



Protecting the U.S. by Defending Israel from the ICC

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Urgent action is required to protect Israel's Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Gallant from the International Criminal Court's (ICC) prosecutorial overreach. Rather than prosecuting actual war criminals—the ICC, for example, never even opened an investigation into Syria's Bashar al-Assad—the court is straying from its intended purpose by going after a democracy that obeys the laws of armed conflict, never acceded to the ICC's jurisdiction, and has a functioning judicial system. Though Israel is the first democracy to have arrest warrants issued for its officials, it will not be the last—the ICC has already investigated the United States for alleged war crimes. To stop the ICC from coming for U.S. leaders and servicemembers in the future, the United States should mount an aggressive defense of Israel now.

To safeguard the United States, Israel, and other U.S. partners and allies from the ICC's judicial excesses, the 119th Congress and incoming Trump administration should sanction ICC officials responsible for these unmerited prosecutions. But they will also need to do more. Given the low likelihood that the ICC rescinds the arrest warrants, U.S. policy will also need to focus on encouraging countries to sign bilateral agreements to protect Israeli officials and discouraging countries from enforcing the ICC's capricious warrants by threatening specific adverse consequences.

What Happened?

- On November 21, 2024, the ICC's Pre-Trial Chamber, a panel of three judges selected from the full court's 18-judge panel, [issued](#) arrest warrants for Israel's Prime Minister Benjamin Netanyahu, former Defense Minister Yoav Gallant, and since-deceased Hamas deputy leader Mohammad Deif for alleged war crimes and crimes against humanity.
 - » Previously, on May 20, 2024, ICC Prosecutor Karim Khan [announced](#) that he requested the ICC issue arrest warrants for Netanyahu and Gallant, as well as senior Hamas leaders.
 - » Khan [alleged](#) that Netanyahu and Gallant were criminally responsible for alleged “war crimes and crimes against humanity” committed in the Gaza Strip “from at least 8 October 2023,” including:
 - “Starvation of civilians as a method of warfare as a war crime”; “Wilfully causing great suffering, or serious injury to body or health ... or cruel treatment as a war crime”; “Wilful killing”; “Intentionally directing attacks against a civilian population as a war crime”; “Extermination and/or murder ... including in the context of deaths caused by starvation, as a crime against humanity”; “Persecution as a crime against humanity”; and “Other inhumane acts as crimes against humanity.”

- On January 15, Italian officials reportedly [told](#) Israeli officials that Italy would not enforce the ICC's arrest warrants against Netanyahu.
 - » Italy joins [France](#), [Hungary](#) and [Poland](#) as the only ICC member states to explicitly commit to not enforcing the arrest warrants.
 - Poland passed a resolution on January 9 [committing](#) not to enforce arrest warrants against Israeli officials after Netanyahu reportedly declined to attend an upcoming ceremony marking the 75th anniversary of the Auschwitz concentration camp's liberation.

Why Is It Important?

- The ICC's issuance of arrest warrants for Netanyahu and Gallant is striking in its overreach and bias, setting a dangerous precedent. The court's decision ushers in a world in which democracies that abide by the law of armed conflict, never accepted the ICC's authority, and have independent and functioning civilian and military judicial systems, can expect to have their soldiers and officials prosecuted on specious charges. This precedent is an ominous sign for the United States, which, having already been the subject of ICC probes, will likely be in the ICC's prosecutorial crosshairs next.
- While attempting to persuade, or force, the ICC to revoke its arrest warrants is a worthwhile first line of effort for U.S. policymakers to pursue, it is unlikely to be successful. The ICC can rescind arrest warrants, but has rarely done so, such as for then-Libyan leader Muammar Gaddafi upon his death.
 - » Ariel Kahana of *Israel Hayom* [reported](#) on January 5 that the incoming Trump administration plans to pressure the court to “independently withdraw its arrest warrants. ... Officials hope that during appeal proceedings, either Prosecutor Karim Khan or the judges will identify legal grounds to rescind these warrants.”
 - » Israel has [appealed](#) the ICC's decision on the grounds of a “procedural error,” one of three grounds on which the court's decision can be [appealed](#), along with “error of fact” and “error of law.”
 - According to the *Times of Israel*, Israel [claims](#) Khan made two procedural errors: failing to provide notification of his investigation into the current war and relying on “a notification issued in 2021,” and claiming jurisdiction over Israeli citizens.
 - Having appealed the charges, Israel's claim could be [heard](#) by the ICC's Appeals Chamber. Khan has [urged](#) the Appeals Chamber to reject the appeal.
 - » However, law of armed conflict expert LTC Geoffrey Corn, USA (ret.), former Chief of International Law for U.S. Army Europe and a JINSA distinguished fellow, has argued that the odds of the ICC revoking its warrants are low.
 - LTC Corn (ret.) [noted](#) in a recent JINSA webinar that the ICC's Pre-Trial Chamber cannot rescind arrest warrants it has issued, and though the ICC's “Trial Chamber actually dismissed the charges against the former president of Kenya,” that was “because he appeared for trial.”
 - Under the Rome Statute, the ICC's Pre-Trial Chamber [decides](#) whether or not to issue an arrest warrant, but has limited authority over a case after a warrant has been issued. Once a warrant is issued and the defendant arrested, the Trial Chamber, a separate body within the ICC, is convened to try the case.

- The ICC's likely irreversible decision poses an obstacle to Prime Minister Netanyahu's ability to conduct diplomacy abroad and deals a significant blow to Israel's global standing.
 - » Though the ICC lacks an enforcement wing and relies on countries party to its founding treaty—the Rome Statute—to detain individuals and turn them over to the court, only a handful of ICC member states have [expressly committed](#) not to arrest Netanyahu and Gallant if they step foot on their soil.
 - » Israel's concern that ICC member states will enforce the warrants are well founded.
 - Similar fears that American personnel would be prosecuted by the court led the United States, beginning in 2002, to reach bilateral immunity agreements with approximately 100 countries to protect American servicemembers and officials from ICC prosecution. The agreements committed the countries to not detain Americans in connection with ICC probes.
 - These agreements, known as Article 98 agreements, were tailored to fall within the technical provisions of the Rome Statute's Article 98, which authorizes a Rome Statute signatory to not surrender individuals to the ICC if doing so would violate any of that country's international treaties.
 - The United States placed a strong policy emphasis—including [conditioning](#) foreign aid to certain countries on signing the agreements—on inking Article 98 agreements despite, like Israel, not being party to the Rome Statute.
 - » Israel is one of just six nations not party to the Rome Statute to have warrants issued for its citizens' arrest, with Netanyahu and Gallant [joining](#) an ignominious list of warlords and dictators from non-ICC member states Burundi, Libya, the Philippines, Russia, and Sudan.
 - » The ICC's indictment also places Netanyahu on a shortlist of just seven former or current heads of state to be the subject of ICC arrest warrants, including:
 - Former Libyan dictator Muammar Gaddafi; Russia's President Vladimir Putin; and Sudan's former leader Omar al-Bashir, whom the United States has [accused](#) of orchestrating genocide.

Heads of State Indicted by the ICC



						
Omar al-Bashir President of Sudan 1993-2019	Muammar Gaddafi Leader of Libya 1979-2011	Laurent Gbagbo President of Cote D'Ivoire 2000-2011	Uhuru Kenyatta President of Kenya 2013-2022	Benjamin Netanyahu Prime Minister of Israel 2022-Present	Vladimir Putin President of Russia 2012-Present	William Ruto President of Kenya 2022-Present
Charges: Crimes Against Humanity; War Crimes; Genocide ACTIVE CASE	Charges: Crimes Against Humanity	Charges: Crimes Against Humanity	Charges: Crimes Against Humanity	Charges: Crimes Against Humanity; War Crimes ACTIVE CASE	Charges: War Crimes ACTIVE CASE	Charges: Crimes Against Humanity

- » This [striking](#) historical artifact will doubtlessly be used by critics and adversaries to delegitimize Israel well into the future.

- However, the threat of ICC prosecution extends well beyond Israel: given Israel’s [extensive](#) and [likely unparalleled](#) measures to protect civilians in wartime, other democracies that abide by the law of armed conflict—including those, like the United States, not party to the Rome Statute—are likely to run afoul of the ICC.
 - » As a task force of seven retired U.S. military officers—including two leading military legal experts—assessed in JINSA’s May report, [The October 7 War: Observations, October 2023 - May 2024](#), Israel’s wartime conduct in the Gaza Strip has been, at a minimum, consistent with the law of armed conflict.
 - According to the task force, Israel “carried out its mission to eliminate the Hamas threat with operational and tactical excellence and in overall compliance with the law of armed conflict. This occurred despite [Israeli forces] encountering a complex urban and subterranean battlefield in which almost the entirety of Gaza, including civilian infrastructure ... had been prepared and repurposed by Hamas as fortified fighting positions.”
 - The task force further assessed that “[t]he U.S. military would benefit from studying how the IDF fought effectively in this highly complex, multi-domain environment.”
 - » COL Marc Warren, USA (ret.), former senior legal officer for the U.S. Joint Special Operations Command and a JINSA distinguished fellow, has [observed](#) that the arrest warrants are “emblematic of a larger move that’s going on throughout the world ... ironically, to constrain those military forces of the very countries that are committed to adherence to the law of armed conflict.”
 - The ICC has already initiated a probe into the United Kingdom for alleged misconduct in Iraq, claiming to have [uncovered](#) evidence that British soldiers committed war crimes, but declined in 2020 to proceed with the case.
 - » That the heads of democracies, even those that are not party to the Rome Statute and therefore do not recognize the ICC’s authority, now face the prospect of being indicted, detained, and turned over to the court if they travel to the majority of the world’s countries, is a troubling development.
- The ICC’s muted approach to actual war crimes and crimes against humanity, such as those perpetrated by the recently deposed Assad regime in Syria, brings into stark relief the capriciousness of the ICC’s prosecutorial agenda.
 - » The ICC has not issued arrest warrants for numerous despots, terrorists, and war criminals across the world, including:
 - Officials in the now-deposed Assad regime responsible for [numerous atrocities](#) against civilians in Syria;
 - The perpetrators of ongoing atrocities in Sudan—including those the United States has [accused](#) of genocide;
 - The current and former leaders of dictatorships like [Cuba](#); [Eritrea](#); [Iran](#); and [North Korea](#)—despite the [efforts](#) of over 116 countries who voted in the UN General Assembly to refer such a case to the ICC;
 - Ethiopian and Eritrean officials whom the United States has [accused](#) of war crimes in the Tigray conflict;
 - Chinese officials [involved](#) in China’s persecution of religious minorities;
 - Members of the Taliban responsible for war crimes and crimes against humanity, despite overwhelming, well-documented [evidence](#) of their war crimes; and

- Iranian or Hezbollah leaders culpable for deadly acts of terrorism in multiple ICC member states, including [Argentina](#) and [Bulgaria](#).
- The threat of ICC prosecution is especially tangible for the United States, which has already had an ICC probe initiated into the conduct of its armed forces.
 - » In 2020, the ICC [opened](#) a probe into alleged U.S. misconduct in Afghanistan but subsequently [dropped](#) the case, though the war crimes probe was reportedly [reopened](#) in 2022.
- Key aspects of the ICC’s decision are troubling for their potential application in future cases against democracies adhering to the law of armed conflict like the United States, such as:
 - » The ICC’s issuance of arrest warrants both for terrorists and those seeking to defend their citizens against them, drawing a false moral equivalence;
 - » Prosecutors overlooking [an abundance of evidence](#) contradicting their allegations; and
 - » The ICC violating its own [bedrock prerequisite](#) for bringing cases to trial: that the relevant state is unwilling or unable to criminally investigate its officials or soldiers.
 - Israel’s ongoing investigations into possible criminal acts by Israeli troops; its independent Attorney General, Military Advocate General, and judiciary; and previous trials and [convictions](#) of former Prime Ministers all debunk the notion that Israel is unwilling or unable to hold its citizens legally accountable.
 - LTC Corn (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.” ICC Prosecutor Khan himself has [acknowledged](#) Israel has a “robust system intended to ensure compliance with international humanitarian law.”
- The latent threat of ICC prosecution could make the United States and other democracies less willing to use force against terrorist enemies due to fears of exposing military personnel or civilian leadership to prosecutorial risk. Therefore, failure to push back strongly against the ICC status quo will only embolden the United States and Israel’s shared adversaries and encourage terrorist groups.
- The chorus of countries across the world expressing a willingness, reluctant or otherwise, to enforce the ICC’s arrest warrants against Netanyahu and Gallant is similarly foreboding. Given the situation facing even one of the United States’ closest partners in Israel, it is no guarantee that other democracies would face a different outcome were they the subject of ICC prosecution.

Rome Statute Signatories of Concern

Country	Position on ICC Arrest Warrant
Australia	<u>Ambiguous</u>
Austria	<u>Will Enforce</u>
Bangladesh	<u>Ambiguous</u>
Belgium	<u>Will Enforce</u>
Bolivia	<u>Ambiguous</u>
Bulgaria	<u>Ambiguous</u>
Canada	<u>Will Enforce</u>
Colombia	<u>Will Enforce</u>
Cyprus	<u>Ambiguous</u>
Czechia	<u>Ambiguous</u>
Denmark	<u>Ambiguous</u>
Egypt	<u>Ambiguous</u>
Estonia	<u>Ambiguous</u>
Finland	<u>Ambiguous</u>
Germany	<u>Ambiguous</u>
Greece	<u>Ambiguous</u>
Iceland	<u>Will Enforce</u>
Ireland	<u>Will Enforce</u>
Jordan	<u>Ambiguous</u>
Latvia	<u>Ambiguous</u>
Liechtenstein	<u>Ambiguous</u>
Lithuania	<u>Will Enforce</u>
Luxembourg	<u>Will Enforce</u>
New Zealand	<u>Will Enforce</u>
Norway	<u>Ambiguous</u>
Portugal	<u>Will Enforce</u>
Romania	<u>Ambiguous</u>
Slovenia	<u>Will Enforce</u>
Spain	<u>Will Enforce</u>
Sweden	<u>Ambiguous</u>
Switzerland	<u>Will Enforce</u>
The Netherlands	<u>Ambiguous</u>
United Kingdom	<u>Ambiguous</u>

Note: List is not intended to be comprehensive.

What Should the United States Do Next?

- The United States must take decisive action to halt the ICC's dangerous judicial overreach, in contrast to previous and unsuccessful U.S. efforts to merely "[quietly](#)" dissuade the ICC from its judicial targeting of Israel.
- Since it is unlikely that the ICC will rescind the arrest warrants, in addition to pressuring the ICC, the United States will need to take a strategic approach to ensure countries do not enforce them. To discourage countries from complying with the court's prosecutions, U.S. officials must clearly signal to Rome Statute signatories that enforcing the ICC's arrest warrants will result in specific, adverse consequences, including loss of U.S. foreign aid.

Actions for Congress

- Congress should pass legislation imposing tangible consequences on the ICC and ICC officials who prosecute citizens of the United States or its allies, as well as those that aid in such prosecutions. Congress should also condition foreign aid to Rome Statute signatories on having those countries sign bilateral agreements with Israel codifying their refusal to enforce arrest warrants against Israeli citizens.
- To penalize the ICC and deter it from similar judicial actions against the United States or other allies, the Senate should pass [The Illegitimate Court Counteraction Act](#) (ICC Act), which [passed](#) the House of Representatives by a vote of 243-140 on January 9. The bill, which received bipartisan support in the House, is expected to be taken up by the Senate in the coming days.
 - » A previous version of the bill passed in the House of Representatives with a strong bipartisan vote of [347-155](#) in June 2024, but [stalled](#) for months in the then-Democratic run Senate.
 - » The ICC Act would sanction the ICC, its officials, and any individual who materially assists the ICC's efforts to investigate, arrest, detain, or prosecute any U.S. or allied nation citizen.
 - "Ally," under the legislation, is defined as any NATO country or major non-NATO ally—including Israel—and would therefore cover the arrest warrants issued for Netanyahu and Gallant.
 - Under the proposed bill, the United States would sanction any non-U.S. individuals who materially assist the ICC's attempts to detain Americans or ally citizens—including by providing goods and financial, material, or technological support.
 - » Specifically, for such individuals, the bill would:
 - Block, and prohibit all transactions of, all their property in the United States or that which comes into the possession of a U.S. citizen;
 - Prevent their entry into the United States and revoke any currently-issued visas; and
 - Apply the same punitive measures to their immediate family members, including children and spouses.
 - » JINSA Fellow and former Special Assistant for the Senate Armed Services Committee Gabriel Noronha [said](#) in a recent JINSA webinar that if the legislation passes Congress, "such sanctions would go very deep ... [and would] likely prevent any of those officials from coming to the United States for any kind of meetings about other matters. It would not ... prevent U.S. attorneys going over to The Hague and talking about a matter about

Russia or another issue, but it would prevent any of them from coming to the United States.”

- » The bill would also rescind any U.S. funding to the ICC and enact a prohibition on any future appropriations to the ICC.
- Since the ICC may not retract the arrest warrants, even were considerable penalties to be levied against the court and its officials, Congress may ultimately have to act to penalize countries that enforce the warrants.
- Should any Rome Party signatory actually enforce the ICC’s arrest warrants for Netanyahu or Gallant, Congress should use its power of the purse to restrict such countries’ ability to:
 - » Participate in the International Military Education and Training (IMET) program, which provides training on a grant basis to military students from allied and friendly nations;
 - » Receive Foreign Military Financing (FMF) assistance, which provides grants to foreign nations to purchase U.S. defense equipment, services, and training;
 - » Receive Economic Support Funds (ESF); and
 - » For any African country involved in such efforts, maintain eligibility for African Growth and Opportunity Act (AGOA) trade benefits.

Actions for the Trump Administration

- The Trump administration should complement Congress’s efforts to counteract the ICC’s dangerous overreach by targeting the court directly, in an effort to deter it from targeting the United States and other allies and partners in the future. These measures should include:
 - » Issuing an executive order, consistent with [precedent](#), blocking the U.S.-based property of ICC officials; and
 - » Rescinding and [restricting](#) the U.S. visas of ICC officials and their family members.
- With the ICC unlikely to rescind the arrest warrants and Israel’s appeal likely to fall on deaf ears at the court, the Trump administration should take proactive action to ensure that countries do not enforce the arrest warrants.
 - » The Trump administration should make clear its intent to liberally interpret the American Servicemembers’ Protection Act of 2002 (ASPA), which [authorizes](#) the executive branch to use any and all instruments of U.S. power to secure the release of American citizens, and officials and soldiers of major non-NATO allies—including Israel—should they be detained or imprisoned by any country on behalf of the ICC.
 - » The Trump administration should threaten to adopt, and enact if necessary, a range of specific adverse measures against countries that enforce the ICC’s arrest warrants. These include:
 - Working to block international financial loans and financial or technical assistance to such countries;
 - Impeding the adoption of trade deals with any such nation; and
 - Refusing to host high-level delegations or hold high-level meetings with officials from such countries.
 - » The Trump administration should strongly encourage ICC member states to agree to Article 98-style bilateral agreements with Israel, modeled on the Article 98 agreements

the United States has signed with over 100 countries to protect Americans from ICC detention, that commit those countries not to enforce the arrest warrants.

- Such bilateral agreements represent a simple, effective, and verifiable mechanism to ensure such countries do not comply with the arrest warrants.
- Article 98 agreements are named for Article 98(2) of the Rome Statute, which provides a carveout for states to not comply with ICC arrest warrants if doing so would violate countries' relevant international agreements.
- The provision [states](#) that after issuing an arrest warrant, “[the ICC] may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the [ICC], unless the [ICC] can first obtain the cooperation of the sending state for the giving of consent for the surrender.”
- Given the increased likelihood of U.S. soldiers or officials being targeted by the rogue ICC, the State Department’s Political-Military Bureau should work to ink additional Article 98 agreements to protect American citizens from future ICC arrest warrants.