Where does Israel stand with the ICC? - analysis

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Could a loud, charismatic British Muslim man whose role model was Pakistan’s foreign minister save Israel from a soft-spoken, tall Gambian Muslim woman who has become one of its greatest enemies in the legal and legitimacy spheres?

Going into June 16, when new International Criminal Court Chief Prosecutor [Karim Khan](https://www.jpost.com/israel-news/icc-prosecutor-to-step-down-tomorrow-new-chief-to-decide-israels-fate-671116) was set to replace [Fatou Bensouda](https://www.jpost.com/international/icc-prosecutor-went-after-israeli-settlements-but-not-cyprus-671165), Israel was already at a deep level of tension about war crimes controversies.

What impact will the events of the May 10-21 Gaza war and the newest related war crimes allegations against Israel have on its fate before the ICC?

As the Jewish state engages in a round of introspection about some of its failed messaging and public diplomacy for incidents in which it misled foreign media or, in the case of the Associated Press in Gaza, blew up its offices, the ICC looms as a much graver, long-term challenge.

The Magazine spoke to some of Israel’s most senior legal officials to frame the events of the war from a legal perspective and to get an idea of what to expect next with the ICC.

BUT BEFORE fully fleshing out their views and the Israel-ICC history which frames this moment, it is crucial to delve deeper into who Khan is.

Recently, he upped his level of media exposure. In likely his most extensive interview since becoming ICC prosecutor-designate, with top legal blog Opinio Juris on May 21, Khan recalled a story from when he joined the British bar in 1992, when the senior lawyers interviewing him “without regard to Khan’s presence in the room, began discussing whether Khan looked more Pakistani or English.”

“Their parting advice to him was that ‘someone [Muslim] like you’ might benefit from changing his name to Smith.” He remembers leaving the interview feeling sad and a bit shocked.

“‘I also had a yearning for human rights law,’ he says, revealing that he spent much of his spare time working on human rights... for the Ahmadiyya community, a Muslim movement much persecuted in Pakistan,” according to the Opinio Juris interview.

Observers would likely sympathize with then-young Muslim lawyer Khan being mistreated. But the story could also increase concern about whether he will have greater empathy for Muslim human rights over others in the case of conflict.

Of additional concern could be positive comments he made about Richard Goldstone, reviled by many in Israel for his contribution to the anti-Israel 2009 Goldstone Report, and Khan’s statement that “to understand international law it is essential to appreciate the role of politics.”

Israel is always trying to focus the ICC on the dry law and away from political interference which tends to work against it.

YET KHAN sent some very pragmatic messages in the Opinio Juris interview that might also hearten Israelis.

“It is important to be realistic about what the Court can achieve... expectations have been raised because of the number of preliminary examinations around the world. But we need to be candid with states and with victims about the limit of the Court’s resources. Dealing with atrocity crimes requires creative solutions. There are many ways to seek to end impunity beyond the ICC, including sharing the burden with national and regional mechanisms,” Khan told Opinio Juris.

This appeared to show he would not be interested in going after Israel if it would lead to nothing and harm the ICC’s position among Israeli allies, like the US and some key Western European funders of The Hague.

So there are still many question marks about Khan, but ICC-Israeli history to date is clear.

On February 5, the ICC Pre-Trial Chamber ruled it has jurisdiction over alleged war crimes committed by Israelis within the territory of the “State of Palestine.”

Shortly thereafter, on March 3, Bensouda said she was pouncing on this decision in order to open a full criminal investigation against Israelis regarding IDF conduct during the 2014 Gaza war and the 2018 Gaza border dispute, and the settlement enterprise.

Bensouda’s decision was the climax of Israel’s first major defeat before the ICC after an approximate 12-year struggle dating back to the Goldstone Report of 2009.

Israel won the first round in April 2012, with the first ICC prosecutor, Luis Moreno-Ocampo, ruling that Palestine was not yet recognized as a state by the UN.

However, by November 2012, the UN General Assembly had improved Palestine’s status from observer to that of a nonmember state.

In January 2015, this led Bensouda to open a preliminary review to decide whether Palestine fulfilled the ICC’s specific jurisdictional standards and whether there was a basis for a criminal probe.

WHAT FOLLOWED was round two: a six-year battle over the issue, including serious attempts by Israel to dialogue with Bensouda’s office to convince it to stay out of the politically fraught Israeli-Palestinian conflict.

Despite Bensouda’s March 3 decision, Israeli legal officials repeatedly indicated to the Magazine that there was some hope that Khan might reverse Bensouda’s decision or bury the case for an extended period.

However, these hopes must now contend with Bensouda’s May 12 warning that she was recording Israeli actions on an ongoing basis that might be added to the war crimes probe.

Also, before the May war, Khan would have taken office with the main allegations against Israel being almost seven years old – something that would not make them seem as urgent.

In contrast, when Khan took office on June 16, it was less than a month after fresh images of the IDF bombing Gaza’s urban areas in Operation Guardian of the Walls had smothered newspaper front pages and television screens around the world.

The real numbers may be debated for some time, but initial estimates are that 256 Palestinians, including 66 children, were killed.

A Meir Amit Intelligence and Terrorism Information Center analysis has found that out of 74 killed Palestinians named in the early days of the conflict, 58 were associated with terrorist groups, including: 31 Hamas operatives, three Palestinian Islamic Jihad operatives and eight terrorism-associated Fatah members (many Fatah members are nonviolent).

In Israel, approximately 13 people were killed by a mix of rockets, collisions while running for bomb shelters and other Gaza-related issues.

Around 1,900 Palestinians and 200 Israelis were injured and millions on both sides were caught up in either Gaza’s 4,360 rockets or the IDF’s around 1,500 airstrikes.

These numbers and video footage depicting them will be front and center as Khan decides whether to continue on Bensouda’s path toward possibly prosecuting Israel versus dropping the case.

WHAT APPROACH should Israel take toward Khan? Should it attempt to quietly dialogue with him, as it did for years with Bensouda?

Or should it try to rally diplomatic pressure against him and the ICC, as has been Israeli policy for the last year or so, once it seemed that Bensouda had made her choice against Israel?

Current and former top Israeli legal officials differ on the issue.

Some former leading legal officials said that a lot depends on US-ICC relations over The Hague’s probe of alleged US war crimes in Afghanistan.

Noting that US President Joe Biden wants dialogue with the ICC, as opposed to former president Donald Trump’s overt aggression, one official said it will be critical “to understand where they are going.”

“It is hard to escape the impression that the politics have a dominant impact there. You can carry out some cooperation, but there is also the court of public opinion. The media shows how many dead Palestinians there are,” and suddenly many start to ignore actual legal facts and principles.

For example, former IDF military advocate-general Maj.-Gen. (ret.) Danny Efrony said some critics seem to imply that Israel is at fault because fewer Israeli civilians died this past May.

Efrony asked rhetorically whether the critics meant that Israel should stop using Iron Dome to protect civilians?!

The former IDF chief legal official, who established the new cutting-edge Fact Finding Assessment mechanism and activated it on the third day of the 2014 Operation Protective Edge, explained: “There is no problem explaining how we probed and no fear from criticism, but first show how Western states, like the US and the UK, probe and then tell me if the IDF meets or exceeds the acceptable standards or not. In this kind of an exchange of viewpoints, I feel solid and comfortable.”

Former officials said dialogue is something you “do behind the scenes based on carefully set understandings.”

One suggested Israel must feel out Khan, and “then, when you know where he is going and how he will act – then you can decide if it is worth investing in dialogue.”

Better understanding Khan’s intentions would also be important for making decisions about what topics to discuss – whether it might be productive to discuss the IDF with Khan, but not settlements, due to the sides having more diametrically opposed basic understandings of the law and politics involved there.

Some voiced doubt about how effective these dialogues would be because of the creeping influence of politics within the ICC.

“If it will be a kangaroo court, then there is no point in cooperating,” said one official.

In one major incident during the May war, it is estimated, as many as 42 Palestinian civilians were killed when the IDF attacked a nearby portion of the tunnel network on al-Wahda Street in Gaza.

The IDF attack was exact and did not directly harm the Palestinian civilians’ homes. But the military underestimated the impact on the tunnel network, and when the targeted tunnel area collapsed it also caused the collapse of the nearby tunnels, which caused the houses to implode on the civilians inside.

Efrony said it is crucial to know the circumstances; sometimes Hamas has explosives hidden in a spot being targeted, and the unexpected secondary explosion of hitting those explosives is what really causes unforeseeable civilian harm.

“You can’t anticipate everything” in war, he said, while also blaming Hamas for using its civilian neighborhoods as mass human shields.

ANOTHER ONGOING and increasing concern for Israel is the tendency of human rights critics to try to obligate the Jewish state to use hyper-accurate weapons in all cases, without taking into account the scarcity and limits to such weapons.

In March, the IDF Ground Forces and Elbit Systems revealed a precise, laser- and GPS-guided mortar munition: the “Iron Sting.”

A mid-March Defense Ministry statement said the new munition was ready for serial production.

The ministry said the Iron Sting engages targets precisely, in both open terrains and urban environments, while reducing the possibility of collateral damage and preventing injury to noncombatants.

This means it could eventually revolutionize ground warfare and equip battalions with organic, accurate and effective firepower “to contend with enemies hidden within civilian” environments, while “meeting the legal and moral standards” of Israel, said Defense Minister Benny Gantz.

Asked to comment on whether this laser weapons system could save Israel from future war crimes allegations, former IDF deputy military advocate-general Eli Bar-On demurred.

“On one hand, the IDF is always trying to do more to help fight while reducing the harm to civilians. Mitigating civilian harm is part of the moral and professional obligation of the IDF, and this is why the IDF is always looking for new ways to decrease the danger to civilians on the battlefield, including the use of various precision-guided munitions,” he said.

On the other hand, he said, “we need to be very careful with the tendency of people in the world to use our abilities against us. They can’t turn against us if and when we sometimes use inexact weapons,” simply because we also have a limited number of exact ones.

He explained international law has “no presumption of unlimited resources for very scarce and expensive” cutting-edge exact weapons systems.

Bar-On described a claim that is often made in the international discourse, according to which, “if you have Iron Dome, there’s a lesser military necessity to attack your enemy and risk collateral damage. Just defend your citizens with Iron Dome.”

He strongly rejected this, saying, “An army’s role is to win wars. Don’t use my defensive measures against me” and try to limit Israel’s right to actively prevent rocket fire on its citizens.

His message was Israel would need to caution observers about expecting too much, too fast from the new laser mortar weapons.

Another issue which he said many critics do not understand is how crucial minutes or even seconds are during active military operations.

He said that critics sometimes ask why a particular IDF unit could not wait for a precise air strike to assist it during a firefight instead of using less accurate artillery rounds.

Bar-On stated he thought some of this is because the basic perspective of many human rights groups is to “think international humanitarian law exists only to stop civilian harm.”

In contrast, he said armies are permitted under those laws “to bring an adversary to absolute defeat so that they will beg for a ceasefire, while also striving to minimize harm to civilians.”

Generally, Bar-On is in favor of attempting dialogue with the ICC, as long as the Jewish state’s expectations are realistic.

For example, he may hold greater hope for mitigating ICC allegations relating to the IDF because of the robust military justice system that investigates these allegations independently and professionally, as opposed to the entirely separate issue of the settlement enterprise. The settlements are not considered illegal by the State of Israel and are not being investigated domestically, which could increase ICC scrutiny.

DESCRIBING THE ICC dilemma in a recent INSS post, former IDF international law department director Col. (ret.) Pnina Sharvit-Baruch wrote that in the war’s initial days there was broad support for Israel defending against Hamas’s launching of rockets on Jerusalem.

However, she added, “once images of civilian victims and severe destruction in the Gaza Strip began appearing in the international media, increasing allegations portrayed Israel as using excessive force.

“Israel was cast, once again, as the powerful Goliath smashing the weak and defenseless Palestinians,” Sharvit-Baruch stated.

“The principle of proportionality is not assessed by comparing the number of casualties or level of destruction on each side. The legal standard refers to ‘excessive’ collateral damage and not to ‘extensive’ collateral damage.

“There are numerous precedents of military operations carried out by Western militaries where most of the damage was incurred by only one side,” she summarized.

Exploring the dilemmas further, she noted that “according to the IDF, in the al-Jalaa tower, which housed the AP and Al Jazeera offices as well as civilian apartments, Hamas positioned military equipment intended to hamper IDF operations.”

The international law expert clarified that the terrorist groups’ use of these offices transformed them from civilian locations into military targets.

Next, she addressed the obligation of militaries to warn civilians to leave an area before attacking, noting reports that the IDF issued extensive warnings prior to most attacks.

In fact, she stated, the IDF said these warnings “enabled Hamas and Islamic Jihad to evacuate the buildings.”

“These warnings appear to have exceeded that required” by the laws of war, which do not always require warnings if such warnings could allow the enemy combatants to escape.

Ironically, this means that while the attack on the AP building was one of the assaults for which the IDF was most condemned, it was also one of the “cleanest” from a purely international law (as opposed to public relations) perspective. Sharvit-Baruch cautioned that some critics have started to make “a more nuanced contention that due to the limited threat caused by Hamas attacks to the lives of Israeli civilians, the military advantage gained by Israel from each attack against Hamas was limited.”

Accordingly, critics – and, in the worst case, the ICC – would contend that the balance of power in such circumstances “does not justify higher levels of collateral damage to civilians and civilian objects in Gaza” by Israel.

She advised that “this line of reasoning assumes that the complete disruption of life in certain areas of Israel and significant disruption in the rest of the country, the severe economic consequences, and the psychological effects of being under constant rocket attacks” invalidate attacks on the source of the rockets.

This argument would mean that “a state’s investment in defensive capabilities – such as Israel’s investment in the Iron Dome missile defense system... which were the very reason Israel suffered only a small number of civilian casualties – would lead to negating its ability to protect itself through offensive measures,” she wrote.

However nuanced this argument may sound, Sharvit-Baruch noted, it is inconsistent with international law and must be loudly opposed.

On going forward in the cross-hairs of the ICC, the former senior IDF lawyer said that when Israel carries out prompt, comprehensive and transparent probes, it puts the Jewish state in better standing in the diplomatic arena.

“Israel must arrive at the legal campaign against it armed with factual and legal material. It is important to allow maximum transparency, including revelation of relevant intelligence when possible,” she explained.

Sharvit-Baruch stressed that her approach “will enable Israel to present its point of view and demonstrate the complexity and challenges of the campaign. The legal campaign is an uphill battle, but it is wrong to view it as destined to fail.”

This last statement indicated that Sharvit-Baruch has not given up on achieving some positive impact through dialogue with the ICC. She wrote this despite the series of legal losses in February-March and the wave of condemnations that came during the May war.

One thing is clear: Israel will have Khan and the ICC hovering over it for the indefinite future. All of the IDF’s efforts to reduce harm to Palestinian civilians may lessen the risk of exposure to war crimes allegations, but will not get Israel off the hot seat.