



Mouin Rabbani @MouinRabbani

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THREAD: To understand why International Criminal Court (ICC) Prosecutor Karim Khan's conduct regarding "The Situation in Palestine" is so scandalous and should disqualify him from office, a little background is necessary.

Israel has not ratified the Rome Statute, and is not a State Party (i.e. member state) of the ICC, the global tribunal established in 2002 to hold accountable perpetrators of war crimes, crimes of aggression, crimes against humanity, and genocide.

Of specific concern to Israel was that the Rome Statute, in Article 8.2.(b).(viii), defines as a "war crime" the "transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies,

or the deportation or transfer of all or parts of the occupied territory within or outside this territory". This closely reflects Article 49 of the IV Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War,

which defines such activities as a "grave breach", the Convention's equivalent of a war crime. Other articles, such as 7.1.(j) which defines "apartheid" as "a crime against humanity", became a serious concern more recently,

as the longstanding judgement of Palestinians on this matter was endorsed by the leading Israeli and international human rights organizations.

The ICC is only empowered to prosecute individuals, not states. (The conduct of states is adjudicated by the International Court of Justice, the ICJ, a separate institution also located in The Hague).

The Office of the ICC Prosecutor can conduct investigations into alleged violations of the Rome Statute only if either 1) a case is referred to the ICC Prosecutor by the United Nations Security Council (UNSC), 2) requested by at least one ICC member state,

or 3) initiated by the Prosecutor, provided it is authorized to move forward by a panel of ICC judges known as the "pre-trial chamber".

Given that the US, which like Israel refused to join the ICC, has veto powers at the Security Council, and that Palestine was not an ICC member, Israel was not particularly concerned that the ICC Prosecutor would independently seek to initiate an investigation of its conduct.

So it sufficed with periodic tirades dismissing, demonizing, and delegitimizing the Court. That began to change in 2015 when Palestine, which has the status of Permanent Observer State at the UN, was admitted to the ICC and permitted to formally ratify the Rome Statute.

The Palestinian leadership had for many years stalled on this and other initiatives promoting the application of international law to the Palestinians. This was, parenthetically, not out of

fear of potential ICC prosecutions of Palestinians.

Hamas, whose members are the most likely to be prosecuted if the ICC investigates Palestinian violations, in fact called for Palestine's accession to the ICC, in both word and writing.

In writing, because Hamas propaganda had been denouncing Abbas for promoting Palestine's ICC application at a snail's pace out of fear of the Israeli and Western response.

Abbas responded by insisting that Hamas and Islamic Jihad sign a document supporting the application before it was submitted, so he could not later be accused by them of joining the Court in order to have his rivals extradited to The Hague.

When the deed was done, Palestinians from across the political spectrum welcomed it, and stated they were prepared to see all alleged violations of the Rome Statute committed in Palestine investigated by the ICC.

Hamas's criticisms of Abbas may have been propaganda, but they were also correct. Israel and its US and European sponsors had from the outset made clear their opposition to Palestine seeking to join the ICC, and demanded that it desist.

The Europeans, who unlike the US and Israel have joined the ICC, were in a particular pickle. As a European diplomat stated to me at the time:

"We don't want the Palestinians to put us in a position where we have to choose between our commitment to international law and our commitment to Israel". In other words, they didn't want to expose the rotten core of their rules-based international order,

where the rules only apply to everyone else. When they failed to prevent Palestinian accession, Israel in particular went berserk. It began withholding Palestinian taxes it was legally obliged to transfer to the Palestinian Authority,

imposed a variety of restrictions on Palestinian officials, and threatened to punish the PA in multiple additional ways. The US also made its displeasure clear, but directed the brunt of its retaliatory measures directly at the ICC.

Washington at one point imposed sanctions on Khan's predecessor, Fatou Bensouda, normally reserved for designated criminals. It was Washington's way of informing the ICC it had no right to investigate either Israel's crimes against the Palestinians or US conduct in Afghanistan.

In 2002 the US had already adopted legislation known as The Hague Invasion Act, which authorizes the US military to invade The Netherlands, a fellow NATO member, and free any US citizen in ICC custody.

Not clear how Nato's collective defense provisions enshrined in Article 5 would operate under such circumstances....

The Europeans, duplicitous as ever, kept confirming their support for the ICC while submitting vacuous legal arguments to the Court insisting it had no jurisdiction over Palestine.

In doing so they came within a hair of endorsing Israel's position that the ICC is an illegitimate body. The Dutch government for its part indicated it could not take a position on the matter because as the state that hosts the ICC,

it was obliged to preserve its neutrality in such matters. Yet several years later it demonstratively awarded the ICC several million Euro to support its investigation of Russian conduct in Ukraine, an initiative it repeatedly and publicly endorsed.

In the event, the Palestinians in 2015 submitted an application to the Office of the ICC Prosecutor to investigate violations of the Rome Statute in the Palestinian territories occupied by Israel in 1967, beginning in 2014.

The Court wasted years adjudicating matters of jurisdiction and competence, before finally confirming, in 2021, that it had a mandate to conduct an investigation.

Which brings us back to the scandal known as Karim Khan. In previous functions, for example investigating the Khmer Rouge genocide in Cambodia and that by ISIS in Iraq, he developed a reputation as an attention whore of sorts.

Didn't achieve much by way of results, but always found his way to the television cameras. A British citizen, his candidacy as ICC Prosecutor was energetically supported by the UK government. His candidacy was also championed by the US and Israel,

two non-member states opposed to the very existence of the Court. In 2021, Khan narrowly won election to a nine-year term. Unless he's forced out, we're stuck with him until 2030.

Some held the forlorn hope that Khan would prioritize efforts to revive the ICC's stature and reputation, which by the time he took office was being widely derided as the "International Caucasian Court" and "International Criminal Court for Africa",

on account of the cases it chose – and chose not to – prosecute. In protest at such biases, South Africa at one point temporarily renounced its ICC membership.

In practice, Khan wasted no time aligning his agenda with that of his sponsors. Almost immediately, he informed the UN Security Council that he would prioritize only those cases referred to him by the Council and essentially ignore the rest.

The ICC Palestine investigation, such as it was, effectively ceased to exist.

Yet when Russia invaded Ukraine in 2022, which the UNSC could not have referred to the ICC for investigation because of Moscow's power of veto, Khan immediately reversed course on his previous commitments.

It took him only a week to pop up in Kiev, informing any and every journalist within a 100-mile radius that his investigation was already active. A little over a year later he indicted none other than Russian President Vladimir Putin.

Throughout this period, the ICC's Palestine investigation remained non-existent.

There was considerably less spring in his step as the latest crisis in the Middle East erupted on 7 October. It was only at the very end of October that he took the trouble to visit the region.

Claiming he had been denied entry to the Gaza Strip, he spoke to the assembled media in Cairo, where he delivered a lengthy and impassioned denunciation of the 7 October Palestinian attacks,

announced his availability to work with the Israeli authorities to prosecute those responsible for violations of the Rome Statute on that day, yet pointedly refrained from any reference to Israeli war crimes,

which his predecessor Bensouda had already in 2019 announced were being committed. Rather, his message to Israel was of a more general nature: that it had clear obligations under international law and would be held accountable for (unspecified) violations.

Khan further, and disingenuously, claimed that in 2021 he established the “first dedicated team to investigate the Palestine situation”.

Even though this team has in contrast to that sent to investigate Russian conduct in Ukraine never been referenced or heard from, Khan on 3 December stated he would “further intensify” its efforts.

But this was nothing compared to his next visit, undertaken in early December to Israel in coordination with the Israeli government which, it needs to be emphasized once again, has rejected the legitimacy of the ICC,

launched extensive campaigns of vilification to delegitimize it, and has consistently obstructed its efforts to investigate Israeli conduct vis-à-vis the Palestinians.

Initially described as an “unofficial” visit (perhaps he entered the country wearing a disguise designed for Inspector Clouseau by Auguste Balls),

he accepted Israel’s rejection of a visit to the Gaza Strip as a condition for meeting with Israeli families who lost loved ones on 7 October. In an effort to conceal and whitewash this dirty deal,

he at the end of his visit took a short trip to Ramallah to meet with PA President Abbas. Seeing through his agenda, Palestinian human rights organizations unanimously refused to meet with him, and denounced his visit.

The most problematic aspect of Khan’s visit was his concluding statement. While claiming his trip was “not investigatory in nature”, he nevertheless allowed himself to establish, as a matter of settled fact,

that the attacks of 7 October “represent some of the most serious international crimes that shock the conscience of humanity”, for good measure denouncing Hamas as a “terror organization”.

If Khan had denounced Israel and its crimes against the Palestinians with similar polemics and conviction, this would have multiplied rather than limited the damage inflicted by Khan.

This is for the simple reason that the ICC investigation, if it indeed exists, is still in its initial stages, yet the prosecutor has already announced its conclusions.

In the event Khan had a very different take on Israel’s conduct. Addressing the slaughter of thousands of children and razing of entire neighborhoods to the ground,

he went no further than to assert that “credible allegations of crimes” that may – or may not – have been committed, should be “the subject of timely, independent, examination and investigation”.

With respect to Israel shutting off the food, water, medicine, and fuel supply to the Gaza Strip, an assessment of which requires no more than a diploma in basket weaving, he would not go beyond insisting that the supply had to be guaranteed,

and “must not be diverted or misused by Hamas.” Gleefully skipping over the patently genocidal statements of Israeli leaders that might have helped him connect the dots he, much like Western politicians, took the easy way out

and instead denounced the violence of Israel’s settlers, as if these form an independent vigilante force rather than auxiliary militia implementing state policy.

The reason Khan tread so lightly also reflects what appears to be the most disturbing element of his agenda.

Pursuant to the Rome Statute the ICC only prosecutes cases where national authorities have demonstrably failed to ensure accountability. In this context, every examination of Israel’s judicial system with respect to violations of Palestinian rights,

has concluded that it is essentially a sham, and exists to provide legal justification for such violations and/or exonerate perpetrators.

Yet Khan emphasized that he stands “ready to engage with relevant national authorities [i.e. Israel] in line with the principle of complementarity at the heart of the Rome Statute”.

In other words, Khan will prosecute Palestinians, and Israeli violations will be adjudicated by Israel’s court system. Both with predictable results.

In order to keep this short, I conclude with posting an article @hasmikegian and I recently wrote for @PassBlue on why Karim Khan is not fit for purpose. I am also indebted to her for multiple insights and substantial input into this thread.

<https://www.passblue.com/2023/11/28/is-the-icc-prosecutor-karim-khan-fit-for-purpose/>

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