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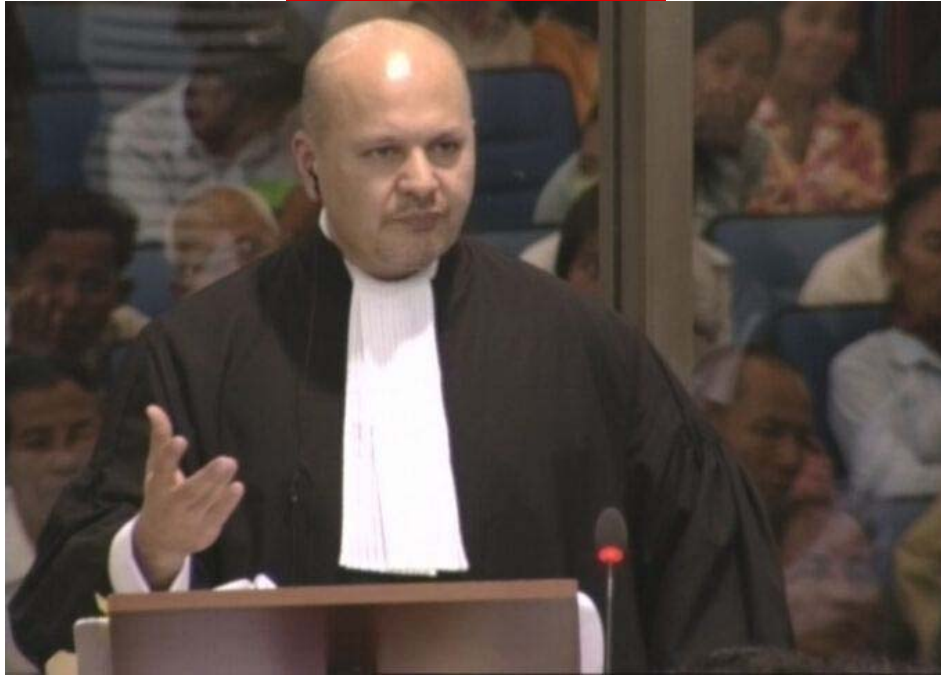
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BY BINOY KAMPMARK

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## The Rages of Equivalence: The ICC Prosecutor, Israel and Hamas



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The legal world was abuzz. The diplomatic channels of various countries raged and fizzed. It had been rumoured that Israel’s Prime Minister Benjamin Netanyahu, along with his cabinet colleagues, had been bracing themselves for a stinging intervention from the International Criminal Court, a body they give no credence or respect to.

Then came the words from the Prosecutor of the ICC, Karim A.A. Khan on May 20, announcing that arrest warrants were being sought in the context of the Israel-Hamas War, benignly described as the “Situation in Palestine”, under the Rome Statute. “On the basis of

evidence collected and examined by my Office, I have reasonable grounds to believe that Benjamin NETANYAHU, the Prime Minister of Israel, and Yoav GALLANT, the Minister of Defence of Israel, bear criminal responsibility for [...] war crimes and crimes against humanity on the territory of the State of Palestine (in the Gaza strip) from at least 8 October 2023”.

Hamas figures responsible for the attacks of October 7 against Israel also feature. They include the essential triumvirate: Hamas chief, Yahya Sinwar, Mohammed Al-Masri, the commander-in-chief of Al-Qassam Brigades, and Ismail Haniyeh, head of the Hamas Political Bureau. All “bear responsibility for [...] war crimes and crimes against humanity committed on the territory of Israel and the State of Palestine (on the Gaza Strip) from at least 7 October 2023”.

On Israel’s part, Khan’s office points the accusing finger at such alleged war crimes as starvation, the wilful causing of “great suffering, or serious injury to body or health”, including cruel treatment, wilful killing or murder, the intentional direction of attacks against a civilian population, extermination, persecution and other inhumane acts falling within the Rome Statute “as crimes against humanity”.

The ICC prosecutor’s assessment follows the now increasingly common claim that Israel’s military effort, prosecuted in the cause of self-defence, is not what it claims to be. Far from being paragons of proportionate warfare and humanitarian grace in war, Israel’s army and security forces are part of a program that has seen needless killing and suffering. The crimes against humanity alleged “were committed as part of a widespread and systematic attack against the Palestinian civilian population pursuant to State policy.”

Khan acknowledges Israel’s innate right and marrow to self-defence. He does not consider it estranged from the objects of international humanitarian law. To divorce them would merely enliven barbarism. The means Israel chose to achieve its military aims in Gaza, “namely, intentionally causing death, starvation, great suffering, and serious body or health of the civilian population – are criminal.”

On the part of Hamas, the prosecutor cites extermination, murder, the taking of hostages, the use of rape and sexual violence, the resort to torture, cruel treatment and “[o]utrages upon personal dignity” as crimes worthy of investigation. Khan finds that the accused individuals “planned and instigated the commission of crimes” on October 7 and had “through their own actions, including visits to hostages shortly after their kidnapping, acknowledged their responsibility for their crimes.”

When law intrudes into the violence of war and conflict, the participants and instigators are rarely satisfied. The matter becomes even more testy when international tribunals feature. Concerns about power, bias, and an inappropriate coupling (or decoupling) of potential culprits abound.

No doubt anticipating the fulminating response, Khan convened a panel of experts in international law to advise him whether his applications for arrest warrants met the threshold requirements of Article 58 of the Rome Statute. It would be hard to dismiss the weighty credentials of a group made up of such figures as Lord Justice Fulford, Judge Theodor Meron and Baroness Helena Kennedy.

None of this mattered in the catatonic rage arising from pairing the warring parties in the same effort. The response reads like a decrypting key to hate and exceptionalism. All wage war justly; all wage war righteously. According to Netanyahu, Israel had suffered a “hit job”, with Khan “creating a false symmetry between the democratically elected leaders of Israel and the terrorist chieftains”. The subtext is clear: democracies, at least those declaring themselves as such, are beyond reproach when fighting designated savages.

On the side of the Middle East’s only nuclear power (officially undeclared) came the erroneous argument that lumping Hamas officials with Israeli cabinet members was tantamount to equivalence. “The ICC prosecutor’s application for arrest warrants against Israeli leaders is outrageous,” declared US President Joe Biden. “And let me be clear: whatever this prosecutor might imply, there is no equivalence – none – between Israel and Hamas.” Ditto the Austrian Chancellor Karl Nehammer, who thought the pairing “non-comprehensible”.

The prosecutor implied no such thing, focusing on the profile of each of the individuals. The allegations regarding Netanyahu and Gallant, for instance, keenly focus on starvation as a means of waging war, including broader applications of collective punishment against Gaza’s civilian population. For the leaders of Hamas, the interest is on allegations of murder, sexual violence, extermination, torture, hostage taking and incidents of captivity.

The trope of faultless democracy at war against terrorism is a common one. The George W. Bush administration made incessant use of it in justifying illegal renditions and torture during the scandalously named Global War on Terror. Memoranda from the White House and the US Justice Department gave nodding approval to such measures, arguing that “illegal combatants” deserved no human rights protections, notably under the Geneva Conventions.

Unfortunately, many a just cause sprouts from crime, and the protagonists can always claim to be on the right side of history when the world takes notice of a plight. Only at the

conclusion of the peace accords can stock be taken, the egregiousness of it all accounted for. Along the way, the law looks increasingly shabby, suffering in sulky silence. These applications for arrest warrants are merely a modest measure to, pardon the pun, arrest that tendency. It is now up to the pre-trial chamber of the ICC to take the next step.

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**Binoy Kampmark** was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne. Email: [bkampmark@gmail.com](mailto:bkampmark@gmail.com)