

# The ICC and the Afghanistan Affair: The New Prosecutor and the Elegant Solution

Pnina Sharvit Baruch and Ori Beeri | No. 1526 | October 14, 2021

On September 27, 2021, following the recent events in Afghanistan, Karim Khan, the Prosecutor of the International Criminal Court, [announced](#) that he had requested the authorization of the Pre-Trial Chamber to resume the investigation opened at the Court in March 2020 regarding war crimes and crimes against humanity committed in the context of the situation in Afghanistan; the investigation would focus on alleged crimes committed by the Taliban and the Islamic State – Khorasan Province in Afghanistan. The decision to refrain in effect from investigating United States forces indicates that Khan has chosen a pragmatic approach that elegantly avoids a confrontation with the US administration. The impact on the investigation pertaining to Israel is unclear: On the one hand, perhaps the opposition by the United States and Israel to this investigation and Khan's desire to avoid confrontations will relegate this issue to a low priority. On the other hand, it is possible that the US administration will now prefer to refrain from placing pressure on the Court to prevent an investigation regarding Israel. In addition, letting the US off the hook could lead to a renewal of the criticism that the Court focuses mainly on Third World countries. Thus, Khan may choose to continue the investigation regarding Israel, in part as proof that he also investigates Western countries.

The proceedings at the International Criminal Court (ICC) regarding the situation in Afghanistan began in 2006, when the first Prosecutor of the Court, Luis Moreno Ocampo, initiated a preliminary examination regarding allegations of war crimes and crimes against humanity. The preliminary examination took place over the course of many years, while in the background the United States administration exerted considerable pressure against opening an investigation regarding US military personnel. Afghanistan is a member of the ICC, and so the Court has jurisdiction over crimes that take place in its territory, even if they are committed by citizens of a country that is not a member of the Court.

On November 20, 2017, then-ICC Prosecutor Fatou Bensouda submitted a [request](#) to the Pre-Trial Chamber for authorization to open an investigation regarding crimes allegedly committed in the territory of Afghanistan starting on May 1, 2003 (the start of Afghanistan's membership in the Court). The request related to crimes allegedly committed both by the Taliban and the Afghan forces, and by the United States. Also included were crimes related to the situation in Afghanistan that were committed in the territory of other member States of the Court, in particular allegations of torture and sexual violence committed by US forces against Afghan detainees in Poland, Romania, and Lithuania, principally in the period of 2003-2004. The US administration subsequently [threatened](#) that restrictions would be imposed on visas to ICC employees involved in the investigation, and in April 2019 the Prosecutor's US visa was [revoked](#).

On April 12, 2019, the Pre-Trial Chamber [rejected](#) the Prosecutor's request to open an investigation, as the investigation "would not serve the interests of justice." This was, as the Court explained, in light of the time that elapsed since the opening of the preliminary examination and the lack of any potential cooperation with the investigation, "hampering the chances of successful investigation and prosecution, as well as the need for the court to use its resources prioritizing activities that would have better chances of success." This decision was met with serious [criticism](#) as surrendering to pressure from the US administration.

On March 5, 2020, the Appeals Chamber [reversed](#) the decision of the Pre-Trial Chamber, and decided that it should have refrained from involving systemic considerations and relate only to the question of whether there was a reasonable factual basis for the prosecution to proceed with an investigation. Following this decision, the Prosecutor announced the opening of an investigation. Consequently, the relevant countries were informed of the possibility of announcing that they intend to conduct the investigation themselves, since according to the ICC Statute, national investigations are given precedence. At the same time, the Office of the

Prosecutor has the authority to request authorization from the Court to resume the investigation if it finds that the proceedings in the country are not genuine. On March 26, 2020, the government of Afghanistan announced that it intends to investigate the allegations itself. Accordingly, the investigation was suspended.

The US administration emphatically [denounced](#) the decision to open an investigation, and in September 2020 even imposed sanctions on the Prosecutor and another senior official. Upon entering the White House, President Biden [announced](#) that he would reexamine the sanctions, and they were cancelled on April 1, 2021. Secretary of State Antony Blinken [stated](#) that the United States continues to strongly oppose the attempts of the Court to apply its jurisdiction over personnel of non-States Parties, such as the United States and Israel. However, these concerns would be better addressed through engagement with the Court and not through sanctions.

In June 2021 Fatou Bensouda completed her term as ICC Prosecutor, and Karim Khan, who is seen as more pragmatic, was appointed in her place. In an [interview](#) before he assumed the position, he stated that it is necessary to recognize the limitations of the Court's capabilities and budget, and that creative solutions should be sought to end impunity beyond the ICC, including by sharing the burden with national and regional mechanisms.

### **The Prosecutor's Announcement**

On September 27, 2021 the Prosecutor [announced](#) his decision to resume the investigation into the situation in Afghanistan, in light of the recent developments in the country. The Prosecutor noted the cooperation of the previous government in Afghanistan with the Office of the Prosecutor, but stated that in light of the Taliban having seized control, “there is no longer the prospect of genuine and effective domestic investigations.”

The Prosecutor noted that the investigation would focus on crimes committed by the Taliban and the Islamic State – Khorasan Province (IS-K),

citing the limited resources at the disposal of his office, which demand focusing the investigation and allocating the resources to cases that can be proven in the court "beyond reasonable doubt." Khan noted the gravity, scale, and continuing nature of the alleged crimes committed by the Taliban and the Islamic State, including "indiscriminate attacks on civilians, targeted extrajudicial executions, persecution of women and girls, crimes against children and other crimes affecting the civilian population at large."

According to the statement, in relation to those aspects of the investigation that have not been prioritized, the Prosecutor's office will limit its actions to preserving evidence and promoting national accountability efforts. In other words, the Prosecutor made clear that he will not investigate the claims made against US forces.

The proceedings regarding Afghanistan are one of the main reasons for the tension between the Court and the United States, which peaked with the former Prosecutor's decision to open an investigation and the sanctions imposed by the Trump administration on senior ICC figures. The Prosecutor's announcement thus paves the way for a resumption of the investigation into the Afghanistan situation without confrontation between the ICC and the United States. In so doing, Khan is turning over a new leaf with the US administration.

Khan's announcement also indicates that he intends to investigate recent crimes as well. For example, he explicitly mentioned the UN Security Council's condemnation of the IS-K terrorist attack on August 26 near the Kabul Airport. This is notable since these crimes are not necessarily closely connected to the crimes stated in the Prosecutor's request that were the subject of the preliminary examination.

International recognition of the Taliban as the legitimate government of Afghanistan will not prevent their actions from being investigated and the prosecution of senior members of the organization. This is because an

official position, such as head of state, minister, or member of parliament does not grant immunity from the court.

### **Implications for Israel**

The decision in effect to refrain from investigating the US forces indicates that Khan is taking a pragmatic approach that enables him to elegantly avoid a confrontation with the US administration. Perhaps the opposition by the United States and Israel to an investigation regarding Israel, and Khan's desire to avoid a confrontation, can relegate this issue to a low level of priority as well. Low priority can also be attributed to the complexity of the investigation regarding Israel and the fact that it concerns actions whose criminality is less clear than in other cases. Khan's statement comments generally about crimes being committed in various parts of the world, stressing that his office will prioritize cases "based on various factors, including the gravity and scale of the alleged crimes, in light of the resources available to us."

At the same time, the decision of the Prosecutor to cease the investigation against the US is bound to leave the US administration with less of an appetite to engage in a confrontation with the Court only in order to prevent an investigation regarding Israel, particularly when there is internal pressure within parts of the progressive camp in the Democratic Party to advance such an investigation. In addition, the Prosecutor's decision to let the US off the hook could revive criticism of the Court for focusing mainly on Third World countries. Thus, it is possible that Khan may prefer to continue the investigation regarding Israel, in part as proof that he also investigates Western countries.

The Prosecutor's statement also demonstrates that in his view once an investigation is opened, it can also cover claims of new crimes, even if they are not closely connected to the crimes underlying the initial decision to open the investigation. The implication of this for Israel is that the Court's investigation in its regard could constitute a kind of "ongoing monitoring mechanism" of Israel's actions without an end date. This can be seen in the [comment](#) made by the former Prosecutor, Bensouda, during

Operation Guardian of the Walls in May 2021 that her office was following the escalation of violence and the possible commission of crimes falling under ICC jurisdiction.

---

Editors of the series: Anat Kurtz, Eldad Shavit and Judith Rosen