

## Open Letter to ICC Assembly of State Parties re: Prosecutor's Engagement on the Situation in Palestine

06 December 2023

### **Open letter to the Assembly of State Parties regarding the ICC Office of the Prosecutor's engagement with the Situation in Palestine**

*For the background to this letter, see the Annex beneath the signatures below.*



We, the undersigned scholars and practitioners of law, international relations, and politics express our grave concern over the integrity of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). The conduct of the OTP under Karim Khan's mandate has prompted urgent concerns about its adherence to impartiality and non-discrimination. During the mandate of former chief prosecutor Fatou Bensouda, the Office has allocated efforts and resources in an attempt to address the fierce criticisms of the OTP's selective accountability, with a view to correcting the shortcomings that characterized its performance during its early years. Recalling that the criticisms referred-to had contained claims about anti-Global South bias especially in relation to the standards applicable to situation and case selection, we are concerned that the international community is witnessing the erosion of years of dedication to ensure that the ICC is indeed international, impartial, and independent. The possible negative impact that informs our concerns pertains to the future of international criminal justice as a whole, and to the perception that the Court is the last resort for victims of international crimes.

### **OTP's Visit to Israel & Palestine: Breach of Impartiality and Non-Discrimination Principles**

*The Prosecutor's Duty of Impartiality and Non-Discrimination*

According to Article 42 (5) of the Rome Statute "neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence." Confidence in the independence of the Prosecutor is reliant on upholding impartiality and non-discrimination, among other principles.

In accordance with the ICC Code of Conduct for the Office of the Prosecutor, the OTP and all its members are guided by principles of independence; professional ethics and integrity; fair, impartial, effective and expeditious investigation and prosecution; non-discrimination against individuals or groups of individuals, among others. Impartiality, one of the core principles governing the work of the OTP, includes “refraining from expressing an opinion that could, objectively, adversely affect the required impartiality, whether through communications media, in writing or public addresses, or through any other actions outside the context of the proceedings before the Court”. As such, the OTP should conduct their internal and external dealings impartially, abstain from being directly or indirectly in conflict with the discharge of their official duties, and uphold the highest standards of integrity.

The ICC Prosecutor, as an international civil servant, is contractually required to comply with the relevant standards of conduct, *inter alia*, the ICSC Standards of Conduct for the International Civil Service. These stipulate the need of international civil servants to “work without bias with persons of all nationalities, religions and cultures; it calls for constant sensitivity as to how words and actions may look to others. It requires avoidance of any expressions that could be interpreted as biased or intolerant.” In reaffirming the principle of non-discrimination, the Standards of Conduct reiterate that “[i]nternational civil servants are expected to respect the dignity, worth and equality of all people without any distinction whatsoever”.

#### *The Prosecutor’s Public Communications visit*

During the course of Khan’s mandate thus far, there have been a number of questionable decisions on the Situation in Palestine. These include considerable delays, lack of responsiveness, as well as policies of understaffing and under-resourcing. No more problematic is Khan’s latest meetings, visit and subsequent statement. The Court announced on 30 November 2023 Prosecutor Khan’s visit to Israel at the invitation of victims, after having met with some of them in the Hague previously. In doing that, the Prosecutor has neglected the longstanding pleas from UN special rapporteurs, scholars and international lawyers, NGOs, and Palestinian victims who have ardently requested the Prosecutor’s visit to Palestine and meetings in the Hague for years. The Prosecutor explicitly asserted that the visit, which was carried out without a publicly accessible agenda or transparent funding, is non-investigative, and intended solely to express sympathy and engage in dialogue, acts which fall outside of his mandate as a prosecutor. A lack of transparency also shrouded his subsequent visit to Ramallah. These raise serious concern about the OTP’s commitment to its mandate underlying which are the principles of non-discrimination, and impartiality.

The Prosecutor's **statement** further demonstrated selective application of international criminal law, and an extralegal interpretation of its principles. While addressing Israel's conduct of hostilities, Prosecutor Khan refrained from making any conclusive statements at this stage. In this, he followed the Office's prosecutorial standards and the language satisfying the evidentiary standards specific to each of the investigation's stages, and adhered to his announcement that the mission was "not investigative in nature." However, Khan seems to have already concluded that international crimes have been committed by Palestinian armed groups, thereby undermining the **fundamental rules**, including on the presumption of innocence and relevant standards.

Prosecutor Khan has used alarming extralegal, political notions, in contravention of the ICSC Standards of Conduct. The Prosecutor has used the term 'terror organization' to describe a Palestinian armed group. The terms "terrorism" and "terror organizations" appear nowhere in the Rome Statute or international humanitarian law. Further, in some of the Prosecutor's **communications**, Khan uses the adjective 'innocent' to describe Israeli civilians. While he does not use the same adjective to refer to Palestinians, this choice of extralegal wording – which was popularized in the U.S. "War on Terror" – insinuates that some civilians deserve more protection than others, and undermines the cardinal principles of international humanitarian law, including the principle of distinction and that civilians cannot be the target of an attack.

In his references to Israeli victims, the Prosecutor has repetitively emphasized the necessity of holding those responsible for the crimes to account. However, when referring to Palestinian victims, he avoids using terms like 'accountability' or any equivalent. It appears as if the victims are presented without a corresponding crime or criminal. Notably, he did not make any reference to the risk of genocide in Gaza, which required special procedures under his mandate, despite warnings by the **UN** and **Academic experts**. Instead, the Prosecutor has **insisted several times** on describing Palestinian population and victims in Gaza as civilians "caught in the crossfire", seemingly concluding that the Israeli military's conduct of hostilities has respected the principles of "distinction" and "proportionality". This framing has formed the core of the Israeli official discourse since the 7th of October, but also during the 2014 Gaza War. By adopting it, the Prosecutor seems to have abruptly accepted Israeli officials' framing, and to have undermined reports on various crimes committed as part of state plans or policies. Further, Prosecutor Khan's hasty insistence on the "caught in the crossfire" framing stands in opposition to the **findings** that the Office itself has announced after five years of preliminary examination activities on the 2014 Gaza War, where it found a reasonable basis to believe that members of the Israeli forces have been "intentionally launching disproportionate attacks" and "wilful killing and wilfully causing serious injury

to body or health”. Such basis was strongly affirmed in reports by the [UN Independent Mission of Inquiry on the 2014 Gaza conflict](#), among others.

Further, we observe a noticeable acceleration in the work and activity of the Office of the Prosecutor since October 7. While we commend this step, we are concerned that the Prosecutor, in view of his consecutive statements, is acting according to a belief that crimes under the jurisdiction of the Court have taken place only since this date, and is thus “deprioritizing” the crimes that have formed the object of the Office’s activities for almost a decade. We recall the Prosecutor’s controversial “deprioritization” of US personnel conduct in Afghanistan as we observe that Prosecutor Khan has mentioned nowhere in his statements any alleged crimes committed by Israel, including in relation to the West Bank and East Jerusalem. Instead, he consistently maintains that Israel, with its legal experts, “[should be able to justify its actions.](#)”

Finally, the Prosecutor’s statement refers to the West Bank and Gaza, while ignoring East Jerusalem. Here it is important to note that in publicizing the Prosecutor’s visit to Israel, the Court posted a [photo on X](#) of Prosecutor Khan in occupied and annexed East Jerusalem. Annexation is a grave violation that is supposedly at the center of the Court’s investigations. This lack of foresight in this regard is not acceptable for an office tasked with investigating this context.

In view of this, the prosecutor’s approach to the case of Palestine as exemplified in the extra-legal wording of the statement and the parallel social media publication are in infringement of the prosecutor’s duty to respect the sensitivity of how words and actions may look to others (Para. 14 of the ICSC Standards of Conduct), and poses questions as to whether or not the prosecutor or members of his office were expressing their personal opinion (Para. 9 of the the ICSC Standards of Conduct for the International Civil Service).

### **Our requests to the ICC’s Assembly of States Parties,**

In leading up to the 22nd Assembly of States Parties to the Rome Statute (ASP), human rights and civil society organizations, including [Amnesty International](#), [Human Rights Watch](#) and the [Anti-Apartheid Movement](#), have called on States to vehemently oppose double standards, selective justice, and any obstruction of the ICC’s investigation in the Situation in Palestine. Amnesty International warned that the legitimacy of the Rome Statute and the ICC is in jeopardy due to this approach, while emphasizing that the “ICC’s legitimacy and effectiveness depend on the OTP demonstrating – without fear or favour – that it will pursue accountability equally in all situations, including situations where perhaps only its intervention will ensure that certain crimes, perpetrators or situations are investigated.”

Considering the above, it appears that accountability for grave breaches that constitute international crimes committed in Palestine is unforeseeable under the current Prosecutor's mandate, his actions and policies, as outlined.

Furthermore, we demand the Assembly of State Parties to:

- Provide adequate political and financial support to the Court, ensure that the Prosecutor disburses resources on the basis of investigative needs as opposed to politically motivated prioritization, and urge it to expedite its investigation into the Situation in Palestine.
- Investigate the adherence of the Prosecutor's Office to ICSC Standards of Conduct, particularly in relation to impartiality, and non-discrimination.
- Investigate the conduct of the current prosecutor of the international criminal court, Karim Khan, and take appropriate measures in accordance with the mandate of the Assembly derived from Article 112 of the Rome Statute.

Signed:

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- Jonathan Kuttub, attorney at law, Member of Israel, Palestine, and New York Bars

- Dr-Ahmed Hassan Alyousefy, Executive Director of the Egyptian Group of Legal and Integrated Services, Integrated Lecturer, Legal Counsel of the Open American University
- Nour Mahameed, Volunteer at Law for Palestine
- Lima Bustami, human rights lawyer, Occupied Palestine
- Jo Hall, PhD Candidate, Australian National University *Annex: the backdrop of these demands*

**Nine years at the ICC: Accountability is Still Out of Sight**  
 The Prosecutor opened a preliminary examination on the situation in Palestine in 2015 following the request of the State of Palestine. Following the appointment of Fatou Bensouda, a series of intricate procedures and protracted steps played out, during which Palestinian human rights organizations and victims provided the OTP with thousands of pages of factual and legal analysis and evidence establishing bases to bring concrete cases for war crimes and crimes against humanity, namely **persecution and apartheid**, the international crimes underpinning the settlements, **forced displacement** and transfer, **pillage**, and various other crimes arising out of Israel's unlawful actions and practices, including the **2014 assault on Gaza** and the Great March of Return, the **Gaza blockade and siege**, **grave breaches against Palestinian children**, amongst others.

Subsequently, Prosecutor Bensouda, in 2019, **concluded** that “war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip.” Finally, the ICC Pre-Trial Chamber, in February 2021, **declared** its jurisdiction over the State of Palestine, being the occupied Palestinian territory (oPt) and encompassing the Gaza Strip and the West Bank, including East Jerusalem, dating back to June 2014 – in line with Palestine's 12(3) declaration accepting the Court's jurisdiction in March 2021, Prosecutor Bensouda **officially initiated** the investigation declaring that the Court's “investigation will cover crimes within the jurisdiction of the Court that are alleged to have been committed in the Situation since 13 June 2014”. However, since then, the ICC's engagement with the persistent and well-documented violations of international law in the State of Palestine/oPt has been significantly delayed and **sluggish** in pace without yielding tangible results for thousands of victims, and under the oversight of the current Prosecutor Khan Karim A. A. Khan.

**Differential Treatment of Cases: Comparison with the Situation in Ukraine**  
 A conspicuous contrast emerges when comparing Prosecutor Khan's conduct in relation to the Situation in Ukraine to other situations involving allegations against certain geopolitical actors. In the latter, Prosecutor Khan issued arrest warrants within a year of opening an investigation. By contrast, the preliminary activities on the Situation in Afghanistan lasted for fourteen years, after which Prosecutor Khan decided to drop the conduct of the U.S. forces from his probe,

a conduct that brought back to the legal and public debate platforms some of the serious claims against the Office's impartiality.

With regards to the Situation in Palestine, the Prosecutor's engagement and communication with on-the-ground Palestinian human rights organizations and victims have been largely nonexistent 32 months since the investigation began despite numerous submissions and calls by **Palestinian, Israeli** and **international** organizations.

Further, in a recent **report** on outreach to victims and affected communities in Palestine, the Court's Registry delineates the profound disappointment expressed by victims to their legal representatives, noting, "Clients have been profoundly disappointed, even before the current crisis, at the complete absence of the Court." Such discrepancies prompt questions about procedural reluctance that do not meet the requirements of justice.

### **Funding Allocation Policies Undermine the Urgency of the Case**

While no resources were designated for investigations into the Situation in Palestine in 2022, the mere **allocation** of approximately one million euro in 2023 signifies progress but raises concerns about its adequacy considering the extensive, intricate, and ongoing grave breaches that may amount to international crimes. The United Nations Special Rapporteur on the situation of human rights in the oPt, Francesca Albanese, has **affirmed** that the Court's investigation is "understaffed and under-resourced," portraying a situation that appears to be at an impasse. In March 2023, Albanese, along with 31 other Special Rapporteurs, **voiced** apprehension about the state of the investigation and advocated for increased allocation of resources in light of "solid evidence of allegations of human rights violations that may have been committed intentionally and systematically".