Prosecutor De-Prioritizes ICC Investigation of US Torture Program

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On September 27, 2021, the new International Criminal Court ("ICC") Prosecutor, Karim Khan, announced that the Office of the Prosecutor was seeking authorization to resume investigation in the ICC's Afghanistan situation. He also announced that his office would focus the Afghanistan investigation on crimes committed by the Taliban and Islamic State-Khorasan Province ("IS-K"). What is being de-prioritized are crimes committed by the (former) Afghan Armed Forces, as well as those by US nationals (members of the Central Intelligence Agency and US armed forces), which had previously been included within the ambit of the investigation.

While this may make sense politically, and there most certainly have been staggering crimes committed by the Taliban, it both reveals the Prosecutor bending to the political "wind," and is a setback if one was hoping to ensure equal application of the rule of law. It also follows on the heels of the ICC's UK investigation of torture committed in Iraq also being dismissed under the past Prosecutor; put together, this takes us back to images of "white person's justice," which the past Prosecutor was (largely) valiantly trying to move the Court away from. While the Court's docket has now expanded beyond its original focus on situations in Africa (for which the Court was roundly criticized), letting UK and US torture programs off the hook conveys an extremely problematic message that the nationals of some countries can evade the rule of law.

The Prosecutor is not suggesting that crimes by US nationals were not committed, nor that the case would not have merit, but that he simply is not "prioritizing them." It also warrants mention that the Afghanistan investigation nearly did not go forward at all,

after the Pre-Trial Chamber's odd ruling that it was not "in the interests of justice" to move forward (basically because the Afghanistan case would be a difficult one to pursue). Two former US War Crimes Ambassadors (and myself) were among the 14 *amicus curiae* who argued to the Appeals Chamber that the case should go forward (with one Trump lawyer arguing for dismissal).

When the Appeals Chamber reversed the Pre-Trial Chamber ruling and opened the Afghanistan investigation, the Trump Administration imposed sanctions (travel bans and asset freezes) on the past ICC Prosecutor and members of her staff, basically for looking into accountability for US nationals. Despite US claims that the ICC lacked "jurisdiction," the crime were committed within the territory of Afghanistan (a Rome Statute State Party), and thus ones over which the ICC has clear jurisdiction (Rome Statute, Art. 12(2)(a)). Now, ironically, when the Biden Administration has lifted those sanctions (i.e., the Prosecutor could move forward without fear of punitive retaliation), he declines to do so. That he is a UK national (with the UK having escaped its own ICC investigation moving forward) only compounds the problematic optics.

Another problem is that although the US has very "able" courts, it has proven itself almost entirely "unwilling" to prosecute those implicated in the extensive torture program—which ranged from Abu Ghraib prison in Iraq, to Afghanistan, to "secret prisons" in various countries that held "high level" CIA detainees (documented by the US Senate Select Committee on Intelligence), to Guantánamo Bay, and those "rendered" to other countries under the "extraordinary renditions program." US courts have also entirely denied any form of civil recovery to torture victims, even those acknowledge to have been wrongfully detained and tortured (e.g., the el-Masri case).

This was a shameful part of the US's post 9/11 "war on terror," and, unfortunately, there are still those in the US who view torture as "good American policy" (e.g., former US Vice President Dick Cheney). The US thus seems to periodically view itself as above the rule of law, at least—in the words of esteemed international law Professor Louis Henkin—"in the crunch, when it really hurts" (Henkin, *How Nations Behave*, 2d ed 1979). While the post-9/11 torture program has been shut down, the US has periodically *had* torture programs, such as the one that was part of "Operation Phoenix" in South Vietnam. It is not merely an adage that when there is no accountability, crimes will be repeated.

There were those in the US who held out hope that, if the US did not have the temerity to pursue these case, maybe the ICC could finally do so—or at least prod the US into doing far more by way of "complementarity." With "de-prioritization" of the investigation vis-à-vis US nationals, the Biden Administration lacks even the *incentive* to conduct complementarity; this potential leverage has thus been squandered.

Remember also that the Rome Statute creates jurisdiction over war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes" (Rome Statute, Art. 8(1)). When high-level US government officials designed "enhanced interrogation techniques" for use at multiple locations, and then had government lawyers engage in clever wordsmithing in memoranda to attempt to provide a veneer of legality, this suggests both such a plan and a policy. And when the resulting torture was inflicted on large numbers of victims in disparate locations around the globe, the crimes appear to have been "large-scale" (true, even if one only considers the crimes committed on the territory of Afghanistan and States Parties that housed "secret prisons"). Thus, the crimes appear to fit easily within the parameters of the type of war crimes prosecutions the ICC was particularly designed to prosecute.

It also warrants mention the importance of the ICC pursuing crimes in a "situation" as a whole—examining crimes on all sides and not selectively. This is what the *ad hoc* and hybrid tribunals attempted to do (not always successfully) as well as the current "investigative mechanisms" investigating crime committed in Syria (known as the "IIIM") and committed in Myanmar (known as the "IIMM"). The only investigative mechanism that broke that model was the Investigative Team to Promote Accountabiity for Crimes Committed by Da'esh/ISIL ("UNITAD") authorized only to investigate crimes committed by ISIL/Da'esh in Iraq—and not crimes by Iraqi or other nationals. The point is not that ISIL/Da'esh did not commit absolutely horrific crimes in Iraq (they did), but that it conveys exactly the wrong message (one of "victor's justice") to prophylactically carve out crimes by other nationals from investigation. In his recent announcement, Kahn is acting as if he were still Head of UNITAD, his post prior to becoming ICC Prosecutor.

Failing to pursue the rule of law equally may make political sense, and it likely also makes financial sense—since the OTP's budget does not permit it to simultaneously pursue all the ICC's preliminary examinations and investigations. Yet, this latest development represents a clear backslide for the notion of global accountability—that the rule of law must apply to all—something that is proving very difficult to achieved, but must be attempted notwithstanding. If the ICC cannot strive to do so, then who can? This was precisely the mandate of the ICC and the new Prosecutor has made a misstep in entrenching impunity for US nationals.