



---

# Going Back to His Roots: Karim Asad Ahmad Khan Returns to the Hague

By Tom Maliti



What was it like when Karim Asad Ahmad Khan and Anton Steynberg met after Khan became the [third prosecutor](#) of the International Criminal Court (ICC) on Wednesday, June 16?

Was it a brief hello-how-are-you-good-to-see-you-again meeting because Steynberg is leading the prosecution of one of the cases Khan committed to recuse himself from in writing? Was it tense? Or were they cool as cucumbers?

Khan, a British lawyer of 28 years' experience, and Steynberg have history. They were on opposing sides during the trial of Kenya's Deputy President William Samoei Ruto and former journalist Joshua arap Sang at the ICC.

Khan represented Ruto. Steynberg, was the lead prosecutor. A South African lawyer of 31 years' experience, Steynberg "sparred" with Khan over 147 days of hearings in a trial that ran from September 2013 to April 2016.

Both Khan and Steynberg experienced the pressures that come with any high profile trial, including sustained media scrutiny and constant public commentary about what was happening in the courtroom. That in itself can make the adversarial relationship between a prosecutor and a defence lawyer more difficult.

Making that adversarial relationship even more fraught was Steynberg watching as the case he was arguing deteriorated before his eyes. An online campaign to “out” witnesses who were testifying under protection measures began as soon as the first prosecution witness testified.

As many as 16 witnesses recanted their statements during the course of the trial and many of them refused to testify in court after recanting. The prosecution [asked the court to compel nine of them to testify](#). The court granted the subpoenas. After all that, Steynberg still had to ask to be allowed to treat some of the witnesses who were compelled to testify as [hostile](#) because they continued to disown their earlier statements to prosecution investigators under oath.

In the middle of all this, Meshack Yebei, who at one time the prosecution had considered calling as a witness, was [found dead](#) in Kenya. At the time, Khan said [Yebei had later become a defence witness](#). He also alleged that at one point the prosecution threatened to abduct Yebei.

The judges stopped the trial after the prosecution closed its case. In a 2-1 majority decision issued on 5 April 2016, they said a key reason for terminating the case was that the evidence had so deteriorated that they would not be able to make a judgment on the [innocence or guilt of Ruto and Sang](#).

The judges said this happened because witnesses had been intimidated and bribed, but they were careful to say that neither Ruto nor Sang were implicated in any scheme to intimidate or bribe witnesses. However, the judges did say that Ruto and Sang were the beneficiaries of such schemes. They released Ruto and Sang from the conditions they had set for them. They, however, did not acquit them.

Five years later, Steynberg is leading the prosecution case in which Kenyan lawyer Paul Gicheru is alleged to have been the manager of a bribery scheme involving six witnesses in the collapsed case against Ruto and Sang. The prosecution has also been explicit in the Document Containing the Charges (DCC) against Gicheru that Ruto was the alleged intended beneficiary of this scheme. The prosecution is also explicit about the association between Gicheru and Ruto. Both these allegations go further than what the prosecution had previously said on the matter.

The prosecution made these allegations in submissions before Pre-Trial Chamber A. Gicheru’s lawyer and the prosecution have made their submissions on the charges against Gicheru and the pre-trial judge is expected to issue a decision by 16 July on whether Gicheru should stand trial.

Khan is now Steynberg’s boss, so how did their first meeting go?

### **Khan’s conflict of interest**

Ruto is not the only person Khan has represented before the ICC. He represented Francis Kirimi Muthaura, the former Head of Public Service in Kenya, in a separate Kenya case before the ICC. When the case against Muthaura was terminated, Khan then became Ruto’s lead lawyer.

Before the Kenya cases, Khan represented a former Darfuri rebel leader, Abdullah Banda. In July 2018, he ceased being Banda’s lawyer when he began work leading a United Nations investigation into atrocities committed by the Islamic State in Iraq. His official title was Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Da’esh/ISIL crimes (UNITAD). Banda’s case is ongoing. Khan has also represented Saif al-Islam Gaddafi, a son of former Libyan leader Muammar Gaddafi. He also ceased representing Gaddafi when he took up his UNITAD assignment. Saif al-Islam Gaddafi is in Libya and has an outstanding ICC arrest warrant.

Khan’s role as a defence lawyer in many cases before the ICC is one of the reasons why he

committed in writing to his predecessor, Fatou Bensouda, that he would recuse himself from any case where a perception of conflict of interest may arise. The Rome Statute, the ICC's founding law, also requires this of him as prosecutor.

But Khan's written commitment to Bensouda will not cover all possible conflicts of interest. For example, it had been the practice of Luis Moreno Ocampo and Bensouda to sign all prosecution filings made to the court. This practice is based in part on the fact that as the ICC's chief prosecutor they have been the lead prosecution lawyer in all cases before the ICC even if they assign day-to-day work to other prosecutors. How will Khan deal with this practice? Will Deputy Prosecutor James Stewart sign off on future filings where Khan may have a conflict of interest?

Khan's written commitment to Bensouda will not cover all possible conflicts of interest.

The committee that interviewed Khan and 13 candidates for prosecutor flagged this issue of Khan's conflict of interest in their appraisal of him.

"Given his previous engagements as defense counsel in a number of on-going cases before the ICC, the probability of the need for multiple recusals is considerable," said the committee in its appraisal that was made public on 25 November 2020.

The appraisal reads in full:

Mr. Khan is a charismatic and articulate communicator who is well aware of his achievements. He demonstrated a good command of international criminal law practice and of the global context in which the ICC operates, as well as a clear vision of necessary changes in the OTP (Office of the Prosecutor). Since his appointment to UNITAD in 2018 he has gained experience in managing a large team, although he did not demonstrate familiarity with ICC budgetary processes. He demonstrated a clear commitment to a harassment-free workplace, drawing on concrete experience. Given his previous engagements as defense counsel in a number of on-going cases before the ICC, the probability of the need for multiple recusals is considerable. The Committee took note of an apparently coordinated write-in campaign by civil society organizations on Mr. Khan's behalf, promoting his candidacy despite the confidential nature of the process.

### **The Kenyan connection**

Khan was not the committee's first choice as nominee for prosecutor. He did not even make it on their shortlist of four nominees for the post. Khan would not have become the third prosecutor of the ICC without Kenya's help. Whether Khan was Kenya's candidate is a matter of speculation. What is clear is that if Kenya had not written to reject the nominees shortlisted for the post of prosecutor, Khan would not be prosecutor now.

The four shortlisted nominees were Morris Anyah, Fergal Gaynor, Susan Okalany and Richard Roy. Each of them has between 24 and 31 years' experience as lawyers. Okalany's and Roy's experience is primarily as prosecutors in their respective countries. Okalany is Ugandan and Roy is Canadian. Anyah, who is Nigerian-American, was the lawyer for the victims during the pre-trial phase of the case against President Uhuru Muigai Kenyatta at the ICC. Anyah's most prominent client has been former Liberian president, Charles Taylor, whom he represented before the Special Court for Sierra Leone. Gaynor, who is Irish, was the lawyer for victims during the abortive trial phase of the case against Kenyatta.

What is clear is that if Kenya had not written to reject the nominees shortlisted for the post of prosecutor, Khan would not be prosecutor now.

In a 13 July 2020 letter widely reported in the [Kenyan media](#), Kenya's ambassador to the Netherlands, Lawrence Lenayapa, questioned whether Anyah, Gaynor, Okalany and Roy were suitable to be the ICC prosecutor. He also said the shortlist was skewed in favour of Gaynor becoming the prosecutor.

Lenayapa argued in his letter that because the outgoing prosecutor, Bensouda, was an African it was unlikely that an African could be elected as prosecutor thus eliminating Anyah and Okalany from the running. He also argued that since the current deputy prosecutor is a Canadian, it was unlikely that Roy could be elected prosecutor.

The ambassador also raised the conflict of interest issue. "It would be imprudent for State Parties to settle for a candidate who would have to recuse himself from some of the most challenging cases pending before the Court," Lenayapa was quoted as saying in his letter. "This would undoubtedly weaken the stature of the Office of the Prosecutor," Lenayapa is further quoted as saying.

This letter was written about two weeks after the [shortlist of nominees was made public](#) on June 30 2020. In the letter Lenayapa said Kenya as an ICC member, or State Party, rejected the shortlist. This triggered more than five months of discussions among ICC members about how to move the process forward. One reason for the months-long discussions is that the Rome Statute requires ICC members to give priority to seeking consensus on a candidate for prosecutor before resorting to a vote on the matter.

In November 2020, it was agreed that the applicants who were on the longlist of 14 candidates interviewed by the selection committee be asked whether they still wanted to be considered for the post of prosecutor. A number said no. Those who said they still wanted to be considered for the position were then given their appraisals. Other applicants dropped out at this point. Eventually, only five of the people who were on the longlist agreed for their names to be put forward for the position. One of them was Khan.

It was after this that ICC members went to the next stage of formally electing a prosecutor. When they failed to reach consensus on a candidate, the ICC members put the matter to a vote. [Khan won the election](#) on February 12 this year after two rounds of voting.

Previous elections for prosecutor have involved horse-trading and the successful candidates have later been accused of underperforming. As Bensouda's term came to an end, ICC members decided to do things differently. They decided not to begin the process of choosing a prosecutor months to their annual meeting as had been the case in the past because that is what is provided for in the Rome Statute. They instead chose to begin the search for a new prosecutor more than a year ahead of time. They also chose to delegate the work of sifting through the applications to a committee of diplomats aided by a panel of experts made up of lawyers and legal scholars.

It is this committee of diplomats that received a total of 114 applications for the position of prosecutor. Together with the panel of experts, the committee whittled down those applications to a longlist of 14 candidates. The committee then interviewed the 14 individuals and shortlisted Anyah, Gaynor, Okalany and Roy.

The committee only revealed the names of those shortlisted, making public their motivation letters, CVs and a summary of the committee's assessment of them. The committee did not reveal who else was on the list of 14 candidates it had interviewed until it was asked to do so in November 2020.

## **The ICC in transition**

Khan becoming the third ICC Prosecutor is Khan returning to his roots. He began his legal career as a prosecutor. Between 1992 and 2000 he worked for Britain's Crown Prosecution Service and then in the prosecutor's office at the International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR/ICTY).

He will be taking office at a time when not just the ICC's Office of the Prosecutor but the entire institution is in transition. This is following a review of the ICC's past 10 years by a panel of experts. Their recommendations are expected to be implemented in the coming years.

In addition, Khan will be presiding over what may be a changing case profile at the OTP. Currently under investigation at the OTP are crimes in Georgia, Myanmar/Bangladesh and Palestine. The Appeals Chamber authorised the OTP to investigate crimes in Afghanistan but the Afghan government has filed a request for a deferral, which is yet to be adjudicated. The OTP has also filed a request to be authorised to investigate crimes in the Philippines.

If these cases progress to pre-trial hearings and then trial, they would move the debate about the work of the ICC away from accusations that the court has an anti-Africa bias; the trials currently before the ICC all involve Africans.

He will be taking office at a time when not just the ICC's Office of the Prosecutor but the entire institution is in transition.

Khan will now carry this baggage of perceptions that the ICC has an anti-Africa bias. But Khan's time will not only be occupied dealing with perceptions about the ICC and the OTP, its most prominent arm. He will be responsible for implementing the recommendations relating to the OTP that the panel of experts made in their 10-year review of the ICC. Overall, the experts were stinging in their criticisms of the OTP.

The politest criticism of the OTP's leadership in the past 10 years was that it was aloof. The experts said junior staff only saw the prosecutor during the OTP's annual town hall meeting. The OTP's work environment as described by the experts in their report can be summarised as toxic: micro-managing department heads, and bullying and harassment are common.

The experts said that they found that prosecutors and investigators have coordinated their work better in recent years than during the tenure of the first ICC prosecutor, Luis Moreno Ocampo. But the experts found that investigators were still based in The Hague and only carried out investigations on the ground during weeks-long visits. The experts also found that the OTP's analysts were underutilised.

These are snippets of the experts' report. But they offer an idea of the kind of changes Khan will be expected to make over the next nine years, which is the duration of his term as ICC Prosecutor.

---

*Published by the good folks at [The Elephant](#).*

*The Elephant is a platform for engaging citizens to reflect, re-member and re-envision their society by interrogating the past, the present, to fashion a future.*

Follow us on [Twitter](#).

