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**The Palestinian case**

It took International Criminal Court Chief Prosecutor Fatou Bensouda five years to conclude her preliminary examination of the situation in Palestine, which found ‘a reasonable basis’ to believe that “war crimes have been or are being committed in the West Bank, including East Jerusalem and the Gaza Strip,” and thus to initiate an investigation. Her statement on December 20, 2019 announcing the end of the inquiry was met with widespread enthusiasm by victims and human rights organisations alike. But the celebrations came too soon.

The prosecutor found that the standard of proof for the commission of war crimes was met, and that opening the investigation was appropriate and in the interest of justice. Nevertheless, instead of proceeding, she sought confirmation on the scope of the ICC’s territorial jurisdiction from the Pre-Trial Chamber. She asked the chamber to take a decision within 120 days. Nearly a year later, victims are still waiting for that decision.

As a Palestinian lawyer in Gaza, I have spent 30 years representing victims of war crimes and crimes against humanity across the occupied Palestinian territory. Since 2009, I have represented the Palestinian victims of Israeli crimes in Gaza before the ICC, our last resort to ensure the most serious crimes of concern to the international community do not go unpunished.

Today, I am increasingly frustrated by the court’s painfully slow progress. It is true that international criminal proceedings are typically longer than domestic cases, but it is hard to understand why the substantive investigations into the crimes committed in Palestine have not commenced, despite the evidence uncovered in the prosecutor’s preliminary examination.

The prosecutor’s decision to ask the Pre-Trial Chamber to confirm territorial jurisdiction in Palestine and consequent delays risk jeopardising the effectiveness of the investigation. This wasted time has played into the hands of certain political actors who have attempted to detract from the seriousness of the court’s preliminary findings of war crimes.

Most notably, the Israeli Ministry of Foreign Affairs has published a position paper which attempts to divert attention away from the gravity of the crimes, and direct it towards the old question: is Palestine even a state? This argument champions a legal and moral absurdity: there can be no victims of war crimes in Palestine if Palestine is not a state.

In January, the Pre-Trial Chamber issued a call for the submission of observations on the question of jurisdiction. In response, 43 amici curiae legal opinions were submitted from third states, international organisations, legal scholars and civil society by the March 16 deadline.

Most submissions did not limit themselves to the technical question of territorial jurisdiction, as requested, but interpreted this moment as an opportunity to make claims about the statehood of Palestine, the legitimacy of the proceedings and their political appropriateness. The chamber, however, did not follow up with a timely delivery of its judgement.

The politicisation of this case engulfed the ICC proceedings from the very beginning, echoing the fate of previous attempts to seek redress for violations of international law in Palestine through legal mechanisms and forums. A delegitimisation campaign was launched against the court, with accusations ranging from taking a political stand to espousing anti-Semitic positions.

Reaffirming its unwavering support to Israel, the United States took radical steps to reject ICC authority over its citizens and territory, suspend visas to ICC personnel and their families, and condemn the Palestine investigation and “any other action that seeks to target Israel unfairly”. Secretary of State Mike Pompeo has repeatedly referred to the court as an embarrassing, political, renegade, unlawful, “so-called” court and a “vehicle for political vendettas”, “masquerading as a legal body”.

In order to shield US and Israeli nationals who committed war crimes, US President Donald Trump even issued an executive order, imposing sanctions on the ICC prosecutor and investigators. Some commentators have expressed doubt that US President-elect Joe Biden will be willing and able to reverse this course of action and hostility towards international justice.

Confronted by a deluge of politically-motivated accusations, the ICC need not sink to the level of its detractors. Its founding treaty, the Rome Statute, requires the court to stand for justice, “determined to put an end to impunity for the perpetrators” of international crimes.

The only valid approach is for the court to tackle the question as a strictly legal one. In this sense, in concluding her preliminary examination satisfactorily, the prosecutor could have opened the investigation directly.

Excerpted: ‘The Palestinian case at the ICC is legal, not political’

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