

INSS Insight No. 1492, June 27, 2021

**The Changing of the Guard at the International Criminal Court:
Prospects for Israel**

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On June 15, 2021, Fatou Bensouda stepped down after a nine-year term as Chief Prosecutor of the International Criminal Court, succeeded by British lawyer Karim Khan. One of Bensouda's most recent decisions was to open an investigation into alleged war crimes committed since June 13, 2014 in "Palestine," i.e., in the West Bank, East Jerusalem, and the Gaza Strip. This decision drew harsh criticism from Israel, which charged that political considerations prompted Bensouda to adopt the Palestinian narrative on the conflict and ignore the fact that the Court has no jurisdiction in this case. Her successor will have to prioritize between the numerous open investigations in the Court, and thus it may be feasible to influence him to assign a low priority to the investigation against Israel, due to the complexity of the procedure. To this end, Israel should seek an informal dialogue with Khan and present its positions regarding the jurisdiction of the Court.

On June 15, 2021, Fatou Bensouda completed her nine-year term as Chief Prosecutor of the International Criminal Court (ICC) and was succeeded by Karim Asad Ahmad Khan. Bensouda, a native of Gambia, previously served as deputy to ICC Chief Prosecutor Luis Moreno-Ocampo and head of the prosecutions division; legal adviser and trial attorney at the International Criminal Tribunal for Rwanda (ICTR); and Gambian Minister of Justice and Attorney General.

Bensouda's tenure was marked by a more activist approach than that of her predecessor, opening four investigations on her own initiative (Georgia, Burundi, Bangladesh/Myanmar, and Afghanistan), including, for the first time, investigations outside the African continent. Among her successes is a higher percentage of execution of arrest warrants, which stemmed inter alia from her decision to stop focusing on senior military and government officials and complex wide-ranging cases, shifting her focus to direct responsibility for crimes committed, even in the mid-seniority levels. This policy change followed the failure in her office in a number of proceedings of the former kind, due to evidentiary difficulties, the complexity of the procedure, and difficulty arresting senior officials. In addition, during her tenure, first convictions were achieved regarding

sexually oriented crimes committed in connection with an armed conflict, such as sexual slavery, rape, forced pregnancy, and forced birth.

At the same time, her tenure was accompanied by criticism, including by the Group of Independent Experts (chaired by Richard Goldstone), which was appointed by the Assembly of States Parties to the Court, and whose [conclusions](#) were adopted. The criticism in part revolved around the low number of convictions obtained by the Prosecutor (only four, with one facing appeal); the few indictments she was able to file against suspects due to lack of approval by the Court; the high number of investigations and preliminary examinations, thereby exceeding the capacity and means of her office, with no open investigations completed; and the long duration of preliminary examinations (an average of over five years), mainly in light of the tendency to await investigations and proceedings in the relevant state.

The first procedure that Bensouda dealt with in the Israeli context was the *Marmara* flotilla to Gaza in 2010. The Prosecutor opened a preliminary examination in 2013, following a request from Comoros, a State Party to the ICC, whose flag the ship bore. At the conclusion of the examination, the Prosecutor [announced](#) that although there is a reasonable basis to believe that war crimes were committed on board the *Marmara*, an investigation cannot be opened as the case is not admissible due to the lack of sufficient gravity. This decision was the subject of two rounds of appeals by Comoros to the Pre-Trial Chamber at the ICC, which twice ruled that an investigation should take place. Despite this, the Prosecutor [insisted](#) on not opening an investigation.

On the other hand, the Prosecutor decided that there was room to open an investigation regarding war crimes allegedly committed in "Palestine," i.e., the West Bank, East Jerusalem, and the Gaza Strip since June 13, 2014. This follows a request from the Palestinian Authority from 2015 and a preliminary examination that lasted over five years. In December 2020, the Prosecutor announced that in her opinion, the Court has jurisdiction to hear the case, although she [sought](#) the Court's position on the matter. In February 2021, the Pre-Trial Chamber, by majority, [approved](#) the existence of jurisdiction, and in March 2021 the Prosecutor announced the opening of an investigation. During Operation Guardian of the Walls of May 2021, she [noted](#) that the investigation could also include crimes committed during this operation.

Israel leveled harsh criticism against the Prosecutor's decision to open an investigation. It argued that she ignored the fact that there is no Palestinian "state" that controls all the territories in question and therefore the Court has no authority to hear this case, as its jurisdiction is limited to war crimes committed on the territory of a member state or by a citizen of a member state. It was also claimed that the Prosecutor involved political

considerations in adopting the Palestinian narrative on the conflict. For example, Bensouda explained that she came to the conclusion that there is a Palestinian state, which extends over the whole of the "Occupied Palestinian Territory," in light of "the detrimental impact of the ongoing breaches of international law" by Israel, which impede realization "of the right of self-determination" of the Palestinian people. Beyond that, the Prosecutor gave great weight to the decisions of UN bodies, including the UN General Assembly and the UN Human Rights Council, which are political bodies with a decided unilateral bias against Israel. In addition, it was criticized that she attached little weight to the fact that the issues of settlements and borders are supposed to be resolved in negotiations between the parties, as well as to the complex security reality, thus dragging the Court into what are in essence political issues.

While she announced the opening of an investigation in "Palestine" despite her nearing the end of her term in office, in other sensitive proceedings Bensouda left the decision on how to proceed to the incoming prosecutor. This relates primarily to an investigation into war crimes in Afghanistan starting May 1, 2003, which also applies to American forces; and an investigation in Georgia and a request from the Court for permission to open an investigation in Ukraine, both of which relate to Russia's actions. This has been criticized as an attempt to tie the hands of the incoming Prosecutor in the context of the "Palestine" investigation.

The new Prosecutor is a British lawyer with extensive experience in international criminal law. In his most recent role, Khan served as Assistant to the UN Secretary General and Special Adviser and Head of the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD). He previously served as legal counsel in the Prosecution Office of the International Criminal Tribunals for Yugoslavia and Rwanda; an advocate and legal adviser on defense in the International Tribunals for Yugoslavia, East Timor, Sierra Leone, and Lebanon; and the representative of the victims in a number of international proceedings. He has extensive knowledge of the ICC, stemming from his role as a lawyer and legal counsel on behalf of the defense in many cases conducted in the court, including in the case of defendants from Congo (Bemba Gombo), Sudan (Abu Garda, Banda and Jerbo), Kenya (Ruto and Muthaura), and Libya (Saif Gaddafi).

Khan seems to be aware of the criticism of the ICC and the Prosecutor's office in particular. In an [interview](#) he noted that the high expectations from the Court were created due to the large number of preliminary examinations opened and that, given its limited resources, the constraints on the Court's capacity should be recognized and creative solutions should be devised to seek to end impunity beyond the ICC, including sharing the burden with national and regional mechanisms. Khan further noted that in

order for the Court to have impact it must prioritize its resources and take into account the gravity of the crimes committed as well as aspects of jurisdiction, focusing on those cases in which the court can make an impact and inroads in terms of accountability.

The main tasks facing Khan are to prioritize among the Court's many open investigations; increase the effectiveness of the Court, *inter alia* by obtaining more convictions; and strengthen its legitimacy among countries and organizations.

In Israel, there was a sigh of relief upon Khan's election, since of the four finalists he was perceived as the most pragmatic and opposed to the "politicization" of the Court. The question arises as to whether Khan can reconsider the Court's jurisdiction over Palestine. On the face of it, there seems to be no reason to prevent him from re-examining this issue. However, if he tries to close the investigation on the basis of lack of jurisdiction, the Palestinian Authority will probably appeal his decision, and in this case, it is likely that the Court, especially in its current composition, will demand an investigation. Hence, it is doubtful that he will take such a step. However, in light of the multiplicity of investigations in the Court, Khan will be required to prioritize between them. There are currently fourteen investigations, as well as three preliminary examinations that ended with the conclusion to open an investigation. It is estimated (as reflected in the Goldstone expert report) that the Prosecutor's office has the resources to conduct only eight investigations simultaneously. Consequently, Khan may decide not to advance the investigation on Palestine, due to its complexity. On the other hand, he will undoubtedly be exposed to intense political pressure to advance this investigation.

Israel should seek an informal dialogue with Khan and present its position on the question of the Court's jurisdiction, the scope of the relevant war crimes, and the issue of complementarity, *i.e.*, the existence of investigations in Israel. To these ends, other countries (especially the United States) can be enlisted to support Israel's positions. In April, the US administration [removed](#) the sanctions imposed on Bensouda and another senior ICC officials by the Trump administration. However, Secretary of State Antony Blinken [noted](#) that the United States continues to strongly oppose the Court's investigations in Afghanistan and Palestine and its attempts to apply its jurisdiction to non-member states (including the United States and Israel), contending that a dialogue should be held with the Court on these issues.