

# [***Opinion: How an ICC arrest of Netanyahu could play out***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6C1D-TTJ1-DY7V-G01P-00000-00&context=1516831)

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**Body**

(CNN) &#8212; The [*signs are mounting*](https://www.cnn.com/2024/05/05/middleeast/netanyahu-icc-warrants-israel-intl-latam/index.html) that the International Criminal Court (ICC) is weighing an indictment against Israeli Prime Minister Benjamin Netanyahu and other top Israeli officials over Israel's conduct of its war against Hamas in Gaza. This would be an earthquake and could be seen as a case of selective justice that ends up helping the beleaguered prime minister politically.

The ICC, which was [*established in 2002*](https://www.cfr.org/backgrounder/role-international-criminal-court), is more of a [*club of about 125 countries*](https://asp.icc-cpi.int/states-parties) that tries to make the rules than a true manifestation of consensual "international law" - and it occupies a rather fuzzy position vis-a-vis non-member states like the United States and Israel.

With a rather modest prosecutor's budget ([*about $185 million*](https://asp.icc-cpi.int/bureau/WorkingGroups/budget), of which only about half goes to the prosecutor's office), it boasts only a handful of convictions, and it has never indicted the leader of a democratic country. It has gone after Russia's [*Vladimir Putin*](https://www.cnn.com/2023/03/17/europe/icc-russia-war-crimes-charges-intl/index.html), Sudan's [*Omar al-Bashir*](https://www.cnn.com/2020/07/21/africa/sudan-omar-al-bashir-trial-intl/index.html) and some other miscreants from dictatorships, like former Libyan leader Moammar Ghadhafi's son [*Saif*](https://www.icc-cpi.int/libya/gaddafi). Netanyahu is already a [*criminal defendant*](https://www.cnn.com/2023/12/04/world/netanyahu-corruption-trial-resumes/index.html) at home on corruption charges and a tremendously unsympathetic figure to many, but he is not in that despotic league.

Israel has a problematic democracy, because of the longstanding occupation of the West Bank and east Jerusalem where millions of Palestinians live - but it is no Sudan.

Have other democratic countries not been involved in wars against terrorist groups that caused massive damage to civilians as in Gaza? Obviously they have, in particular the US and Britain and the coalitions that fought the Iraq war, tried to eradicate al Qaeda and ISIS, and had anything to do with the Libya and Yemen meltdowns of the 2010s. But when a country has a viable legal system, as Israel does, the ICC's inclination has been to keep things domestic.

The tricky question of jurisdiction

If the ICC has now decided to throw this tradition away, there is still the enormous question of jurisdiction, beginning with the odd procedure by which [*Palestine was admitted to the ICC*](https://mepc.org/commentaries/palestine-joins-international-criminal-court/#:~:text=Palestine%20became%20the%20123rd,committed%20in%20the%20Occupied%20Territories.) almost a decade ago.

The court operates by "state consent," which means it only accepts states. While the UN General Assembly did grant Palestine [*non-member observer status in 2012*](https://www.un.org/unispal/data-collection/general-assembly/), it is not recognized as a state by most major powers and economies, including the US. (Recently, some momentum has gathered to change that longstanding reality. The [*UN has taken steps*](https://www.youtube.com/watch?v=6EDunh8sspc) to grant more weight to Palestinians, and the UK among other countries has suggested it will consider recognizing a Palestinian state.) But in 2015 [*the ICC stepped in to decide*](https://www.justsecurity.org/68227/international-criminal-court-and-the-question-of-palestines-statehood-part-ii/) that implicitly it is, [*by accepting it*](https://www.icc-cpi.int/news/icc-welcomes-palestine-new-state-party) - [*without consulting the Assembly of States Parties (ASP), representing ICC member states*](https://www.icc-cpi.int/victims/state-palestine).

Moreover, the ICC can only take on cases that have occurred on the territory of member states - but Palestine, even if it exists, does not have recognized territory. So again, the ICC judges, in a majority but not unanimous vote, decided in 2021 that Palestine [*comprised the West Bank, Gaza and East Jerusalem*](https://unric.org/en/israel-palestine-the-role-of-international-justice/#:~:text=On%20its%20part%2C%20the%20State,Bank%2C%20and%20East%20Jerusalem.) (the last of which has been annexed by Israel).

That reflects the fairly random [*ceasefire lines of 1949*](https://www.bbc.co.uk/news/world-middle-east-54116567) that ended the war that accompanied Israel's own declaration of independence. The West Bank and East Jerusalem are the areas of British Mandate Palestine seized in that war by Jordan, while Gaza was seized by Egypt - but neither country now lays any claim to them.

Israelis and Palestinians cannot themselves agree. Many Israelis [*want no part of annexing the West Bank whole*](https://en.idi.org.il/articles/51746), fearing for the Jewish majority in their country. Hamas, meanwhile, has little interest in these borders, [*claiming all of Israel for the Palestinians*](https://www.wilsoncenter.org/article/doctrine-hamas). An ICC indictment would mean that the court has ruled meaningfully on borders.

Then there's proving the charges

Lastly, there is the question of the charges. To justify any war crimes charge against Israel's leaders, the court would have to deem Israel's actions to be disproportionate to what was needed in response to the Hamas attacks on October 7.

No matter how the court spins this, for instance if it were to claim it was only looking at a particular crime and not the aggregate, this will be perceived by its many critics as being subjective (in addition to selective).

And there will be no escaping factoring in Hamas' manifest policy of using the population of Gaza as a [*human shield*](https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/10/10/remarks-by-president-biden-on-the-terrorist-attacks-in-israel-2/). Even though the media has hardly mentioned this, established war crimes jurisprudence makes clear that civilian sites lose their protected status if they are in effect [*turned into military sites*](https://ihl-databases.icrc.org/en/customary-ihl/v1/rule10#:~:text=Civilian%20Objects'%20Loss%20of%20Protection%20from%20Attack,-Related%20practice&text=of%20an%20object-,Rule%2010.,as%20they%20are%20military%20objectives.). (As journalists have lacked access to active war zones in Gaza, it is difficult to assess how actively Hamas is using civilians as human shields, but the terrorist group is known to embed itself in population centers and has been widely accused of making use of hospitals and schools.)

If the court ignores this, terrorists everywhere will take succor from the idea that they can commit atrocities and then hide behind human shields, daring their pursuers to risk international arrest warrants. The use of human shields [*is not a new war tactic*](https://www.american.edu/sis/news/20231116-hamas-isnt-the-first-military-group-to-hide-behind-civilians.cfm), but this extent, with the terrorists hiding underground in a vast network of tunnels, has been rarely seen, and the ICC risks encouraging the practice.

Moreover, if the ICC were not to [*charge*](https://www.theguardian.com/law/2024/apr/29/icc-possible-war-crimes-charges-israel-hamas-g7) Hamas itself, that would be absurd. Hamas' October 7 invasion - with the stated purpose of killing a maximal number of Israelis and with subsequent [*promises to do so again*](https://www.msnbc.com/morning-joe/watch/hamas-official-vows-to-repeat-attacks-on-israel-again-and-again-until-it-s-destroyed-196930629782) - was among the more classic acts of genocide in modern times, according to the UN's own definition in the [*1948 Genocide Convention*](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf), which places great emphasis on intent. There is nothing in the ICC's own rules that limits its jurisdiction to officials, and indeed, Hamas is anyway the effective government of Gaza, certainly until Israel's invasion.

The court has a lot of leeway, and therefore ***politics*** are inevitable. Could the highly respected chief prosecutor, Britain's Karim Khan, be feeling some pressure to play his part in ramping up the pressure on Netanyahu? Last week, he [*pushed back on the pressure*](https://www.ynetnews.com/article/skat2egg0) coming from Israel to block potential arrest warrants of leaders.

A world fed up with war

That touches on issues that are not juridical but strategic. Netanyahu has not supported forging a pathway to a Palestinian state - which may well be necessary to effect US President Joe Biden's grand design to establish a Western-Sunni-Israeli axis that would counter Iran and achieve the other (perhaps unspoken) goal of counterbalancing Russian and Chinese influence in the Middle East.

Netanyahu has done this because his far-right coalition is blocking the condition of [*restoring the Palestinian Authority to control in Gaza*](https://www.cnn.com/videos/politics/2023/11/12/sotu-netanyahu-on-palestinian-authority.cnn) in place of Hamas - which many in Israel itself have [*in theory wanted for years*](https://www.inss.org.il/publication/the-day-after-hamas/). This self-defeating position is a big reason why the world is fed up with the war - on top of, of course, the [*appalling death toll in Gaza*](https://time.com/6909636/gaza-death-toll/).

The Netanyahu factor

Then there's the convoluted [*process to actually get to court*](https://www.icc-cpi.int/about/how-the-court-works#:~:text=Investigations,arrest%20warrant%20may%20be%20issued).). Israel might try to buy time or derail the process by saying it is investigating on its own. This might not work (because Israel is not a member state, which matters) - but on the other hand it might (because Netanyahu's effort to eviscerate Israel's independent judiciary last year was stalled by [*mass protests*](https://www.cnn.com/2023/03/12/middleeast/israel-protests-benjamin-netanyahu-intl/index.html)).

After all, if Netanyahu had succeeded in killing the independence of the courts, Israel would not be able to claim it has a proper judiciary of its own, which is one of the triggers for ICC interference.

If in the end the ICC does issue an arrest warrant against Netanyahu, despite all the reasons not to, it would be handing a gift to critics who charge that the court is a bizarre construct with little oversight or accountability whose decisions and choices are not consistent or sufficiently explained to the public.

Moreover, it could be playing into Netanyahu's hands politically. The same would be true if the court attempted a compromise and went after Israeli military figures, for example. By applying selective justice to Israel, it will walk right into claims [*he has already made that the case is an antisemitic calumny*](https://www.timesofisrael.com/netanyahu-icc-arrest-warrants-would-be-antisemitic-hate-crime-distortion-of-justice/). This argument will be popular in Israel, and the opposition parties will most likely have to back it - especially if the indictments extend to military leaders.

Netanyahu is on the ropes politically and would almost certainly be trounced in an election held today. He's dragging his feet on the war and proposals to end it, likely in hopes of keeping his government intact until circumstances change. An ICC arrest warrant would give him an effective axe to grind - and would not even prevent him from traveling to the one place he cares about, the United States.

Israel desperately needs Netanyahu to be gone, as does the region and the world. It would be a shame if the ICC inadvertently made that more difficult.

Opinion by Dan Perry

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