, Israel [airdropped](#) over 1.5 million pamphlets, made nearly 6 million calls, and sent nearly 4.4 million texts to Gazans warning them to evacuate from areas that were soon to become combat zones.
 - The IDF has subjected its personnel to substantial tactical risk by attempting to surge food, water, fuel, and medical equipment to hospitals in active combat zones. As JINSA has [noted](#), in the first three months of the war Israel “facilitated the entry of approximately 6,500 tons of medical supplies and 43 ambulances into Gaza.”
- The ICC’s decision should be of concern for the United States. If Israel can be targeted for investigation, and its leaders subject to arrest warrants, the United States and its national security leaders face the same risk for alleged violations of the Rome Statute in future operations whenever they occur in the territory of a member state or party to the treaty.
 - » The United States is a functioning democracy with an independent judicial system, including an extensive military legal structure and process, negating the need for an ICC probe under the complementarity principle. Nonetheless, the United States has already been [subject](#) to ICC probes in violation of the complementarity principle.
 - In 2020, the ICC [called into question](#) the viability of the Rome Statute’s complementarity principle by opening a probe into allegations of torture by U.S. personnel in Afghanistan.
 - After the U.S. imposed visa restrictions on, and then [sanctioned](#), ICC personnel the ICC [dropped](#) the case. 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.
- Pursuing arrest warrants for Netanyahu and Gallant based on dubious grounds also devalues the ICC’s legitimate arrest warrants, including [those](#) for Russia’s President Vladimir Putin and [other](#) senior Russian officials, for Russia’s war crimes against Ukraine.
 - » Issuing arrest warrants for Israeli leaders undermines the ICC’s 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.

- 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 Netanyahu and Gallant 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.

What Should the United States Do Next?

- The United States must act to demonstrate its rejection of the ICC’s announcement, in accordance with stated policy [codified](#) in U.S. law, to display unambiguous resolve and ensure that its citizens and those of its allies, namely Israel, are protected from extrajudicial harassment.
 - » The United States should call on all allies to unequivocally condemn the ICC’s prosecutorial decision and encourage the Pre-Trial Chamber to reject this request.
- The President should 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. U.S. law authorizes 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, which Congress passed 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).”
- Congress should urgently pass a joint resolution expressing that the ICC prosecutor’s decision to issue arrest warrants for Israel’s leaders is an illegitimate and extrajudicial act of intimidation against Israel and its leaders, threatens the sovereignty of the United States, and stands in violation of the ICC’s own complementarity principle. The resolution should stress that Congress supports prosecuting Hamas leaders and personnel based on the overwhelming evidence of war crimes and crimes against humanity and a complete lack of process to hold them accountable.
- The State Department should initiate a diplomatic campaign to encourage ICC member states to condemn this prosecutorial effort and to refuse to comply with ICC arrest warrants for Israeli officials.
 - » Congress should consider 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 consider opposing 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 consider facilitating the imposition of 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.