

# Israel – Hamas 2024 Symposium – What Happens If the ICC Issues Warrants for Senior Hamas and Israeli Leaders?

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by [Douglas Guilfoyle](#) | May 2, 2024



In recent days Israeli newspapers and television channels have been reporting rumours that the International Criminal Court (ICC) may soon issue arrest warrants in the *Situation in the State of Palestine*. Israeli leaders rumoured to be facing warrants include Prime Minister Benjamin Netanyahu, Defence Minister Yoav Galant, and Army Chief of Staff Herzi Halevi. It seems unlikely the ICC Prosecutor, Karim Khan, would seek arrest warrants for Israeli leaders and not also for senior Hamas leaders such as Ismail Haniyeh (the political leader based in Qatar), Yahya Sinwar (Hamas leader within the Gaza strip), and Mohammed Deif (leader of Hamas's military arm).

Some sources suggest there is no basis to these rumours and they may just be spin (to what end seems uncertain). That said, the Israeli government certainly appears to be taking them seriously. Regardless, the rumours raise a number of questions as to process, likely charges, jurisdiction and admissibility of cases before the ICC, and the likely impact of any such warrants as and when they are issued.

## The Process

ICC arrest warrants are issued by a three judge Pre-Trial Chamber of the ICC. The Prosecutor must persuade the Pre-Trial Chamber that there “are reasonable grounds to believe” a suspect has committed a crime and that the arrest of the person is “necessary” (ICC Statute, art. 58). Necessity includes cases where arrest is needed to “ensure the person’s appearance at trial.” Obtaining such warrants is not analogous to seeking bench warrants from a district or county court. There will be a hearing, evidence led, and time taken for judges to deliberate.

“Sealed” warrants may be sought and issued to prevent suspects being tipped off. Sealed warrants played a role in the arrest of four persons accused of administration of justice offences against the ICC who were arrested in four countries over two days in 2013. There are presently at least four sealed warrants outstanding in relation to the situation in Libya. So it is theoretically possible warrants have already been issued.

Any of the 124 ICC State parties that receives a request for arrest and surrender of a person to the ICC, must deliver that person to the Court as soon as possible (subject to a number of due process guarantees) under Article 59 of the ICC Statute.

Reports of diplomatic attempts to persuade the ICC to delay any decision in order to avoid prejudicing ceasefire talks are hard to fathom. To whom would such representations be made? If Khan has already made a secret application for arrest warrants, when they are issued is out of his hands. Bluntly, once the judicial arm of the ICC is activated, it isn’t easy to turn off.

## The Likely Crimes to Be Charged

The best indication of the Prosecutor’s likely strategy comes from the arrest warrants issued for Vladimir Putin and Maria Alekseyevna Lvova-Belova. These warrants were issued in the Ukrainian situation for the war crime of forcible deportation of the civilian population, focusing on crimes against children. This narrow focus followed the easiest trail of evidence: Putin and Lvova-Belova effectively confessed to the crime of removing Ukrainian children on Russian television.

More conventional war crimes based on attacks doing disproportionate civilian damage are harder to prove. They can involve fine-grained factual analysis about what damage and death was caused, by whom, based on what information was available at the time and upon what assessment of military advantage. Tying such crimes to higher command can also be difficult absent evidence of an order or, in the case of command responsibility, wilful blindness.

We can expect, then, a similar approach of pursuing “low hanging fruit” crimes against higher leaders in the situation in Palestine. The likely focus will again be war crimes. Genocide, notoriously, requires proof of special intent. Similarly, in practice, proving a crime against humanity involves showing the crimes occurred as part of a widespread and systematic attack pursuant to a government or organisation policy.

The Prosecutor himself warned in December 2023 “that humanitarian assistance must be allowed in at pace, at scale in Gaza” and that “if Israel doesn’t comply [with international law] now, they shouldn’t complain later.” The consensus is thus that the most likely crime with which Israeli leaders might be charged is starvation as a war crime. This also appears to be the principal fear among Israeli officials, and it is possible this assessment was one factor in the recent easing of restrictions on aid entering Gaza.

As I have noted elsewhere there is a clear case to be made that the threshold for starvation as a war crime based on the denial of aid to Gaza by Israel has been passed. Professor Tom Dannenbaum lays out the applicable law expertly here and here. The existence of a plan to starve the population of Gaza may be inferred from factors including: the inadequate number of aid trucks being allowed to enter daily and their frequently being turned back on arbitrary grounds; non-implementation of multiple International Court of Justice provisional measures on humanitarian relief; failure to act against Israeli civilian protesters who block aid trucks; and government ministers directly calling for a “complete siege” of Gaza. Alternatively, as Professor Dannenbaum has noted, even if the only policy is to prevent materiel reaching Hamas, the fact that civilian starvation will now follow “in the ordinary course of events” remains sufficient to establish the crime.

Similarly, the easiest war crime to prove against the Hamas leadership is hostage-taking. To belabour the obvious, hostage-taking was always the plan of the political and military wings of Hamas, and they presently have control over when and if hostages are released.

This is not to say these are the only, or even the most serious, international crimes that could arise from the situation. Just that they would likely be easiest to prove. It is also worth stating that prosecuting Israeli leaders for such crimes would in no way impair “Israel’s very ability to defend itself.” The point of international humanitarian and international criminal law is not to prevent States defending themselves, but to insist that they do it within the limits set by law.

### **How Does the ICC Have Jurisdiction Over Israel, a Non-Party to the ICC Statute?**

The State of Palestine has accepted the jurisdiction of the ICC over events occurring on its territory since 2014. It did so first by lodging an Article 12(3) declaration with the Court, the same mechanism by which Ukraine accepted ICC jurisdiction over its territory. Palestine later acceded to the ICC Statute on 2 January 2015 and the Court found it to be a State party for the purposes of the Statute on 5 February 2021, giving the Court jurisdiction over events

occurring in Gaza and the West Bank. (The claim that Palestine is “not yet” a State is, at best, a minority position. Palestine is recognised as such by 140 States, it is an observer State at the UN General Assembly, and is only not a full UN member due to a U.S. veto.)

It is uncontroversial that a State has jurisdiction over crimes committed on its territory, even when committed by foreign nationals. Territorial jurisdiction over foreign nationals is subject to only limited exceptions such as diplomatic immunity and treaty arrangements such as status of forces agreements. It is well established that territorial jurisdiction over foreign nationals may be delegated to an international tribunal. The facts here are not meaningfully distinguishable from the arrest warrant issued for Vladimir Putin in the Ukraine situation, involving the ICC prosecuting crimes committed by nationals of an ICC non-party State (Russia) on the territory of a State accepting ICC jurisdiction (Ukraine).

It is thus regrettable that U.S. officials have said they “don’t believe” the ICC has jurisdiction over the situation in Palestine as regards Israeli nationals, given that President Biden had previously described ICC arrest warrants in the case of Putin as “justified.”

### **Has the ICC Pre-Judged Complementarity?**

The *Jerusalem Post* has asked how arrest warrants could be issued without first “address[ing] the issue of complementarity,” asserting that “the IDF has a robust . . . criminal probes mechanism for investigating war crimes.” Regardless of the IDF’s poor record of investigating and prosecuting crimes committed by its members against Palestinians, this involves a misunderstanding of how the ICC’s complementary jurisdiction operates.

A common misconception is that complementarity means the ICC only has jurisdiction if the State in question is “unable or unwilling to prosecute.” This is not correct. The relevant rule is found in the test of admissibility under Article 17 of the ICC Statute. The first question to ask is: is any State investigating or prosecuting *the same suspect for the same crime*? If the answer is “no” the ICC case is admissible. If the answer is “yes” (an investigation or prosecution is ongoing) the ICC may proceed only if “the State is unwilling or unable genuinely to carry out the investigation or prosecution.”

For example, an ICC case would be admissible if Prime Minister Netanyahu were charged with the war crime of starvation and there was no investigation or prosecution on foot in Israel against him for *the same underlying conduct*. The only way to invoke complementarity is thus to run a genuine case of your own. (This includes, for example, conducting a criminal investigation and reaching a genuine decision not to prosecute.) Then, and only then, will double jeopardy prevent an ICC case going forward. It would, however, be open to Israel to contest admissibility before the Court at a later stage.

### **What Will Be the Impact? Will Anyone Stand Trial?**

Based on the ICC's track record to date, the odds of anyone from this conflict standing trial in the Hague are not zero but nor are they high. For example, an ICC warrant was first issued for (now former) President Al Bashir of Sudan in 2009. He continued to travel largely unhindered around Africa for years and has not been surrendered to the Hague even after losing power in 2019. Even where senior political or military figures have been brought before the ICC, an embarrassing number of such cases has collapsed at trial or on appeal. Notable examples include Ruto and Sang (Kenya), Bemba (Congo), and Gbagbo and Blé Goudé (Côte d'Ivoire).

The impact on politics is likely to be wider. None of those with ICC arrest warrants out against them can safely travel in 124 State parties including effectively all of Europe, and much of Africa and the Americas. However, the United States, Russia, China, and much of central and southeast Asia are not parties. Still, while living as an international fugitive might not make a notable difference to the life of a Hamas military leader, one can scarcely imagine a politician as used to the global stage as Prime Minister Netanyahu relishing the prospect. It is commonly believed that President Putin has curtailed international travel due to the ICC arrest warrant against him.

### **Concluding Thoughts**

A common criticism of international courts is that they may become obstacles to peace. Indicted leaders, the argument goes, are incentivised to cling to power if the alternative is sitting in the dock in The Hague. It is less clear whether ICC intervention here changes any of the parties' incentives. It is unlikely Hamas leaders in Gaza care much, though Hamas political leaders in Qatar might. Prime Minister Netanyahu already has every incentive to stay in power – insofar as he faces a complex and ongoing corruption trial in Israel. Indeed, without prejudging the outcome of those proceedings, in the end the nearest cell awaiting him might be much closer to home than The Hague.

The biggest impact may be on third parties. Continuing to give material and political support to leaders labelled "indicted war criminals" in international headlines is likely to be contentious. Germany, as a major supplier of military materiel to Israel, may in particular find itself caught between its traditional support of the ICC and its traditional support of Israel. There is also the possibility of a backlash from non-parties to the ICC Statute. Indeed, we have already seen some U.S. politicians decry the prospect of ICC intervention and reaffirm support for Israel.

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