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The legal implications of the arrest warrant for the Israeli Prime Minister



Introduction

On November 21, the Pre-Trial Chamber of the International Criminal Court (ICC) issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Gallant. The court charged them with committing a "war crime" by using starvation as a method of warfare, as well as committing "crimes against humanity," including murder and persecution. The charges cover actions committed between October 8, 2023, and May 20, 2024. The court found reasonable grounds to believe that the accused deliberately and knowingly deprived civilians in Gaza of essential life-sustaining resources, such as food, water, medicine, and medical supplies.

Additionally, the Pre-Trial Chamber issued an arrest warrant for Mohammed Deif, the Commander-in-Chief of the Al-Qassam Brigades, the military wing of Hamas. He faces charges of mass murder related to the attacks carried out on Israel on October 7, 2023.

The arrest warrants raise important questions about their legal implications, particularly in terms of activating international accountability mechanisms for violations committed in Palestinian territories. Key issues include the feasibility of arresting the Prime Minister or handing him over to the court if he visits a state party to the ICC, as well as the diplomatic impact of this move in exerting pressure to halt human rights violation.

Firstly: The Jurisdiction of the International Criminal Court Over Violations Committed in Palestinian Territories

The International Criminal Court (ICC) was established through an international treaty to exercise jurisdiction over specific types of crimes, making it subject to the general provisions of treaties outlined in the 1969 Vienna Convention on the Law of Treaties. Consequently, the ICC operates based on a treaty that is binding only on its member states¹.

¹ Under Article 16 of the Vienna Convention on the Law of Treaties, a treaty is binding on the states that are parties to it, and they are required to perform its obligations in good faith. However, the treaty is not binding on non-party states and does not create rights for them. An obligation for non-party states may arise only if it is intended to establish such an obligation and the non-party state expressly accepts it in writing. – Refer to Articles 34 to 38 of the aforementioned Vienna Convention.

Article 13 of the Rome Statute stipulates the circumstances under which the ICC may exercise jurisdiction over crimes referred to in Article 5 of the Statute, in accordance with the provisions of Article 13, in the following scenarios:

1. If a State Party refers a situation to the Prosecutor under Article 14, in which it appears that one or more of these crimes have been committed.
2. If the United Nations Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Prosecutor in which it appears that one or more of these crimes have been committed.
3. If the Prosecutor has initiated an investigation concerning one or more of these crimes in accordance with Article 15.

However, under paragraph 3 of this article, the Prosecutor may not initiate any investigation unless the crime was committed on the territory of a state that has ratified the Rome Statute, was perpetrated by one of its nationals, or if a non-party state has accepted the jurisdiction of the court. Thus, the International Criminal Court (ICC) binds only the member states of the Rome Statute. For non-member states, those states must accept the court's jurisdiction under the Statute by submitting a declaration to the ICC Registry, stating their acceptance of the court's jurisdiction over the crime in question.²

Based on this framework, Israel rejected the ICC's jurisdiction, arguing that it is not a signatory to the Rome Statute and that Palestine's ratification of the Statute does not grant the court jurisdiction, as Palestine lacks official recognition by the United Nations as an independent state. However, the ICC based its decision on Palestine's territorial jurisdiction, given that the alleged crimes occurred on Palestinian territory and that Palestine is a party to the Rome Statute. The court also dismissed an appeal submitted by Israel on September 26, arguing that Israel's acceptance of the ICC's jurisdiction is not required, as the court can exercise its jurisdiction based on Palestine's territorial jurisdiction. Furthermore, the court ruled that states cannot challenge its

² Article 12, Paragraph 3 of the Rome Statute of the International Criminal Court

Secondly: The Impact of Immunity on the Possibility of Prosecuting the Israeli Prime Minister

Arrest warrants issued by the International Criminal Court (ICC) against senior officials have long sparked debate in political and legal circles regarding the feasibility of extraditing suspects and bringing them to justice. This debate was reignited when Russian President Vladimir Putin visited Mongolia last September, despite an ICC arrest warrant issued against him, especially given that Mongolia is a state party to the Rome Statute.

From a political perspective, Mongolia's stance could be understood as an effort to avoid jeopardizing its diplomatic and political relations with a major power and permanent member of the UN Security Council. However, the issue becomes even more complex from a legal standpoint, as it intersects with the question of immunity.

1. The Position of the ICC Statute on the Principle of Immunity

In practice, while immunity may still be invoked under national criminal law, the situation is markedly different when dealing with international crimes as defined in the Rome Statute. It is now well-established that immunity cannot be used as a shield to escape accountability for such crimes. The principle of non-recognition of immunity as a defense against prosecution has been emphasized in various international instruments, and this concept was first firmly established in the Statute of the Nuremberg Tribunal, which prosecuted war criminals after World War II. The Nuremberg Statute explicitly stated that the official capacity of defendants, whether as heads of state or high-ranking officials, would not be considered a mitigating factor for punishment³.

This principle was also incorporated into the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, both of which stipulated that the official position of an accused, whether as a head of state, head of government, or government official, does not exempt them from criminal responsibility or serve as grounds for a reduced sentence. This principle was demonstrated in the prosecution of former Yugoslav President Slobodan Milošević⁴.

3 ARTICLE 7 OF THE CHARTER OF THE NUREMBERG TRIBUNAL: "THE OFFICIAL POSITION OF DEFENDANTS, WHETHER AS HEADS OF STATE OR RESPONSIBLE OFFICIALS IN GOVERNMENT DEPARTMENTS, SHALL NOT BE CONSIDERED AS FREEING THEM FROM RESPONSIBILITY OR MITIGATING PUNISHMENT."

4 SEE: ARTICLE 27 OF THE STATUTE OF THE RWANDA TRIBUNAL AND ARTICLE 28 OF THE STATUTE OF THE YUGOSLAVIA TRIBUNAL.

The Rome Statute of the ICC, in Article 27, took a definitive stance on this issue. Article 27 stipulates that the Statute applies equally to all individuals without any distinction based on official capacity. Specifically, it states that official capacity, whether as a head of state or government, a member of a government or parliament, an elected representative, or a government official, does not exempt a person from criminal responsibility under the Statute and cannot, in itself, constitute grounds for a reduced sentence. Moreover, immunities or procedural rules linked to a person's official capacity, whether under national or international law, do not bar the court from exercising jurisdiction over that individual.

Article 27 underscores two key principles: **equality before the court and non-recognition of immunity**. This provision aligns with the values and objectives for which the ICC was established, particularly ensuring that officials and leaders cannot evade criminal accountability for atrocities committed under the guise of immunity afforded by their positions.

2. The Possibility of Bringing an Immunity-Holding Individual Before the Court

Despite the stance of the Rome Statute rejecting immunity, issues related to immunity continue to pose practical obstacles for the International Criminal Court. The actual challenges arise when the immunity-holding individual is in their own country or a second country that refuses to cooperate with the Court. This gap is codified within the Rome Statute itself, as **Article 98** stipulates:

1. The Court may not issue a request for surrender or assistance that requires the requested state to act in a manner inconsistent with its obligations under international law regarding state immunities or diplomatic immunities of a person or property belonging to a third state, unless the Court first obtains the cooperation of that third state to waive the immunity.
2. The Court may not issue a request for surrender that requires the requested state to act in a manner inconsistent with its obligations under international agreements, which require the consent of the sending state as a condition for surrendering a person belonging to that state to the Court, unless the Court first obtains the cooperation of the sending state to provide consent for surrender.

Conclusion:

In light of the above, it appears that the International Criminal Court (ICC) may be unable to bring any officials to trial if they are on the territory of a state other than their own, unless that state requests permission from Israeli authorities to obtain their consent to waive immunity. This measure is necessary to avoid breaching international agreements that uphold immunity and to prevent the resulting tensions in international relations between states.

However, despite the legal and political complexities surrounding the enforcement of the ICC's decision, the ruling holds significant political and diplomatic importance, as highlighted in the following points:

1. It constitutes a clear acknowledgment by an important international institution of Palestinian sovereignty over its territories, with the court determining that its jurisdiction extends to Gaza, the West Bank, and East Jerusalem.
2. The decision will increase diplomatic pressure and international isolation on Israeli leaders to halt aggression and ongoing violations in Gaza and the West Bank. It will also heighten domestic pressure and provide an opportunity for the Israeli opposition to leverage the ruling for political gains against Netanyahu's government.
3. The ruling offers a glimmer of hope for justice for the victims of the conflict, narrowing the opportunities for perpetrators of violations to escape accountability.