

Fatou Bensouda: the truth about the ICC and Gaza

Posted by Joan Russow

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Under the laws of the Hague court, my office can only investigate alleged war crimes in Palestine if it grants us jurisdiction in its territory. It has not done so



[Fatou Bensouda](#) [theguardian.com](#) ,

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[It is my firm belief that recourse to justice should never be compromised by political expediency. Photograph: Mohammed Othman/AFP/Getty Images](#)

[Has the international criminal court avoided opening an investigation into alleged war crimes in Gaza due to political pressure, as suggested in an article published in the Guardian](#) earlier this week? The answer is an unequivocal “no”. As prosecutor of the ICC, I reject any suggestion of this in the strongest terms.

When an objective observer navigates clear of the hype surrounding this issue, the simple truth is that my office has never been in a position to open such an investigation due to lack of jurisdiction. We have always, clearly and publicly, stated the reasons why this is so.

The [Rome statute](#), the ICC’s founding treaty, is open to participation by states. The prosecutor can only investigate and prosecute crimes committed on the territory or by the nationals of states that have joined the ICC statute or which have otherwise accepted the jurisdiction of the ICC through an ad hoc declaration to that effect pursuant to article 12-3 of the statute.

This means that the alleged crimes committed in Palestine are beyond the legal reach of the ICC, despite the arguments of some legal scholars that fundamental jurisdictional rules can be made subject to a liberal and selective interpretation of the Rome statute. They appear to advocate that as the object and purpose of the ICC is to end impunity for mass crimes, the court ought to intervene, even where clear jurisdictional parameters have not been met. This is neither good law nor does it make for responsible judicial action.

The Palestinian Authority sought to accept the jurisdiction of the ICC in 2009. My office carefully considered all of the legal arguments put forth and [concluded in April 2012](#), after three years of thorough analysis and public consultations, that Palestine’s status at the UN as “observer entity” was crucial – since entry into the Rome statute system is through the UN secretary general, who acts as treaty depositary. Palestine’s status at the UN at that time meant it could not sign up to the Rome statute. The former ICC prosecutor concluded that as Palestine could not join the statute, it could also not lodge an article 12-3 declaration bringing itself under the ambit of the treaty, as it had sought to do.

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In November 2012, [Palestine's status was upgraded](#) by the UN general assembly to “non-member observer state” through the adoption of resolution 67/19. My office examined the legal implications of this development and concluded that while this change did not retroactively validate the previously invalid 2009 declaration, Palestine could now join the Rome statute.

That Palestine has signed various other international treaties since obtaining this “observer state” status confirms the correctness of this position. Nonetheless, to date, the statute is not one of the treaties that Palestine has decided to accede to, nor has it lodged a new declaration following the November 2012 general assembly resolution. It is a matter of public record that Palestinian leaders are in the process of consulting internally on whether to do so; the decision is theirs alone and as ICC prosecutor, I cannot make it for them.

By virtue of the nature of the court’s mandate, every situation in which the ICC prosecutor acts will be politically fraught. My mandate as prosecutor is nonetheless clear: to investigate and prosecute crimes based on the facts and exact application of the law in full independence and impartiality.

Whether states or the UN security council choose to confer jurisdiction on the ICC is a decision that is wholly independent of the court. Once made, however, the legal rules that apply are clear and decidedly not political under any circumstances. In both practice and words, I have made it clear in no uncertain terms that the office of the prosecutor will execute its mandate, without fear or favour, where jurisdiction is established and will vigorously pursue those – irrespective of status or affiliation – who commit mass crimes that shock the conscience of humanity. My office’s approach to Palestine will be no different if the court’s jurisdiction is ever triggered over the situation.

It is my firm belief that recourse to justice should never be compromised by political expediency. The failure to uphold this sacrosanct requirement will not only pervert the cause of justice and weaken public confidence in it, but also exacerbate the immense suffering of the victims of mass atrocities. This, we will never allow.