

BROOKINGS

COMMENTARY

Biden's ICC hypocrisy undermines international law

The ICC has called for the Israeli prime minister's arrest, and the U.S. president is defending him.

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When International Criminal Court (ICC) judges issued [arrest warrants](#) for Israeli Prime Minister Benjamin Netanyahu and his [former defense minister](#), Yoav Gallant, last month, U.S. President Joe Biden [said](#) the decision was “outrageous” and declared that “We will always stand with Israel.”

What explains Biden's stance? The evidence suggests that he is engaging in hypocrisy, opposing the ICC because it is scrutinizing the actions of a U.S. ally. Biden (like [his predecessors](#)) has supported the ICC—when doing so has served U.S. interests. This uneven approach undermines international law.

Israel isn't an ICC member, but the court still has jurisdiction

The ICC was established in 1998 when 120 states adopted the [Rome Statute](#). Today, the court has 124 member states that are subject to its jurisdiction if their nationals are suspected of committing “atrocious crimes” (i.e., war crimes, crimes against humanity, and genocide). Nonmember nationals are also subject to ICC jurisdiction if they are alleged to have committed atrocious crimes on the territory of a state that has accepted

the court's jurisdiction on.
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The State of Palestine acceded to the Rome Statute on January 2, 2015, about two years after being granted "[nonmember observer state ↗](#)" status at the United Nations, accepting ICC jurisdiction from June 13, 2014, onward—a period covering the [2014 Israel-Gaza war ↗](#). U.N. nonmember observer state status has allowed the Palestinian Authority (PA), which speaks for the Palestine Liberation Organization, the internationally recognized representative of the Palestinian people, to enter Palestine into international agreements at international organizations like the ICC.

So, for more than a decade, Palestinian nationals have been subject to the ICC's jurisdiction—and so have Israeli nationals engaged in the Israeli-Palestinian conflict. This is how the court can investigate Netanyahu and Gallant (among others) as well as the Hamas militants responsible for the horrendous [October 7, 2023 ↗](#), terrorist attack against Israel.

There is an ICC warrant for the arrest of Mohammed Deif, a top Hamas military leader. [Israel claims to have killed him ↗](#) but the ICC prosecutor hasn't been able to confirm his death. The prosecutor [withdrew warrant requests ↗](#) for Yahya Sinwar (Hamas' former leader in Gaza who was killed in October) and Ismail Haniyeh (Hamas' former political bureau chairman who was killed in July).

Biden and Netanyahu have accused the court of drawing a false [moral equivalence ↗](#) between Israel and Hamas. However, by issuing arrest warrants for leaders on both sides of the conflict, the case indicates the court is trying to render [equal justice under the law ↗](#). Israel has a right to defend itself in light of the unspeakable Hamas attacks, but it matters how it does so.

A 10-year investigation changes course

The ICC's probe in Palestine concerns [suspected war crimes and crimes against humanity ↗](#) in Palestine (i.e., the Gaza Strip, the West Bank, and East Jerusalem) committed since June 13, 2014.

Regarding Palestinian armed groups, including Hamas, the ICC prosecutor previously [Opt-Out Signal Honored](#) war crimes (including [rocket attacks and attacks on civilians ↗](#))

during the 2014 war. On the Israeli side, the prosecutor focused on alleged [attacks on civilian infrastructure](#) (e.g., residential buildings and hospitals) during the 2014 war, as well as violence against protesters on the Israel-Gaza border and illegal West Bank settlements.

But the prosecutor is now focused on abuses committed since the Oct. 7 attacks, when Hamas fighters killed approximately 1,200 people in Israel and took 250 others hostage, about 100 of whom are [reported to still be in captivity](#). In retaliation, Israel has waged a now 14-month-long military operation in Gaza in which more than [45,000 Palestinians have been killed](#), more than 100,000 have been wounded, and roughly 1.9 million (90 percent of the population) have been [displaced](#).

Deif, Netanyahu, and Gallant are charged with serious crimes

The warrant for Deif's arrest is classified to protect witnesses and the prosecution's case. But the pretrial chamber judges released some information, saying they believed it was important for Deif's victims and their families to know the warrant exists. Because the judges suspect similar conduct is ongoing, the warrant also puts Hamas militants on notice that both their past and current actions may lead to criminal charges.

The judges said they found reasonable grounds to believe that [Deif is criminally responsible](#) for:

- Crimes against humanity of murder, extermination, torture, and rape and other forms of sexual violence.
- War crimes of murder, cruel treatment, torture, hostage taking, outrages upon personal dignity, and rape and other forms of sexual violence.

The key difference between [crimes against humanity](#) and [war crimes](#) in this case is crimes against humanity are directed at civilians rather than military targets and are "widespread or systematic."

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[Deif is accused](#) of committing these crimes “jointly and through others.” He is also accused of ordering or inducing others to commit said crimes and “fail[ing] to exercise proper control over forces under his effective command and control.”

ICC judges also said they found reasonable grounds to believe that since October 8, 2023, [Netanyahu and Gallant are criminally responsible](#) for:

- The war crime of starvation as a method of warfare.
- Crimes against humanity of murder, persecution, and other inhumane acts.

The judges said Netanyahu and Gallant committed the acts “jointly with others.” Moreover, as civilian leaders in command of Israeli forces, they are accused of “intentionally directing attacks against the civilian population of Gaza”—a war crime.

The judges determined that a lack of access to food, water, electricity, and medical supplies—linked to Israeli restrictions on humanitarian aid—“created conditions of life calculated to bring about the destruction of part of the civilian population in Gaza, which resulted in the death of civilians.” This finding is potentially significant for a [separate case](#) at the International Court of Justice (ICJ), in which South Africa has [accused](#) Israel of committing and failing to prevent and punish genocide against Palestinians. The ICC arrest warrants announcement suggests that Israel has at least violated the [provisional measures the ICJ has ordered](#) while evaluating the case, in particular, the order for Israel to ensure the flow of humanitarian aid into Gaza.

Countries have had mixed reactions

Warrants mean the 124 states that are ICC members are legally obligated to arrest Deif (if alive), Netanyahu, and Gallant if they enter their territory (under Rome Statute Article 59), and to cooperate with the court’s investigation (under Article 86).

The reaction has been mixed: France has gone [back and forth](#), with officials in Paris [initially signaling](#) that they would cooperate before declaring that Netanyahu is [immune from prosecution](#) because he is a sitting prime minister and Israel isn’t an ICC member. The United Kingdom has [said](#) it is obligated to refer the question of

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whether to extradite Netanyahu to The Hague to [U.K. domestic courts ↗](#). Germany has been [noncommittal ↗](#).

The [Belgian Ministry of Foreign Affairs ↗](#) has said that “[t]hose responsible for crimes committed in Israel and Gaza must be prosecuted at the highest level, regardless of who committed them,” suggesting Brussels would cooperate. [Switzerland ↗](#), historically known for its neutrality in international conflicts, was more direct: it would execute the warrants and initiate extraditions.

[Many other countries ↗](#) have made vague statements in support of the ICC but haven't said they would cooperate.

To avoid arrest, Deif, Netanyahu, and Gallant—now ICC fugitives—could simply not travel to ICC member states, like Russian President [Vladimir Putin ↗](#) has since ICC judges issued warrants for his arrest in March 2023. (With the exception of Putin's visit to Mongolia, which defied its ICC obligations, he has avoided travel to ICC member states including South Africa, which hosted the [August 2023 BRICS summit ↗](#), and Brazil, which hosted the [November 2024 G20 meeting ↗](#).)

Biden's hypocrisy

When ICC judges issued [arrest warrants ↗](#) for Putin, Biden said the decision was [justified ↗](#) even though the United States doesn't officially recognize the court's jurisdiction over Russians.

Washington had [separately concluded ↗](#) that Russian forces had committed war crimes since their full-scale invasion of Ukraine, which Putin ordered, but Biden was wary of acknowledging ICC jurisdiction over Russia because doing so would concede the point that the ICC has jurisdiction over nonmembers under certain conditions (including, possibly, Americans). Russia isn't a party to the Rome Statute, and neither is Ukraine. But through a declaration under Rome Statute [Article 12 ↗](#), [Ukraine has accepted the court's jurisdiction ↗](#) since 2013, so Russians have been and remain [liable for crimes committed on Ukrainian territory ↗](#).

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Though the objection that Russia is a nonmember and thus exempt from ICC jurisdiction in Ukraine is erroneous, Biden was trying to stay on message: U.S. leaders [for decades ↗](#) have said nonmember nationals are immune from ICC scrutiny, including Americans [accused of illegal conduct in Afghanistan ↗](#), which became an ICC member in 2003.

Yet Biden went off message in July 2023 when he conceded ICC jurisdiction over Russia [by authorizing his administration ↗](#) to give the court [evidence of Russian abuses in Ukraine ↗](#). The United States *has* helped the ICC over the years when it's served U.S. interests but, before this, never for nonmembers. Biden set one American principle aside (the ICC lacks jurisdiction over nonmembers), in favor of an international legal principle (justice must prevail over impunity).

But Biden didn't make the same call when an ally, not an adversary, was concerned.

The ICC is growing in confidence

The ICC's pursuit of charges against Israeli leaders—contrary to the wishes of the United States—[demonstrates ↗](#) that powerful countries, particularly those aligned with the West, are not exempt from accountability. We're seeing a more ambitious, confident court, and that's a good thing for the international rule of law.

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