

Forces of Impunity: The US Threatens the International Criminal Court

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The International Criminal Court is a dusty jewel, a creation of heat, tension and manufacture in the international community. Various elements have gone into its creation. As with any international institution which draws its legitimacy from nation states and the like, its detractors are many, the invective against it frequent. Some 124 countries have signed the Rome Charter of 1998 that gives the body its authority and jurisdictional force, but no one is foolish enough to think that its reach can ever be anything but tempered by political consideration and self-interest.

Be it issuing a problematic arrest warrant for Russian President Vladimir Putin, attempting to investigate alleged US war crimes in Afghanistan, or busying itself with some nasty examples of African despotism, the scope of the body is potentially extensive. At present, ICC prosecutor Karim Khan is sniffing out the prospect of issuing arrest warrants against senior Israeli officials in the context of the war in Gaza. The sniff, however, has come with a rebuking blast from Israel, joined by various politicians in the United States champing at the bit to take a swipe at the body.

Such attacks have only been emboldened by the [American Service-Members' Protection Act](#), an instrument from 2002 that prohibits federal, state and local governments from furnishing the ICC with assistance in any way while authorising the US president "to use all means necessary and appropriate to bring about the release" of any "US person" or "allied persons" detained or imprisoned by, on behalf of, or at the request, of the ICC.

In what is expedient and legally anomalous, Washington has chosen not only to avoid signing the Rome Statute but reject ICC jurisdiction over the Palestinian territories. The ICC begs to differ, [noting the acceptance](#) of the court's jurisdiction on the part of "the Government of Palestine" and its accession to the Rome Statute in January 2015.

In late October 2023, Israel announced that it would not be permitting Khan to enter Israel, signalling its intention to frustrate, as far as possible, his investigative functions. In April this year, [Axios revealed](#) that Israeli Prime Minister Benjamin Netanyahu had requested US President Joe Biden to prevent the ICC from issuing arrest warrants against senior Israeli officials. A broader lobbying effort of the US Congress by the Netanyahu government is also taking place.

On May 1, a bipartisan group of US senators [held a virtual meeting](#) with members of seniority from the ICC, worried about the prospect that arrest warrants for top Israel might issue from the prosecutorial pipeline. In a threatening [letter](#) to Khan from a dozen Republican senators led by Tom Cotton, the promise for retaliation was unequivocal:

“Target Israel, and we will target you.”

Issuing such warrants would be “illegitimate and lack legal basis, and, if carried out, will result in severe actions against you and your institution.” They would “not only be a threat to Israel’s sovereignty but to the sovereignty of the United States.”

This was hardly novel and was unlikely to have phased Khan or his staff. In June 2020, President Donald Trump implemented an [executive order](#) directed at the ICC. The order authorised the blocking of assets and imposed family entry bans into the US in response to the court’s efforts to investigate the alleged commission of war crimes in Afghanistan by US personnel. In September that year, pursuant to the executive order, targeted [sanctions were imposed](#) on then ICC prosecutor Fatou Bensouda and senior prosecution official Phakiso Mochochoko.

Since 2021, the ICC has been vested in examining alleged war crimes committed by both the Israeli Defense Forces and Palestinian militants stretching back to the 2014 Israel-Hamas war.

“Upon the commencement of my mandate in June 2021,” Khan [states](#), “I put in place for the first time a dedicated team to advance the investigation in relation to the Situation in the State of Palestine.”

Its mission is to collect, preserve and analyse “information and communications from key stakeholders in relation to relevant incidents.”

In November 2023, the office of the prosecutor received a [referral](#) from South Africa, Bangladesh, Bolivia, Comoros and Djibouti to investigate “the Situation in the State of Palestine.” The referral requests the prosecutor “to vigorously investigate crimes under the jurisdiction of the Court allegedly committed” on various grounds, including, among others, the unlawful appropriation and destruction of private and public properties, the forcible transfer of Palestinians, the unlawful transfer of Israel’s population into Occupied Palestinian Territory and a discriminatory system amounting to apartheid.

The spectacularly brutal Israeli campaign in Gaza following the October 7 attacks by Hamas also enlivened interest in using the ICC’s jurisdiction to investigate allegations of genocide, crimes against humanity and relevant war crimes. But the notable catch, and bound to be threatening to its intended targets, was the request that culprits be found, and perpetrators be outed and held accountable. South Africa, more specifically, requested that the prosecutor “investigate the Situation for the purpose of determining whether one or more

specific persons should be charged with the commission of such crimes.”

On May 3, officials from the ICC openly reproached efforts to tamper and modify any opinions on the part of the body regarding its activities. The ICC welcomed, [according](#) to Khan, “open communication” with government officials and non-governmental entities, and would only engage in discussions so long as they were “consistent with its mandate under the Rome Statute to act independently and impartially”.

As he continued to explain in his statement, Khan argued

“That independence and impartiality are undermined ... when individuals threaten to retaliate ... should the office, in fulfilment of its mandate, make decisions about investigations or cases falling within its jurisdiction”. He demanded that “all attempts to impede, intimidate or improperly influence its officials cease immediately.”

Netanyahu had previously [promised](#) that, under his leadership, “Israel will never accept any attempt by the ICC to undermine its inherent right of self-defense.” He regarded any “threat to seize the soldiers and officials of the Middle East’s only democracy and the world’s only Jewish state” as “outrageous.” Going heavy on the forces of light battling those of darkness – a favourite theme of his – the Israeli PM went on to claim that such actions “would set a dangerous precedent that threatens the soldiers and officials of all democracies fighting savage terrorism and wanton aggression”.

Under my leadership, Israel will never accept any attempt by the ICC to undermine its inherent right of self-defense.

The threat to seize the soldiers and officials of the Middle East’s only democracy and the world’s only Jewish state is outrageous. We will not bow to it.
Israel...

— Benjamin Netanyahu - בנימין נתניהו (@netanyahu) [April 26, 2024](#)

Far from threatening democracies of whatever flavour, the actions of the ICC can serve the opposite purpose, holding individuals in high office accountable for egregious crimes in international law. In doing so, it can contribute, in no small part, to efforts in defeating impunity and rebutting brutal and often callous assertions of self-defence.

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