ICC has new prosecutor, what are his, Bensouda's next steps? - analysis

February 24, 2021

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The Jerusalem Post

<https://www.jpost.com/international/icc-has-new-prosecutor-what-are-his-bensoudas-next-steps-analysis-660074>

International Criminal Court Prosecutor [Fatou Bensouda](https://www.jpost.com/tags/fatou-bensouda" \t "_blank) is not dead-set on taking further major concrete action against Israelis before her term expires on June 16, The Jerusalem Post has learned.

This does not mean, however, that Bensouda may not eventually take some serious moves in the process of a full criminal war crimes probe against Israelis in the coming months.

But it means that at least at this moment, her view on the subject is likely either in play, or that she may lean toward leaving the issue toward her successor, Karim Khan.

In fact, many major ICC moves seem to have been postponed long enough that Bensouda’s successor will be more dominant than her in determining them.

The two most significant decisions were the ICC’s decision about jurisdiction over Israel and the selection of a new prosecutor.  
It seems that both decisions were stalled at least partially to wait for the administration of US President Joe Biden to take the reins.  
The idea seems to have been that whatever decisions were reached would come out without facing the same overt hostility the Trump administration directed toward the ICC over the last four years.

The ICC officials and judges who postponed their decisions were probably right about this.

Though the Biden administration criticized the ICC ruling about Israel, it was still a toned-down criticism and without new concrete threats of sanctions like president Donald Trump might have made.

Likewise, the Biden administration is expected to cooperate more positively with the incoming Khan. If Trump were still in power, there might have been no attempt to appease the US. ICC officials might have seen this as a hopeless endeavor under Trump.  
Bensouda had asked for a decision about Israel in March 2020, after filing her request in December 2019.

By July 2020 it was expected that there would already be significant hints about her successor, who was due to be anointed by December 2020.

The delays until the same week in February, and a few weeks into Biden’s term, seem to confirm that the waiting was intentional and calculated.

SO WHAT if the Israel-related decisions are made by Khan?

Technically, arrest warrants can be issued secretly in the middle of a criminal investigation.

This would not occur in the coming months, because the criminal probe would just be starting or may not start until months into Khan’s term. It might even take years.

Or, arrests might never happen.

Bensouda herself said that she has not yet ruled against the IDF’s investigations as inadequate.

If she or, more likely, Khan finds the IDF’s probes as adequate or inadequate but in good faith (a formula Bensouda used to characterize Britain), then any criminal probe of the IDF would likely close without any arrests.

A wild card here is that Bensouda said she would at some point issue a ruling about the legitimacy of the IDF’s war crimes investigations, but she did not reveal the timing.

A careful reading of the ICC February 5 decision would indicate that there is a strong chance that Bensouda or Khan might choose to first obtain ICC approval of a finding against the IDF’s investigative system before trying to arrest someone.

This would mean that even though arrest warrants can be done secretly, Israel or individual political or IDF officials who might be in the ICC’s crosshairs would be more likely to have some warning and get to fight the jurisdictional issues in court.

In fact, the ICC even said that individual Israelis could relitigate the question of whether there is a “State of Palestine” in court. The court added its ruling was only for the preliminary purposes of letting a criminal probe go forward.

Even if the ICC issues arrest warrants and tries to keep them secret, many European and other countries are likely to tip off Israel beforehand. This would allow Israeli officials to avoid travel and any embarrassment.

There is precedent for this.

In the post-2000 era, anti-Israel lawyers in Britain, Spain and elsewhere tried to abuse certain domestic laws to arrest Israeli officials for alleged crimes committed against the Palestinians or on some other battlefield.

THE QUESTION of whether the ICC might seek to arrest Israelis involved in the settlement enterprise at an earlier date has other complexities.

Israel has not “investigated” building settlements as a crime, as it views such building as legitimate. This could mean that there is one less hoop for the ICC to hop through before seeking arrests.

On the other hand, with the IDF, Israel agrees that violence against civilians is a war crime if the rules of war were not followed.

In contrast, Israelis may still try to convince the ICC that it cannot arrest or indict Israelis for building in areas that are likely to remain part of Israel even in the event of a peace deal with the Palestinians.

It is unknown whether the ICC may seek arrest warrants at an earlier date against [Hamas](https://www.jpost.com/tags/hamas), since the ICC prosecution has already concluded that the terrorist group has no interest in prosecuting its own when they fire rockets on Israeli civilians.

Though the February 5 decision moved things closer to a crisis between Israel and the ICC, Bensouda will likely leave Khan the opportunity for an out. The question will be whether he takes it.