

The ICC takes action: The Gaza arrest warrants and the international obligations of states

On 21 November 2024, in a stunning decision defying significant challenges and mounting pressure, the International Criminal Court (ICC) issued arrest warrants for the Prime Minister of Israel Benjamin Netanyahu, former Defense Minister Yoav Gallant and Mohammed Diab Ibrahim Al-Masri (Dief).^[1] All stand accused of having committed crimes against humanity and war crimes. This decision is momentous not only because the world has waited 6 months for these warrants to be issued, but also because it marks the second instance of a leader from a Western democracy facing such action by the Court, with Vladimir Putin, the Head of State of Russia, being the first. The issuance of these warrants signals a pivotal shift in the fight against impunity for international crimes, demonstrating the equal application of law and accountability for individuals. It also reinforces the Court's legitimacy, addressing criticism of a historical focus on prosecuting individuals from African nations. By taking this step, the Court has delivered a resounding message that no state or individual is above international law, and that justice will be pursued equally against individuals. In his official statement on the issuance of the arrest warrants, Karim Khan QC, Chief Prosecutor of the ICC, noted that *'Today, our collective mind and focus should be on the victims of international crimes in Israel and in the State of Palestine. In my own meetings with the victims and families of hostages taken from kibbutzim, and with victims from Gaza who have lost so many loved ones, I have underlined that the law is there for all, that its role is to vindicate the rights of all persons'*^[2]

Challenges experienced by the Court

The jurisdiction of the International Criminal Court to prosecute Israeli nationals has been a contentious issue. As an international court established under the Rome Statute, the ICC derives its authority from the consent of its state parties, which are countries that have signed and ratified the treaty.^[3] Israel, however, is not a party to the Rome Statute, nor has it accepted the Court's jurisdiction, leading to the argument that the ICC lacks the competence to prosecute its nationals. The Rome Statute provides that: if a crime within the ICC's jurisdiction is committed on the territory of a state party or involves a victim who is a national of a state party, the Court may exercise jurisdiction.

Although Israel is not a state party, Palestine acceded to the Rome Statute in 2015 and is recognised as a state party. Consequently, the ICC has jurisdiction to prosecute crimes allegedly committed by Israeli nationals in Palestinian territories. Challenges to Palestine's ICC membership are also unlikely to succeed. The ICC's recognition of Palestine as a state stems from a combination of legal and political factors, particularly its status under international law. In 2012, the United Nations General Assembly granted Palestine non-member observer state status, a step widely viewed as affirming Palestine's claim to statehood.^[4] This recognition enabled Palestine to join international treaties, including the Rome Statute. In February 2021, the ICC confirmed its jurisdiction over alleged crimes in territories

claimed by Palestine, including the West Bank, East Jerusalem and Gaza. This decision was based on Palestine's recognised borders as a non-member observer state and its voluntary acceptance of ICC jurisdiction. Although this ruling did not settle broader questions about Palestine's statehood under international law, it affirmed Palestine's standing to engage with the ICC.

The ICC's investigation into the situation in Palestine has faced numerous challenges. These include allegations of misconduct against Chief Prosecutor of the ICC Karim Khan QC, political pressure from the United States to refrain from issuing warrants against Israeli leaders and questions about the impartiality of an ICC judge involved in reviewing the arrest warrants. These controversies raised concerns about potential delays, particularly since the Chief Prosecutor had applied for the warrants over 6 months ago. Despite these hurdles, the warrants were ultimately issued, underscoring the ICC's resolve to uphold its mandate.

The arrest warrants and the ethical and legal obligations of states

On 20 May 2024, Karim Khan QC announced that he had applied for arrest warrants against two Israeli leaders, Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Gallant, for war crimes and crimes against humanity committed in Palestine from 8 October 2023, onward.^[5] He also sought warrants against three Hamas leaders—Yahya Sinwar, Mohammed Diab Ebrahim Al-Masri (Deif) and Ismail Haniyeh—for similar crimes in Israel and Palestine, particularly in Gaza, from 7 October 2023. Following confirmation of the deaths of Sinwar and Haniyeh, their arrest warrant applications were withdrawn. While Israel alleges Deif has also been killed, his death remains unconfirmed.

On 21 November 2024, the ICC issued arrest warrants for Netanyahu and Gallant. They were charged as co-perpetrators of war crimes, including starvation and intentionally directing attacks against civilians, and crimes against humanity such as murder, persecution and other inhumane acts. The charges allege that they knowingly deprived Gaza's civilian population of essential resources—food, water, medical supplies, fuel and electricity, causing widespread suffering. Hospitals faced dire shortages of medicine and equipment, forcing doctors to perform surgeries and amputations without anaesthetics (even on children), causing extreme human suffering. The Court noted that these actions resulted in severe deprivation of fundamental rights, including the right to life and health, and observed that Netanyahu had explicitly linked the deprivation of aid to achieving military objectives. Furthermore, the co-perpetrators were found to have obstructed humanitarian aid except under external pressure, leading to significant civilian deaths, including from malnutrition and dehydration.^[2]

The Court's decision has drawn sharp criticism, particularly from Israeli officials. President Isaac Herzog accused the ICC of antisemitism, calling the warrants 'a reward for the acts of terrorism

on October 7' and alleging that the Court served as 'a human shield for Hamas'.^[5] However, it must be emphasised that the Prosecutor also sought warrants for Hamas leaders. Notably, it is Israel's assumption of responsibility for the deaths of Haniyeh and Sinwar that precludes their prosecution, and it is now not possible for these individuals to be brought to justice. The allegation that the issuance of the warrants against Israeli leaders constitutes antisemitism on the part of the Court, is therefore invalid. The warrant issued for Deif is extensive, charging him with crimes including murder, extermination, torture, sexual violence, hostage-taking, and cruel treatment.^[6]

State parties to the Rome Statute (numbering 124), are legally obligated to execute these warrants and arrest the accused if they enter their territories. This restricts travel for the accused, although non-state parties like Israel, the US, China, India and Russia are not bound by the Statute. Non-state parties may, however, voluntarily cooperate with the ICC or comply with UN Security Council resolutions mandating cooperation. The execution of ICC arrest warrants has historically been contentious, influenced by political considerations. For instance, South Africa (SA) faced international criticism for failing to arrest Omar al-Bashir when he entered its territory in 2015 despite the fact that an ICC warrant had been issued for his arrest. However, more recently, SA reaffirmed its commitment to the ICC by stating that it would be under a legal obligation to arrest Russian President Vladimir Putin by executing a warrant issued by the ICC if he entered South African territory. States now face a critical test of their commitment to international justice. Cooperation with the ICC should be consistent and impartial, and states should not demonstrate a moral and legal double standard. For example, there have been particular states which have reacted enthusiastically to the Putin warrant, yet have attempted to dissuade, pressure and coerce the Court not to proceed with the investigation into the situation in Palestine. Some states have reacted to the warrants issued against the Israeli leaders by unequivocally stating that they should not be enforced. While the conflict has elicited polarised views, it is important that states take this moment to exercise moral courage and a position of legal clarity in relation to the warrants. Their actions in the coming days and months will be significant.

The turn of the tide: A trigger for further actions

The issuance of the warrants marks the beginning of a crucial process, signalling that the wheels of justice have started to turn. However, it is important to recognise that this is only the first step in what will be a long legal journey. However, these warrants have the potential to trigger significant developments on the ground in Gaza. The Rome Statute criminalises the aiding or abetting of international crimes, which may exert pressure on those who have supported Israel, both militarily and politically, to halt their assistance. Additionally, states

may be encouraged to exercise universal jurisdiction—a principle of international law that allows countries to prosecute international crimes committed beyond their borders. This could result in more prosecutions of individuals accused of perpetrating international crimes in Gaza. As the ICC investigation progresses and more evidence is gathered, additional charges, including genocide, may be brought against the accused and other individuals. Although the ICC proceedings are separate from the genocide case filed by SA at the International Court of Justice, they will run concurrently, and the warrants issued by the ICC will hold significance in that case. Ultimately, the warrants symbolise a slow but steady shift in the dynamics of this conflict. The ICC has reaffirmed its legitimacy as a cornerstone of the international criminal justice system, emphasising that no person is above the law when it comes to the prosecution of international crimes. A legal obligation now rests on states to uphold and enforce the principles of international law and international criminal justice, ensuring their impartial and fair application. It is crucial to hold those responsible for these atrocity crimes accountable, regardless of their position or nationality.

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