

Reining In the Rogue ICC

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Israel, like the United States, is not a state party to the Rome Statute, which established the International Criminal Court. Nevertheless, on Nov. 21, at the behest of ICC Prosecutor Karim A.A. Kahn KC, the court issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Israeli Defense Minister Yoav Gallant. This makes Netanyahu and Gallant subject to arrest if they set foot on any of the ICC's 124 member states' territories. To demonstrate evenhandedness, the ICC also issued an arrest warrant for Mohammed Deif, the longtime head of Iran-backed Hamas' military wing, whom Israel reportedly killed in Gaza by a July airstrike.

Kahn and the unanimous 3-judge ICC panel corrupted international law to propagate falsely a moral – or immoral – equivalence between Israel, a rights-protecting democracy exercising its right of self-defense and Gaza's jihadist regime whose stated purpose is the Jewish state's annihilation. The ICC prosecutor's and judges' abuse of power not only harms Israel by coupling its leaders with Islamic extremists who seek Israel's destruction, but also damages U.S. interests in balancing the just claims of national sovereignty and international law.

Nevertheless, Kahn praised his court and, by extension, himself as paragons of equal justice under law: "The decision of the independent judges of the International Criminal Court affirms that international humanitarian law must be upheld in all circumstances through fair and impartial judicial processes." Contrary to the prosecutor's self-congratulations, the ICC's grossly disparate treatment of the likely dead jihadist and of Israel's wartime leaders perverts judicial process and erodes respect for international law.

Concerning Deif, who has not been heard from since Israel's July airstrike, "the judges of the International Criminal Court," stated Kahn, "have found reasonable grounds to believe that he is responsible for the crimes against humanity of murder, extermination, torture, and rape and other forms of sexual violence; as well as the war crimes of murder, cruel treatment, torture, taking hostages, outrages upon personal dignity, and rape and other forms of sexual violence."

The ICC beliefs about Deif and Hamas derive from conclusive evidence. The jihadists broadcast themselves live on Oct. 7, 2023, rampaging through Israel's southern border communities and reveling in their murder, mutilation, and kidnapping of Jews.

Concerning Netanyahu and Gallant, “the judges of the International Criminal Court have found that there are reasonable grounds to believe that each has committed the war crime of using starvation as a method of warfare and crimes against humanity of murder, persecution, and other inhumane acts, as a direct perpetrator, acting jointly with others,” asserted Kann. “The Chamber also found reasonable grounds to believe that they are each responsible for the war crime of intentionally directing attacks against civilians as a superior.”

In contrast to the ICC’s rock-solid case against Deif and Hamas, the court’s beliefs about Netanyahu and Gallant lack evidence and defy reason. Hamas casualty figures stemming from the complex and tragic urban warfare that its Oct. 7 attack forced upon Israel include – but do not distinguish – noncombatant and combatant deaths. Even accepting Hamas’ numbers, the ratio of noncombatant-to-combatant deaths in Gaza stemming from Israel Defense Forces actions compares favorably to the ratio of noncombatant-to-combatant deaths for all modern militaries compelled to fight in densely populated areas. Moreover, since the ICC has not had access to IDF rules of engagement, the prosecutor and the judges could not have reasonably determined whether specific IDF actions, let alone overall Israeli military tactics and strategy, violate the international laws of war. And the ICC gives no appearance of having considered Hamas’ theft of huge amounts of the humanitarian relief that Israel, at considerable risk to its soldiers, has shepherded into Gaza since the Oct. 7 massacre.

By deliberately enmeshing Israel in complex and tragic urban warfare, Hamas has made itself presumptively responsible, morally and legally, for the terrible physical destruction and loss of life in Gaza. In defiance of the international laws of war, the jihadists conduct operations and maintain military infrastructure – headquarters, bases, hideouts, munitions workshops, arsenals, and rocket launchers – amid and under Gaza’s civilian populations. The jihadists know that by using Gaza’s noncombatant population as human shields they can inhibit Israel, which respects the international laws of war. When large numbers of Palestinian noncombatants die, as inevitably they will even when the IDF, consistent with the laws of war, uses no more force than is necessary to accomplish its legitimate military objectives in Gaza’s cities, Hamas counts on the so-called international community and international organizations to blame Israel and charge the Jewish state with criminal conduct.

The so-called international community and international organizations have shown themselves only too ready to oblige.

Prosecutor Kahn and the ICC judges, for example, have embraced Hamas’ loathsome propaganda. The ICC’s press release explaining the issuance of arrest warrants for Netanyahu and Gallant does not mention Hamas’ monstrous transformation of Gaza’s civilian areas and infrastructure into battle zones.

Israel promptly denounced the ICC arrest warrants. Netanyahu highlighted Kahn's broken promise, which invalidated his legal analysis. "The ICC prosecutor lied when he told American senators that he would take no action until he had visited Israel and heard its side," said a statement issued by the prime minister's office. "Instead, he canceled his arrival in Israel in May, several days after suspicions of sexual harassment were made against him, and announced his intention to issue arrest warrants against the prime minister and former defense minister." Gallant stated that the ICC action "sets a dangerous precedent against the right to self-defense and moral warfare and encourages murderous terrorism."

The Biden administration declared that it "fundamentally rejects" issuance of the arrest warrants. Contrary to fundamental fairness and due process, "the prosecutor failed to provide Israel with a meaningful opportunity to engage constructively and to properly consider its domestic processes," asserted White House Press Secretary Karine Jean-Pierre. "This calls into question the credibility of the prosecutor and his investigation."

In contrast, ICC-member liberal democracies, to the great detriment of international law, are largely standing behind the ICC. "The European Union's foreign policy chief on Nov. 23 reminded the bloc's member states that they are obligated to enforce the warrants," according to the Epoch Times, while "some U.S. allies including Canada, Belgium, and France have expressed their readiness to comply." After the cease fire between Israel and Hezbollah went into effect on Nov. 27, France changed its mind; it now believes that Israeli officials have immunity from ICC prosecution because Israel is not an ICC member.

Earlier this year, in an April 24 letter addressed to Khan, twelve Republican senators led by Tom Cotton – and including President-elect Donald Trump's secretary-of-state nominee Marco Rubio – sternly warned the ICC against issuing arrest warrants for Netanyahu and other Israelis. "Such actions," the senators wrote, "are illegitimate and lack legal basis, and if carried out will result in severe sanctions against you and your institution."

The arrest warrants, the senators maintained, would contravene the Rome Statute. The ICC charter bars it from exercising jurisdiction over nation-states with judiciaries that are willing and able to prosecute credible allegations of war crimes against their own government officials and soldiers. "You yourself have said," the senators' letter to Khan emphasized, "that 'Israel has trained lawyers who advise commanders and a robust system intended to ensure compliance with international humanitarian law.'"

Second, the arrest warrants would constitute selective prosecution. "Your office has not issued arrest warrants for Iran's Supreme Leader Ayatollah Ali Khamenei or any other Iranian official, Syrian President Bashar al Assad or any other Syrian official," wrote the senators. "Nor have you issued an arrest warrant for the genocidal General Secretary of the People's Republic of China, Xi Jinping, or any other Chinese official."

Third, the arrest warrants would involve the exercise of powers that the ICC lacks. “[N]either Israel nor the United States are members of the ICC and are therefore outside of your organization’s supposed jurisdiction,” stressed the senators. “If you issue a warrant for the arrest of the Israeli leadership, we will interpret this not only as a threat to Israel’s sovereignty but to the sovereignty of the United States.”

Although in the minority last April, the twelve GOP senators gave notice to Kahn that the lawless issuance of arrest warrants for Israeli government officials would entail serious consequences. “The United States will not tolerate politicized attacks by the ICC on our allies,” they wrote. “Target Israel and we will target you.” The senators vowed to “move to end all American support for the ICC, sanction your employees and associates, and bar you and your families from the United States.”

It is reasonable to expect that come January, Sen. Cotton and the new Republican Senate majority – along with the GOP-controlled House of Representatives, Secretary of State Rubio, and the Trump White House – will impose stiff penalties on the rogue International Criminal Court. This will advance U.S. interests not only by aiding Israel, a friend enmeshed in a seven-front war waged against it by the Islamic Republic of Iran, but also by upholding nation-state sovereignty and countering the abuse of international law.

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