

Israel and Hamas: Possible International Criminal Court (ICC) Arrest Warrants

May 23, 2024

On May 20, 2024, [International Criminal Court \(ICC\) Prosecutor Karim Khan](#) filed applications for warrants of arrest before a Pre-Trial Chamber (PTC) of the ICC in the “Situation in the State of Palestine.” He seeks to indict top leaders of Israel—including Prime Minister Benjamin Netanyahu—and of the Palestinian Sunni Islamist movement Hamas (a U.S.-designated foreign terrorist organization), asserting the ICC’s “jurisdiction over crimes committed by nationals of States Parties [Hamas officials] and by the nationals of non-States Parties [Israeli officials] on the territory of a State Party [‘Palestine’].” Foreign countries and international organizations have [expressed](#) varied reactions to the applications. The ICC Prosecutor’s action has triggered strong opposition from [U.S.](#) and [Israeli](#) officials, with the Biden Administration [expressing openness](#) to working with Congress on a “bipartisan basis” on “an appropriate response.”

The ICC Prosecutor opened a formal [investigation into the situation in “Palestine”](#) on March 3, 2021, weeks after a PTC determination that the ICC had jurisdiction over the West Bank (including East Jerusalem) and Gaza Strip. In November 2023, following the outbreak of [Israel-Hamas conflict](#), the Prosecutor [announced](#) that the investigation “extends to the escalation of hostilities and violence since the attacks that took place on 7 October 2023.”

ICC Crimes Alleged by the Prosecutor

The Prosecutor’s applications [allege](#) that Hamas leaders Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri (aka Mohammed Deif), and Ismail Haniyeh have committed war crimes, including murder, taking hostages, and cruel treatment, as well as crimes against humanity, including extermination, rape and other sexual violence, and torture. Allegations leveled at Israeli Prime Minister Netanyahu and Defense Minister Yoav Gallant include the war crimes of starvation of civilians, murder and causing great suffering, and intentional attacks on civilians, and the crimes against humanity of extermination, murder, and persecution.

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ICC Procedural Issues and Next Steps

The PTC will issue the requested arrest warrants if it determines there are “[reasonable grounds](#)” to believe the crimes have occurred. There is no deadline for a determination. If warrants are issued, the following might affect outcomes:

- The ICC might not be able to take custody of the accused individuals. While the Rome Statute of the ICC [requires](#) states parties to detain and transfer wanted individuals to ICC custody, states have at times failed to do so, despite the fact that the ICC does not recognize immunity for such officials.
- The ICC [cannot try](#) individuals in absentia.
- Despite relevant previous PTC rulings, defendants might challenge ICC jurisdiction based on the argument that “Palestine” does not qualify as a sovereign state capable of accepting the ICC’s jurisdiction, and that nationals of non-states parties may not be tried before the Court. (Israel is not a State Party to the Rome Statute and has not accepted ICC jurisdiction.)
- Defendants could challenge the ICC’s exercise of jurisdiction based on the ICC principle of complementarity, which [precludes](#) the ICC from conducting investigations and prosecutions if an appropriate, competent national judicial system has or is undertaking the same work.

Impact and Initial Reactions

The Prosecutor’s decision to pursue arrest warrants could have an impact on

- Israeli and Hamas actions regarding continued conflict, potential cease-fires and/or hostage releases, humanitarian assistance delivery efforts, and post-conflict planning, and
- deliberations in various countries, international tribunals, or organizations regarding the conflicting parties’ compliance with international law.

In Israel, 106 of 120 Knesset members [opposed](#) the Prosecutor’s decision. Prime Minister Netanyahu [said](#) the decision denied Israel its “right of self-defense,” while insisting Israel complies with international law. Israeli leaders [pledged](#) to fight the Prosecutor’s efforts and seek other countries’ nonenforcement of potential ICC orders against Israeli officials.

After reports earlier that West Bank-based [Palestinian Authority \(PA\) President Mahmoud Abbas](#) (a Hamas rival) was urging ICC action against Israel, and speculation grew that such action [might be imminent](#), Israeli Finance Minister Bezael Smotrich reportedly decided to [withhold tax revenue](#) from the PA that Israel collects on its behalf. As this revenue represents a [sizable portion](#) of the PA budget, the PA has apparently reduced public sector salaries. With the withholding seemingly set to continue following the Prosecutor’s action and some European countries’ recognition of Palestinian statehood, National Security Advisor Jake Sullivan [has argued](#) that the withholding undermines Israeli interests because it destabilizes the West Bank.

Hamas has [expressed support](#) for arrest warrants against Israeli leaders but [condemned](#) attempts to issue warrants against its leaders, contending it has the right to “armed resistance” against “Israeli occupation.”

U.S. Response and Options for Congress

On May 20, President Joe Biden [called](#) the Prosecutor’s action “outrageous” and said “there is no equivalence” between Israel and Hamas. Secretary of State Antony Blinken [further said](#):

Moreover, the United States has been clear since well before the current conflict that [the] ICC has no jurisdiction over this matter.... In other situations, the Prosecutor deferred to national investigations and worked with states to allow them time to investigate. The Prosecutor did not afford the same opportunity to Israel, which has ongoing investigations into allegations against its personnel.... Fundamentally, this decision does nothing to help, and could jeopardize, ongoing efforts to reach a ceasefire agreement that would get hostages out and surge humanitarian assistance in.

Members of Congress [have voiced](#) varying [views](#) on the matter. These differences might lead to some Member initiatives supporting the ICC process and others opposing it. Speaker of the House Mike Johnson [stated](#), “Congress is reviewing all options, including sanctions, to punish the ICC and ensure its leadership faces consequences if they proceed.”

Proposed [legislation](#) (H.R. 8282 and S. 224) would authorize sanctions—including blocking property and revoking visas—on foreign persons who carry out or assist the ICC’s investigation and prosecution of U.S. nationals or nationals of U.S. allies (such as Israel). The executive branch has taken action to sanction ICC personnel in the past. In September 2020, the Trump Administration [imposed](#) sanctions against ICC officials in connection with an investigation regarding Afghanistan. President Biden [lifted](#) these sanctions in April 2021 while reiterating objections to ICC assertions of jurisdiction over U.S. and allied personnel. If Israeli officials are eventually detained by the ICC, Congress has [authorized](#) the President to “use all means necessary and appropriate to bring about the release of” such officials.

Additionally, Congress could change or clarify annual appropriations provisions (in Section 7041(k)(2) of P.L. 118-47) that appear to prohibit U.S. economic aid for the PA (which the executive branch has distinguished from aid for the Palestinian people) and a Palestinian Liberation Organization office in the United States if the Palestinians support ICC investigations against Israeli nationals. Congress may also assess [current and proposed U.S. support](#) for (1) PA security efforts in the West Bank and (2) a possible future PA role in Gaza.

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