

The ICC's illegitimate pursuit of Israeli leaders is political warfare

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The court is bringing unprecedented settlement cases against Smotrich and others while ignoring far more obvious population transfers by Turkey in Northern Cyprus and Russia in Ukraine

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The International Criminal Court (ICC) chief prosecutor, Karim Khan, is reportedly seeking a second round of arrest warrants against senior Israeli officials. Finance Minister Bezalel Smotrich is apparently the leading target along with Interior Security Minister Itamar Ben-Gvir, Defence Minister Yisrael Katz, and other military officials. This would be more warrants than the Court has issued for Russian officials for their conquests in Ukraine and Georgia (the former of which has seen massive inflows of settlers from Russia), or against any government in all the bloody conflicts in the world.

The warrant requests, which the Court has not denied, come as the Court's legitimacy has reached a low point amid an ever-widening scandal concerning Khan.

Khan requested arrest warrants against Prime Minister Netanyahu and then-Defence Minister Gallant in 2024, shortly after being accused of sexual assault by an employee, accusations he denies.

But it gets worse. Last month, the Wall Street Journal reported that Qatar reassured Khan, a British lawyer, of its help against the pending sexual assault investigations. The Dutch intelligence agency reportedly found that Qatar hired two London-based intelligence firms to discredit ICC employees linked to the allegations against Khan. Qatar also reportedly promised to “look after” Khan should he move against Israel's Prime Minister.

These reports raise serious questions about Khan's bias, ethics, and professionalism, as well as the basic fairness and impartiality of the proceedings against Israel, particularly given that Qatar is one of Hamas' major financial and diplomatic patrons and continues to host Hamas' political leadership. Notably, the ICC has not taken any action against the Qatar-based leadership of Hamas, a designated terrorist organisation since 1997, for waging terrorist attacks against Israel, even as it brings new rounds of indictments against Israeli officials.

Before the Gaza War, the ICC was widely considered a failure even by those who believed most in its vision of an end to impunity for global atrocities. Despite operating on an annual budget of over \$150 million, the Court has secured fewer than 15 major convictions since it began operations in 2002. Throughout its first decade and a half, the ICC pursued cases exclusively against individuals from African nations, leading critics to denounce the Court as a tool of neo-colonialism. All of Europe signed up, but that has not been where serious crimes are occurring.

The ICC was under great pressure to bring cases outside of Africa, but it can only hear cases involving member states. Africa was where membership and crime overlapped. Thus, the Court invented a “State of Palestine”, which it admitted might not be a state for any purposes other than giving the Court jurisdiction over Israel. Israel is the only non-member state being prosecuted at the behest of a member that is not a state.

Proceedings against Israeli leaders are thus a godsend for the Court. It is a Western country without the political power of the United States or the United Kingdom; it is, of course, deeply unpopular among the European legal elites whose culture the Court embodies; and most importantly, as a non-member, it cannot quit in protest as other countries have done.

If Khan's tainted pursuit of Netanyahu had occurred in a domestic criminal prosecution in a Western democracy, the case would have been thrown out for prosecutorial misconduct. For the ICC, though, dropping the case would only magnify its record of failure. For much

of its constituency, if the only thing it does is put top Israeli officials in jail, its existence would be justified. Devoid of successes and with no laurels to rest on, the ICC is doubling down on Israel. For this, the Court is prepared to indict Israel for crimes for which no one has ever been convicted or even charged.

The new cases against Smotrich and others are unprecedented in international law. They are being ostensibly targeted due to their involvement in allowing homes to be built in the settlements. In the history of international criminal law, no one has ever been prosecuted for such conduct. Yet it may have been the mission of the ICC from the start. When the Court's founding document, the Rome Statute, was being written three decades ago, it adopted verbatim the Geneva Conventions' definitions of war crimes. A glaring exception was the definition for the crime of the transfer of population by an occupying power.

That's because the Geneva Conventions prohibit government-organised population transfers akin to the Nazi colonisation programmes of eastern Europe. It was never meant to cover individuals freely choosing to move from Kfar Saba to Elkana. Israel, even assuming the laws of occupation apply, has not "deported or transferred anyone" into the settlements. The Jewish presence there has emerged through voluntary migration and return to prior Jewish-inhabited areas.

The Rome Statute drafters, specifically at the behest of Arab states, added the words "directly or indirectly" to the prohibition, with the clear understanding that this was targeting Jewish communities. Indeed, that is why Israel did not join the treaty.

The settlement activities the ICC is seeking warrants for are a "made for Israel" crime. Turkey continues to illegally occupy northern Cyprus, a real ICC member state, and to carry out a massive demographic campaign to settle ethnic Turks in the territory. Properties seized from Greek Cypriots in Northern Cyprus are heavily marketed to British civilians. Over a decade ago, Cypriot refugees filed a complaint against Turkey at the ICC over its occupation and settlement policy. Since then, nothing has happened. In 2021, former Prosecutor Fatou Bensouda announced that she would decide on the issue before the end of her term. Similarly, Russia's population transfer to occupied Ukraine is notably absent from the charges filed against Putin and other Russian officials.

Whatever one thinks of his politics, the warrants against Smotrich and other Israeli leaders are fundamentally illegitimate and reveal the Court to be unworthy of the high hopes originally placed in it. Rather than fulfilling its founding mission to end impunity for the world's worst atrocities, the Court has chosen to double down on political warfare to appease its constituency.

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