

21 May 2024

The ICC Prosecutor's Application for Arrest Warrants Against Israeli and Hamas Officials

As the hostilities between Israel and armed groups in Gaza persist and the levels of violence in the West Bank, including East Jerusalem, remain high, the Diakonia IHL Centre provides regular updates regarding legal aspects of the evolving situation.¹ This update covers the International Criminal Court (ICC) Prosecutor's application for the issuance of arrest warrants against Israeli and Hamas officials, made public on 20 May 2024.

On 20 May 2024, the ICC Prosecutor, Karim Khan, announced that his office had requested Pre-Trial Chamber I to issue warrants of arrest against leaders in the Israeli government and Hamas suspected of war crimes and crimes against humanity.² The individuals listed in the application are:

- Yahya Sinwar (Head of the Islamic Resistance Movement ('Hamas') in Gaza);
- Mohammed Diab Ibrahim Al-Masri ('Deif') (Commander-in-Chief of the military wing of Hamas, the Al-Qassam Brigades);
- Ismail Haniyeh (Head of Hamas' Political Bureau);
- Benjamin Netanyahu (Prime Minister of Israel); and
- Yoav Gallant (Minister of Defence of Israel).

Sinwar, Deif, and Haniyeh are suspected of having committed, as co-perpetrators and superiors, the following international crimes under the Statute of the ICC (ICC Statute):

- Extermination as a crime against humanity, contrary to Article 7(1)(b);
- Murder as a crime against humanity, contrary to article 7(1)(a), and as a war crime, contrary to Article 8(2)(c)(i);
- Taking hostages as a war crime, contrary to Article 8(2)(c)(iii);
- Rape and other acts of sexual violence as crimes against humanity, contrary to Article 7(1)(g), and also as war crimes pursuant to Article 8(2)(e)(vi) in the context of captivity;
- Torture as a crime against humanity, contrary to Article 7(1)(f), and also as a war crime, contrary to Article 8(2)(c)(i), in the context of captivity;
- Other inhumane acts as a crime against humanity, contrary to Article 7(1)(k), in the context of captivity;
- Cruel treatment as a war crime contrary to Article 8(2)(c)(i), in the context of captivity; and

¹ '2023-2024 Hostilities and Escalating Violence in the oPt | Legal Updates' (Diakonia IHL Centre) <<https://www.diakonia.se/ihl/jerusalem/2023-2024-hostilities-escalating-violence-opt/legal-updates/>> accessed 21 May 2024.

² 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine' (ICC, 20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>> accessed 21 May 2024.

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- Outrages upon personal dignity as a war crime, contrary to Article 8(2)(c)(ii), in the context of captivity.

These crimes were allegedly committed in connection with the Hamas attack in Israel on 7 October 2023. The Prosecutor assessed that some of these crimes continue to this day.

Meanwhile, Prime Minister Benjamin Netanyahu and Minister of Defence Yoav Gallant are suspected of being internationally responsible, as co-perpetrators and superiors, for the following crimes under the ICC Statute:

- Starvation of civilians as a method of warfare as a war crime contrary to Article 8(2)(b)(xxv);
- Wilfully causing great suffering, or serious injury to body or health contrary to Article 8(2)(a)(iii), or cruel treatment as a war crime contrary to Article 8(2)(c)(i);
- Wilful killing contrary to Article 8(2)(a)(i), or murder as a war crime contrary to Article 8(2)(c)(i);
- Intentionally directing attacks against a civilian population as a war crime contrary to 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 contrary to Article 7(1)(h);
- Other inhumane acts as crimes against humanity contrary to Article 7(1)(k).

The Prosecutor alleged that Benjamin Netanyahu and Yoav Gallant contributed to a ‘common plan’ to use starvation as a means to eliminate Hamas, free the hostages, and inflict collective punishment on Palestinians. The focus on the crime of starvation can be explained, *inter alia*, by the exceptional gravity of the consequences for the Palestinian population; the repeated warnings to Israel about the need to reverse course and ensure humanitarian assistance to the people of Gaza; and the strength of evidence linking Netanyahu and Gallant to the crime. The war crime of starvation has not been prosecuted before at the international level; the cases against Netanyahu and Gallant, if they proceed, could therefore provide an important precedent.

To prove a war crime, it must be demonstrated that the conduct in question was carried out in connection with an armed conflict. The ICC Prosecutor specified in his statement that the alleged crimes were committed in the context of an international armed conflict (IAC) between Israel and Palestine and a non-international armed conflict (NIAC) between Israel and Hamas, running in parallel since 7 October 2023. Crimes against humanity do not require a link to an armed conflict but must be committed in the context of a ‘widespread or systematic attack directed against any civilian population’ pursuant to a State or organisational policy (Article 7 of the ICC Statute).

Pre-Trial Chamber I will now decide whether there are ‘reasonable grounds to believe’ that the individuals in question have committed a crime within the jurisdiction of the Court and that their arrest appears necessary, pursuant to the criteria set out in Article 58(1) of the ICC Statute. According to a report issued by a panel of experts in international law, which the ICC Prosecutor convened in January 2024 to assist in his deliberations, these criteria have been satisfied with respect to the crimes listed in the application for arrest warrants.³ Among others, this panel included Theodor Meron CMG, who was a member of the

³ For more information about the panel see ‘Panel of Experts in International Law’ (ICC) <<https://www.icc-cpi.int/about/otp/special-advisers-to-the-prosecutor/panel-of-experts-in-international-law>> accessed 21 May

Israeli Foreign Service (Legal Advisor to the Foreign Ministry and Ambassador to Canada and to the United Nations) and later served as President of the International Criminal Tribunal for the former Yugoslavia (ICTY).

Historically, the Pre-Trial Chamber has taken several months to decide whether to issue a warrant of arrest. The first arrest warrant against Omar al-Bashir, the former ruler of Sudan, was issued only nine months after the request was made by the Prosecutor. On the other hand, less than one month lapsed between the Prosecutor's request and the issuance of the arrest warrant against Russian President Vladimir Putin.

The Court does not try cases *in absentia* (without the suspect present) and does not have its own enforcement agents. If arrest warrants are issued, the Court is therefore dependent on the cooperation of the 124 State parties to the ICC Statute to hand the suspects over to the Court (which they have an obligation to do, as per Article 86 of the ICC Statute). While it remains to be seen whether State parties to the Statute that are also close allies of Israel will be cooperative, those against whom arrest warrants are issued will have to think twice before travelling internationally. Moreover, there is no statute of limitations or amnesty available for war crimes or crimes against humanity.

Should the cases proceed to trial, Israel might elect to challenge the jurisdiction of the Court, including by contesting the statehood of Palestine and thus the validity of its accession to the ICC Statute. Israel is not a party to the ICC Statute, and the ICC's jurisdiction is premised on the State of Palestine's accession to the Statute in 2015 and its ad hoc declaration accepting the Court's jurisdiction in relation to crimes committed on its territory since 13 June 2014. On that basis, the Court has jurisdiction over the territory occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem, and over Palestinian citizens, including with respect to crimes allegedly committed by Palestinians in Israel (Article 12(2)(a) and (b) of the ICC Statute).

It is highly unlikely that a challenge of the Court's jurisdiction would be successful. The Pre-Trial Chamber already decided (on 5 February 2021) that Palestine's accession to the Statute was successful (for the purpose of initiating an investigation).⁴ It is worth noting that if Israel did successfully challenge the jurisdiction of the Court, the Court would also lack jurisdiction over crimes allegedly committed by Hamas leaders.

Israel could also challenge the admissibility of the cases against Netanyahu and Gallant by reference to domestic investigations or prosecutions relating to the alleged crimes (Article 19(2) of the ICC Statute). According to the principle of complementarity, the ICC is a court of last resort. However, it is unlikely that the Israeli Attorney General and/or Military Prosecutor would open up investigations into the conduct of Netanyahu or Gallant for war crimes or crimes against humanity. Furthermore, the Prosecutor stressed in his statement that the principle of complementarity 'requires a deferral to national authorities only when they engage in independent and impartial judicial processes that do not shield suspects and are not a sham. It requires thorough investigations at all levels addressing the policies and actions underlying these applications'.

In deciding to request arrest warrants for the leaders of Israel and Hamas, and in making these requests public, the ICC Prosecutor signalled that the international criminal justice system – to be credible – must be (seen to be) applied equally to all alleged perpetrators. The Prosecutor stressed that '[n]o foot soldier, no commander, no civilian leader – no one – can act with impunity'. Moreover, he emphasised that Israel's

2024. For the full report see 'Report of the Panel of Experts in International Law' (ICC, 20 May 2024) <<https://www.icc-cpi.int/sites/default/files/2024-05/240520-panel-report-eng.pdf>> accessed 21 May 2024.

⁴ *Situation in the State of Palestine* (Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine') ICC-01/18-143 (5 February 2021).

right to defend itself does not absolve it of its obligation to comply with international humanitarian law (IHL). While the arrest warrants do not cover all international crimes likely to have been committed in the occupied Palestinian territory (oPt), or all perpetrators, the ICC Prosecutor indicated that his office will not hesitate to submit additional applications for warrants of arrest if new evidence emerges from the continuing investigation. The Prosecutor may also request the Pre-Trial Chamber to amend the arrest warrants by modifying or adding to the crimes specified therein (Article 58(6) of the ICC Statute).