

# **Netanyahu's Arrest Warrants and New Developments in International Criminal Law**

**Zafar Azeem\***

This write-up examines the effects and impact of emerging developments in International Criminal Law. The Prosecutor of International Criminal Court (ICC) recently filed Criminal charges against Benjamin Netanyahu, the sitting Prime Minister of Israel, for the commission of war crimes including the use of starvation as a method of warfare, targeting of civilians and restricting the human aid to Gaza. The ICC, while taking cognizance of the matter and after examining the material evidence presented before it, issued warrants of arrest of the Israeli Prime Minister.<sup>1</sup>

---

\*Zafar Azeem: PhD in International Law from Concordia College, LL.M from Washington University in St. Louis School of Law: MPA: University of Southern California. LL.B: Punjab University, an associate of Azimuddin Law Associates.

The Israeli's objections relating to court's jurisdiction were rejected.

The court ruled, "in the light of ratification of Rome Statute by Palestine State<sup>2</sup>, the court is competent to proceed in the matter.

Although, it is early to say about the outcome of these proceedings, yet let us understand and examine the nature of allegations against the accused and possible outcomes. The allegations alleged against the accused are the following.<sup>3</sup>

- **War Crimes in Gaza:**<sup>4</sup>

It has been alleged: Netanyahu and his associates used starvation as a method of warfare by placing deliberate restrictions on the supply of food, water, fuel, electricity, and medicines.

---

<sup>1</sup> Article 58 (I) of the Rome Statute sets out two limbs requirements to the frame charges against an accused, that is, reasonable involvement in the commission of crime, such person's arrest becomes necessary for ensuring his presence in the court and to check that such person does not obstruct the investigation.

<sup>2</sup> The Rome Statute which created the International Criminal Court is a treaty. This treaty was ratified by the Palestine State in 2015. As of October 2024, 125 states are party to the statute.

<sup>3</sup> See Tyler McBrien's report on LAWFARE: lawfaremedia.org:  
<https://www.lawfaremedia.org/contributors/tmcmbrien>

<sup>4</sup> The Statute of Rome sets out the court's jurisdiction over crimes such as genocide, crimes against humanity, aggression and war crimes under Articles 5 to 11.

- **Crimes against Humanity:** The civilian population, particularly children and age old people, of Gaza were targeted by denying water, electricity and food particularly when it was evident that they were non-combatants.
- **Inhuman acts:** The acts of war by Israel caused deaths and torture through destruction of medical facilities.
- **Persecutions:** People in Gaza were targeted on their identity and nationality.
- **Targeting of Civilians:** Deliberate military actions were taken against the civilian population of Gaza.<sup>5</sup>

The actions of ICC are though within the framework of Rome Statute, yet its actions may confront challenges of jurisdiction and absence of action by the Israeli authorities.<sup>6</sup>

1. **Jurisdiction:** Israel may argue the ICC lacks jurisdiction because Israel is not a party to the Rome Statute and to the dispute of Palestine's statehood.<sup>7</sup>

---

<sup>5</sup> The acts committed by Israel violated International Humanitarian Law. Humanitarian law mandates protection of civilians during armed conflicts.

<sup>6</sup> See Articles 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Statute of Rome.

2. **Absence of Intervention by the Israeli Courts:** Israel preempts ICC involvement by conducting investigations into the alleged crimes. However, its failure to do so conferred jurisdiction on ICC to proceed in the matter.<sup>8</sup>

## **Political and Geopolitical Implications**

### **1. Enforcement Challenges:**

- The ICC lacks its own enforcement mechanism and depends on member states to execute arrest warrants. Countries with strong ties to Israel, like the United States and Hungary, have already indicated that they will not cooperate with ICC as they do not recognize the institution; it undermines the ICC's authority.<sup>9</sup>
- Non-cooperation from powerful allies also highlights the ICC's limitations and its reliance on political will of the world community.

### **2. International Relations:**

---

<sup>7</sup> The court, however, affirmed its authority in the matter in the light of accession to the Statute of Rome by the State of Palestine.

<sup>8</sup> For the court: "It looked to be a fit case falling within the jurisdiction of the court as the prosecutor did present facts where the court has to render a judgment.

<sup>9</sup> However, a number of states including some members of the European Union have shown courage to declare that they intend to support ICC and declared that ICC's orders will be implemented.

- The charges against Netanyahu could strain Israel's diplomatic ties with ICC member states.
- A number of countries support the ICC's investigations, these states emphasize on accountability of rogue nations. It may lead to a deepening divide between Israel and other countries.

### **3. Developing Precedent for Accountability:**

- A conviction of a sitting or former head of government like Netanyahu can set a historic precedent for holding rogue leaders accountable for their illegal actions and atrocities.

## **Impact of ICC's Orders:**

### **1. Ending Impunity:**

The ICC action aims to end impunity for those who commit inhuman acts of atrocities.

### **2. Ringing the bell of Justice:**

The International Law requires the rights of war crime affectees as recognized by the principles of Nuremberg Trials which were adopted by the UN in 1946.<sup>10</sup>

### **3. Global Security:**

The ICC being an arm of United Nations is contributing towards global security and peace.

### **4. Past Precedents:**

The ICC's investigations into Benjamin Netanyahu affairs is significant though, yet not without precedents. Political leaders have previously been held responsible for their illegal actions by international courts.

### **Examples:**

#### **1. Slobodan Milosevic<sup>11</sup> (Yugoslavia):**

- **Charges:** Milosevic was indicted by the International Criminal Tribunal for war crimes, crimes against humanity, and genocide during the Balkan wars.

---

<sup>10</sup> The adopted and recognized principles include: Individual Criminal responsibility, no immunity for International Crimes, and the right of the fair trial.

<sup>11</sup> The Prosecutor v. Slobodan Milosevic IT . 02-54-T, International Criminal Trial. (2004).

- **Result:** He was arrested and extradited to The Hague in 2001, but he died in custody before a verdict was reached. The action of the ICC amid complex geopolitical challenges demonstrated the international community's commitment and ability to prosecute high-ranking officials who commit atrocities.

## 2. Omar al-Bashir Case:<sup>12</sup>

- **Charges:** The ICC issued arrest warrants against al-Bashir for genocide, war crimes, and crimes against humanity in Darfur.
- **Result:** Despite the warrants, al-Bashir traveled to several countries without being arrested. After being ousted in 2019, Sudan indicated willingness to cooperate with the ICC, but no transfer has yet occurred.<sup>13</sup>

## 3. Charles Taylor Case:<sup>14</sup>

- **Charges:** Taylor was tried by the Special Court for Sierra Leone for war crimes committed during the Sierra Leone Civil War.

---

<sup>12</sup> The Prosecutor v. Omar Hassan Al Bashir : ICC – 20/05-01/09.

<sup>13</sup> The precedent highlight enforcement challenges, particularly when suspects are shielded by their own governments or allies

<sup>14</sup> The Prosecutor v. Charles Ghankay Taylor. SCSL – 03 – I – T : ICL 936 (SCSL 2012).

- **Result:** Convicted and sentenced to 50 years in prison in 2012. Where international courts and states collaborate, the potential for accountability increases.

#### **4. Uhuru Kenyatta Case:<sup>15</sup>**

- **Charges:** Crimes against humanity related to post-election violence in Kenya.
- **Result:** Charges were dropped due to lack of evidence.
- **Limitations:** It demonstrates the difficulties in sustaining a trial without state cooperation.

### **Process followed by the ICC**

#### **1. Investigation and charges:**

- To establish whether there exist grounds to believe occurrence of a crime within court's jurisdiction, the ICC Prosecutor gathers evidence.<sup>16</sup>
- The Complaint to the court has to establish "reasonable grounds" against the accused, with reference to charges of war crimes and crimes against humanity.

#### **2. Implementation of the Arrest Warrants<sup>17</sup>:**

---

<sup>15</sup> Prosecutor v. Kenyatta (Uhuru), ICC 01/09 – 02/11- 1005: 13-3-2015.

<sup>16</sup> See article 54 of the Statute of Rome, it confers powers and defines duties of the prosecutor in conducting investigations.

<sup>17</sup> See article 58 of the Statute of Rome.



- The ICC relies on cooperation extended by member states for execution of warrants. Member states are under an obligation to comply<sup>18</sup>.
- In Netanyahu's case, Several ICC member states have already shown non-cooperation, weakening the enforcement prospects, but many other states have shown commitment to enforce ICC orders, it includes Holland, France and Britain.

### **3. ICC Trial Process:**<sup>19</sup>

- The accused must be present in The Hague for a trial to proceed. This includes pre-trial confirmation of charges, the main trial, and sentencing if convicted.
- Trials are conducted with strict adherence to international legal norms, including the presumption of innocence and the right to defend.

### **4. Challenges of Harmonization:**<sup>20</sup>

- Where a country itself conducts credible investigations into the allegations, the ICC restrains itself as the ICC acts as a court of last resort.<sup>21</sup>

---

<sup>18</sup> See Article 86 of the Rome Statute.

<sup>19</sup> See article 62 through 76 for the mechanism of the trial process.

<sup>20</sup> See article 86 through 102 and for enforcement of court's orders, see also articles 103 to 111.

<sup>21</sup> Israel's refusal to engage with the ICC has instead reinforced the court's jurisdiction.

## **Undertones for Netanyahu**

### **1. Challenges of International Politics:**

- ICC proceedings and court's legality has been challenged by US and Hungary. They oppose the ongoing proceedings. These challenges highlight the limits of international law and its enforcement.

### **2. General Disagreement:<sup>22</sup>**

- The ICC faces pressures but the court maintains its impartiality while reviewing the collection of evidence in politically charged cases, particularly where state cooperation is absent.

### **3. Impact of such Prosecutions:**

- The actions of ICC provide a powerful message regarding accountability. These cases provide an opening for apprehending the defiant leaders particularly those who can be successfully prosecuted.<sup>23</sup>

## **ICC Proceedings and Potential Legal Defenses for the Accused:**

---

<sup>22</sup> Sterio, Milea: "The International Criminal Court: Current challenges and future successes," case western reserve Journal of International Law, Vol 52, issue I (2020).

<sup>23</sup> Donohue, Joan E. The Effectiveness of the International Court of Justice; ASIL Annual Meeting 2014, Cambridge University Press (2014).

An accused can employ several legal and procedural defenses to counter the ICC charges. The accused can challenge both the jurisdiction of the court and substance of the allegations.

## 1. Jurisdictional Challenges

- **Palestinian Statehood Dispute:** Israel contends the ICC lacks jurisdiction because from Israeli perspective it is not a sovereign state. Whereas Palestine proposes that is an independent and Sovereign State it did accede to the Rome Statute in 2015. Israel, however, contends that Palestine's statehood still remains unresolved under international law.<sup>24</sup>
- **Statute of Rome and Non-Signatories:** The States, who are not a party to the Rome Statute, can argue that the ICC has no authority over its nationals.<sup>25</sup>
- **Complementarity Principle:** a country can assert that its judicial system is capable of addressing the allegations independently; in that case, it will render the ICC involvement unnecessary.<sup>26</sup>

---

<sup>24</sup> For continuation of debate, see Kyrus, George: The recognition of right of statehood and Palestine: <https://www.tandfonline.com/doi/full/10.1080/17449057.2024.2362510> published on 8 July, 2024.

<sup>25</sup> The ICC views that its jurisdiction applies in territories that fall under a state party who stands recognized, such as Palestine.

<sup>26</sup> See articles 12, 21, 24 (2) and 51 of the Rome Statute. This plea has not been taken by Israel.

## 2. Military Defence Argument:<sup>27</sup>

- **Warfare its necessity and proportionality:** Defence can argue, the military actions in Gaza were necessary and proportionate to Hamas' attacks and to the use of human shields and indiscriminate rocket fires. The civilian casualties can be claimed as collateral war damage rather than intentional targeting.<sup>28</sup>
- **Distinction between Combatants and Civilians:** Israel can claim that Hamas deliberately operates in civilian areas, making it difficult to avoid civilian harm by framing it as violations (by Hamas) of international humanitarian law.

## 3. Humanitarian Aid Blockade Justifications

- **Security Concerns:** Israel can argue, restrictions on goods entering Gaza were necessary to prevent weapon smuggling to Hamas and it was not a belligerent action being a legitimate measure under international law, aimed at protecting Israeli civilians from ongoing threats.
- **Responsibility Sharing:** Netanyahu's defense might assert that Gaza's humanitarian crisis was exacerbated by Hamas'

---

<sup>27</sup> See Article 31 (I) (c ) of the Rome Statute.

<sup>28</sup> See Geneva Convention and its Additional Protocols.

mismanagement of resources and refusal to prioritize civilian needs.

#### **4. Issue of Knowledge and Chain of Command**

- **Responsibility:** It can be argued that decisions on military operations or humanitarian aid were not made by Israeli PM directly but by lower-ranking officials, challenging the claim of “command responsibility,” a key component of ICC allegations.
- **Insufficient Evidence:** Defence can assert that the ICC lacks concrete evidence directly linking the accused to decisions resulting in alleged war crimes or crimes against humanity.

#### **5. Political Bias as Defence**

- **Selective Prosecution:** Israel has repeatedly accused the ICC of political bias. Israel’s lawyer can argue that the investigation is biased and ignores acts of violence committed by Hamas.
- **Geopolitical Influences:** It can be alleged on behalf of the accused that the court is influenced by international politics rather than strict adherence to justice. In other words, the defending accused can allege, prejudice, racism, discrimination, exploitation, oppression, sexism and inter-group conflict.

## Critical Considerations

- **Conducting Domestic Investigations:** Israel can preemptively establish independent commissions or initiate investigations to address the allegations, thereby demonstrating a willingness to investigate. Israel might also invoke the principle of complementarity, rendering the ICC proceedings inadmissible.<sup>29</sup>
- **Political Pressure:** The United States, a close ally of Israel has criticized the ICC's investigation. It could lead to diplomatic pressure on the court to reconsider its proceedings.<sup>30</sup>

The ICC has, however, dismissed jurisdictional challenges by observing that significant evidence exists on the face of record of the commission of alleged war crimes.

## Command Responsibility Argument and ICC Precedents

The international law holds military and civilian superiors to stand accountable for crimes committed by their subordinates when they knew or should have known about such crimes and failed to prevent or punish the culprits. This refers to command responsibility. In

---

<sup>29</sup> This argument has not so far been put forward by the state of Israel.

<sup>30</sup> Diplomatic backing could influence implementation of court's orders, particularly in view of the fact that US has not acceded to the Statute of Rome.

several key cases, the ICC and other international tribunals have already taken cognizance of such crimes and awarded punishments.

### **Examples:**

#### **Jean-Pierre Bemba Gombo (2016)<sup>31</sup>**

**Facts:** Bemba was found guilty under command responsibility, as his troops committed acts of murder, rape, and pillaging. He was accordingly convicted by the ICC for war crimes and crimes against humanity committed by his forces in the Central African Republic.

#### **Important findings of the Court:**

- The court observed that Bemba had **effective command and control** over his troops and he failed to take reasonable measures to prevent or repress their crimes.
- Superiors, when they have knowledge of crimes being committed, are required to act to safeguard the innocent.<sup>32</sup>

---

<sup>31</sup> The Prosecutor v. Jean – Pierre Bemba Gombo: ICC – 01 / 05-01 / 08 – 3636 – Anx I – Red dated 8-6-2018

<sup>32</sup> The case did reinforce the ICC's application of command responsibility for civilian and military leaders.

## **2. Thomas Lubanga Dyilo Case:<sup>33</sup>**

In this case the principles of accountability were laid down relating to leadership roles. Lubanga, a Congolese warlord, was convicted by the ICC for recruiting and using soldiers.

The fact of Lubanga's effective control over his forces became the cause of conviction.

## **3. Radovan Karadzic<sup>34</sup>**

- In this case, the Bosnian Serb leader Karadzic was convicted for genocide and crimes against humanity, including the Srebrenica massacre.
- Tribunal's observations in the case:
  - As a superior, Karadzic was under command responsibility whereas he failed to prevent war crimes; rather he orchestrated policies that enabled atrocities.
  - The court was applied a strict standard for producing evidence to support the fact that the superior had effective control and he knew or should have known about the crimes committed. This case reinforced the

---

<sup>33</sup> The Prosecutor vs. Thomas Lubanga Dyilo, ICC-01 / 04-01 / 06-803 - Zen Dated 14-3-2012.

<sup>34</sup> The Prosecutor v. Radovan Karadzic: MICT – 13 – 55- R86 F. 12



principle that civilian leaders, not just military commanders, can be held responsible for actions of atrocities.

#### **4. Slobodan Milosevic.<sup>35</sup>**

- **Overview:** This trial laid a significant groundwork for command responsibility cases. Milosevic did face charges of war crimes against humanity and genocide.
- **Findings:**
  - Active involvement of a leader in planning and tolerating crimes against humanity leads to command responsibility.
  - The Court emphasized that "effective control" over perpetrators caused the offence.

#### **Important Elements in Command Responsibility Cases**

##### **1. Knowledge:**

- The superior must have known, or had reason to know, about the crimes being committed.

---

<sup>35</sup> Id.

- The element of awareness can be established through direct reporting, circumstantial evidence, and patterns of misconduct.

## **2. What is Effective Control:**

- The authority to prevent or punish the crime.
- Control is based on hierarchy, communication lines, and the leader's influence over his subordinates.

## **3. Command Responsibility:**

- Command responsibility arises when a leader fails to take reasonable steps to prevent crimes or punish perpetrators.

## **Implications of Netanyahu's Case<sup>36</sup>:**

### **• Important Points to Establish Knowledge:**

- It appears to be an established fact that Netanyahu was aware of civilian casualties, humanitarian restrictions, and alleged targeting in Gaza.
- Military communications, public statements, and patterns of misconduct support the fact.

### **• Effective Control:**

---

<sup>36</sup> The Prosecutor v. Benjamin Netanyahu: ICC 01/18 37421/2024

- Netanyahu, as head of government, possesses the authority over military and humanitarian policies. The prosecution can argue that he could have intervened to prevent alleged crimes.
- **Failure to Act:**
  - The ICC would claim that Israel's continued operations, despite warnings from international bodies about civilian harm, constitute a failure to act.

### **Challenges for the ICC**

- **Political Nature:**
  - Netanyahu's defense may argue that policy decisions in war are inherently complex and not comparable to direct war crimes.
- **Evidence:**
  - Unlike previous cases involving warlords or localized commanders, Netanyahu's defense could argue that decisions were made through collective state mechanisms, diffusing individual responsibility.

### **Evidence Used in Command Responsibility Cases**

There are three pillars of command responsibility: **knowledge**, **effective control**, and **failure to act**. Following are the key evidence types used in such cases.

## **1. Direct Evidence**

It is based on documents, testimony, or recordings that explicitly link a superior to the crimes and its knowledge. Examples:

- **Military Orders:** Written or verbal orders directing or approving unlawful actions.
- **Public Statements:** Speeches, interviews, or public comments demonstrating intent or awareness of crimes.
- **Communication Records:** Emails, phone transcripts, or meeting minutes showing involvement or awareness.

**Example:** In *Jean-Pierre Bemba case*, radio communications were used to prove Bemba's control over his forces and knowledge of their actions.

## **2. Patterns of Behavior**

Even in the absence of direct evidence, systematic patterns can demonstrate that crimes were widespread and well-known. Examples:

- Repeated reports of misconduct from reliable sources, such as UN agencies or NGOs.
- Documentation of similar incidents across multiple locations or times, suggesting a policy or tolerance for illegal conduct.

**Example:** In *Radovan Karadzic*<sup>37</sup> case, reports of ethnic cleansing and massacres across Bosnia established that such crimes were a central policy, implicating leadership.

### 3. Chain of Command Documentation

The Examples to prove charges on the basis of chain of command include:

- The structure of authority.
- Who issued or approved plans leading to the crimes.
- A clear link between superiors and the actions of their subordinates.

In *Thomas Lubanga*<sup>38</sup>, the ICC relied on evidence showing Lubanga's recruitment policies and how he directed child soldiers.

### 4. Witness Testimony

---

<sup>37</sup> Id.

<sup>38</sup> The Prosecutor v. Thomas Lubanga Dyilo: ICC – 01-04-01/06

Testimonies from victims, insiders, or experts play a critical role in reconstructing events. Examples:

- **Victim Testimonies:** Highlighting the impact of policies or actions on civilians.
- **Defector or Insider Accounts:** Statements from military or political insiders about instructions or discussions at leadership levels.
- **Expert Analysis:** Experts in military tactics or international law explaining how policies violated legal standards.

**Example:** In *Slobodan Milosevic*,<sup>39</sup> witnesses testified about orders given during ethnic cleansing operations.

## 5. Reports and Warnings

Leaders can be held accountable if they were warned about crimes and failed to act. Examples:

- **NGO and UN Reports:** Alerts sent to leaders about ongoing or impending violations.
- **Media Coverage:** Widespread reporting that should have made leaders aware of crimes.

---

<sup>39</sup> Id.

- **Internal Reports:** Warnings or complaints from subordinates about illegal conduct.

**Example:** In *Charles Taylor*<sup>40</sup> case, reports of atrocities in Sierra Leone were used to show Taylor's knowledge of the crimes his forces committed.

## 6. Forensic and Material Evidence

Physical evidence can corroborate allegations and provide concrete proof of crimes. Examples:

- **Battlefield Evidence:** Weapons, attack remnants, or remains tied to specific operations.
- **Satellite Images:** Documenting destruction of civilian infrastructure or mass graves.
- **Medical Records:** Showing patterns of injuries consistent with alleged crimes.

**Example:** In *Karadzic*<sup>41</sup>, forensic evidence from mass graves was critical in proving genocide at Srebrenica.

## 7. Failure to Prevent or Punish

---

<sup>40</sup> Id.

<sup>41</sup> Id.

Evidence of inaction or deliberate negligence can establish liability.

Examples:

- **No Disciplinary Measures:** Lack of investigations or punishments for reported crimes.
- **Continuation of Crimes:** Crimes occurring repeatedly without intervention.
- **Internal Policies:** Evidence of policies tolerating or enabling illegal actions.

**Example:** In *Jean-Pierre Bemba*<sup>42</sup>, the ICC highlighted Bemba's failure to prosecute or discipline soldiers, even after repeated reports of atrocities.

### **Application to Netanyahu's Case**

For Netanyahu, the ICC would likely focus on:

1. **Knowledge:**
  - Public and internal reports about civilian casualties and humanitarian crises in Gaza.
  - Warnings from the UN, NGOs, and other states regarding the impact of military actions and blockades.

---

<sup>42</sup> Id.



## **2. Control:**

- Netanyahu's position as Prime Minister and documented oversight of military and government policies in Gaza.
- Evidence of his role in approving or continuing operations.<sup>43</sup>

## **3. Inaction:**

- Failure to investigate or halt operations that led to civilian harm, despite repeated warnings.
- Continuation of policies restricting humanitarian aid, contributing to alleged starvation and suffering.

---

<sup>43</sup> The International media channels reported and showed action of approval of the killing of Chief of Hezbollah by Israeli PM.