Failed ICC cases will influence Bensouda successor

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By [George Kegoro](https://www.standardmedia.co.ke/author/george-kegoro)

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The search is underway for the next prosecutor of the International Criminal Court (ICC) to take over from Fatou Bensouda (pictured), whose term is nearing its end.

The plan is that the Assembly of State Parties to the Rome Statute will elect the next prosecutor during its 19th session in late 2020.

At its final meeting late last year, the bureau of the ASP established a committee to oversee the election of the prosecutor. The bureau adopted terms of reference to govern the identification of candidates including mandates, timelines and composition of the committee on the election of the prosecutor.

The committee is comprised of five members, one representing each regional group, and has the mandate to facilitate the nomination and election of the next prosecutor. The committee is assisted by a panel of independent experts, again one for each regional group. The committee is expected to work impartially and its members act independently.

The committee has now formally declared the vacancy of the prosecutor and is currently receiving applications until October 31 after which the committee will start a process that will eventually derive a short list of three candidates for consideration by the ASP late next year.

The ICC prosecutor is elected by the ASP for a nine-year non-renewable term. Bensouda, who hails from The Gambia, took office in June 2012 as the second ICC prosecutor after Luis Moreno Ocampo and will retire in June 2021.

When she took office, Bensouda continued with the seven situations, all from Africa, which she had inherited from Ocampo, and which had led to the criticism that the ICC was targeting African countries.

She brought the situation in Georgia into the ICC, the first non-African country, but a pre-trial chamber denied her permission to commence investigations into Afghanistan which would have been the second. During her time, she also commenced preliminary examinations in far-flung regions of the world.

Commenced by Ocampo, the Kenyan cases collapsed under Bensouda and were followed by two high profile acquittals, the first of former Democratic Republic of Congo Vice President Jean-Pierre Bemba in 2018 and the second of former Ivorian President Laurent Gbagbo early in the year.

The collapsing cases have left the office of the prosecutor under mounting pressure to show results for the massive investment that has been put into establishing and maintaining the court.

While other organs of the ICC have certainly contributed to the failure of these cases, the prosecutor alone gets blamed. Part of the reason is that the prosecutor has ended up as the public face of the court, and is therefore an easy target when things go wrong.

The failed prosecutions are likely to influence the choice of the next prosecutor. As deputy to Ocampo, the ASP settled on an internal candidate as the next prosecutor.

Against this record of setbacks, it seems unlikely that the ASP will favour an internal candidate to succeed Bensouda, and in this regard, the current deputy prosecutor James Stewart, may not stand a strong chance of succeeding her.

A rumoured external candidate is Karim Khan, who served as defence counsel for Deputy President, William Ruto, before the ICC. The case against Ruto was terminated in April 2016, when the court declared a mistrial over what the presiding judge characterised as a “troubling incidence of witness interference and political meddling.”

Shortly after the termination of the case, Khan was shortlisted for appointment as UN Special Rapporteur on Torture.

However, a global coalition of NGOs opposed his appointment, pointing out in their letter to the president of the Human Rights Council that “as defence counsel in the case (against Ruto) Khan’s actions in relation to a specific witness, Meshack Yebei … suggests that if an independent investigation on the death of the witness was to be conducted, he might possess information that would be of interest in such an investigation.”

When, on a different occasion, Khan applied for appointment to a different UN special mandate, same objections against him were raised and he was not appointed.

With the Kenyan cases of witness tampering still pending before the ICC, the appointment of Khan as the prosecutor would raise an avoidable conflict of interest especially if any investigations lead in the direction of his former client.

Both Ocampo and Bensouda were elected by consensus and the ASP did not have to vote. It is not unlikely that the same process will follow when electing the next prosecutor.

While Ocampo angered Africa in the selection of cases for prosecution, Bensouda has irked the US and alarmed the UK.

Both powers will take a keen interest in who is elected the next prosecutor, even though the US is not a member of the ASP while the African bloc, now more discordant than ever before, is likely to be a lesser force.