

American Enterprise Institute for Public Policy Research



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U.S. House Foreign Affairs Subcommittee on the Middle East and North
Africa on “The Palestinian Authority’s International Criminal Court Gambit:
A True Partner for Peace?”

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Mme. Chairman, Mr. Deutch,

Thank you for your kind invitation to speak at this important hearing. As I underscored to your staff prior to agreeing to testify today, I wish to be absolutely clear that I am neither a lawyer, nor an expert on the International Criminal Court. I will confine my remarks today to questions of U.S. policy in relation to this, only the latest in efforts by the Palestinian Authority and its supporters to internationalize and otherwise, through both warfare and lawfare, subvert a genuine negotiation between Israel and the chosen representatives of the Palestinian people toward a secure and lasting peace.

The issue at hand is straightforward. In a letter from members of this committee to Secretary of State John Kerry, you wrote that:

The United Nations Secretary-General Ban Ki-moon proclaimed that the Palestinians will become ICC members on April 1, despite the State Department's objections that the PA "does not qualify to join the ICC." The ICC prosecutor Fatou Bensouda has already opened a preliminary examination regarding the current situation between Israel and the PA.

That step was taken within days of the failure of a Palestinian promoted United Nations Security Council resolution that sought to place a timeline on negotiations between Israel and the Palestinians on the creation of a Palestinian state on terms dictated by the resolution (and highly unfavorable to Israel). (The U.N. General Assembly had previously voted to declare Palestine to be an "observer state", which, as my colleague, former UN Ambassador John Bolton points out, is "a status nowhere found in the UN Charter". UNESCO admitted "Palestine" as a member that same year.

U.S. law is clear: P.L. 113-76 codifies these "Restrictions on aid to the Palestinians":

(j) West Bank and Gaza.--

(2) Limitations.--

(A)(i) None of the funds appropriated under the heading "Economic Support Fund" in this Act may be made available for assistance for the Palestinian Authority, if after the date of enactment of this Act--

(I) the Palestinians obtain the same standing as member states or full membership as a state in the United Nations or any specialized agency thereof outside an agreement negotiated between Israel and the Palestinians; or

(II) the Palestinians initiate an International Criminal Court judicially authorized investigation, or actively support such an investigation, that subjects Israeli nationals to an investigation for alleged crimes against Palestinians.

(ii) The Secretary of State may waive the restriction in paragraph (A) resulting from the application of subparagraph (A)(i)(I) if the Secretary certifies to the Committees on Appropriations that to do so is in the national security interest of the United States, and submits a report to such Committees detailing how the waiver and the continuation of assistance would assist in furthering Middle East peace.

(B)(i) The President may waive the provisions of section 1003 of Public Law 100-204 if the President determines and certifies in writing to the Speaker of the House of Representatives, the President pro tempore of the Senate, and the Committees on Appropriations that the Palestinians have not, after the date of enactment of this Act, obtained in the United Nations or any specialized agency thereof the same standing as member states or full membership as a state outside an agreement negotiated between Israel and the Palestinians.

Having spent a decade at your counterpart committee on the Senate side, I have little doubt of any Secretary of State or President's ability to waive these restrictions, relying on obfuscations and technicalities. That being said, your own legislative intent must be clear to you: The very conditions you have laid out on both the question of standing within the U.N. and member agencies as well as claims before the International Criminal Court have been violated. Aid to the Palestinians should be cut off.

Allow me for a moment to preview the arguments that will be brandished against those of you who wish to uphold this law of the land:

- Cutting off aid will only hurt the Palestinian people.
- This is the only way to advance the cause of a homeland for the Palestinian people.
- This will undercut the International Criminal Court and the legitimacy of the United Nations.

The Palestinians of the West Bank and Gaza are among the recipients of the highest amounts of overseas assistance (per capita) in the world today. The United States provides approximately \$400 million in annual Economic Support and other funding to the West Bank and Gaza. Interestingly, CRS reports that in addition to other programs, "[d]irect U.S. budgetary assistance to the PA goes toward paying off its commercial debt, as the following FY2013 USAID congressional notification language says: Direct budget support will be used in the same manner as previous transfers—to service debt to commercial suppliers and commercial banks.

Debt to commercial banks will be debt originally incurred for purchases from commercial suppliers.”

Let me translate that for you: U.S. taxpayer funded aid to the Palestinians is paying commercial sellers and banks for debts incurred by the PA. Both George W. Bush and Barack Obama have issued waivers to U.S. law to allow these transfers to the Palestinian Authority to take place.

Cutting off aid will indeed inevitably harm some Palestinians, I have little doubt. Unfortunately, this is the price of independence. Those who desire self-governance and self-determination for the Palestinian people must also accept that the Palestinian people must live with the choices made by their elected leaders.

There are few who believe that this ICC case or Palestinian efforts within the United Nations will bring about the creation of a Palestinian state. But don't listen to me; let me quote Dennis Ross, who has with admirable tenacity served presidents of both parties as a Middle East peace negotiator:

“Since 2000, there have been three serious negotiations that culminated in offers to resolve the Israeli-Palestinian conflict...”

“In each case, a proposal on all the core issues was made to Palestinian leaders and the answer was either “no” or no response...”

“Palestinian political culture is rooted in a narrative of injustice[...] Compromise is portrayed as betrayal, and negotiations -- which are by definition about mutual concessions -- will inevitably force any Palestinian leader to challenge his people by making a politically costly decision...”

“But going to the United Nations does no such thing. It puts pressure on Israel and requires nothing of the Palestinians. Resolutions are typically about what Israel must do and what Palestinians should get. If saying yes is costly and doing nothing isn't, why should we expect the Palestinians to change course?”

In short, the ICC and the UN aren't about solving problems, they're about an unwillingness to negotiate and compromise for a true and lasting peace.

Finally, there is the question of the ICC and the United Nations itself. One anecdote, recently recounted by the Israeli ambassador, should suffice on the credibility of the United Nations writ large. Recently, the Conference of High Contracting Parties at the Fourth Geneva Convention convened for only the third time in their history to pass judgment on a country in violation of these important standards. Three times in history. Each time – this is almost incredible – has been to condemn the State of Israel. Not Syria. Not Iran. Not Burma or Cambodia or Sudan. Israel.

But going to the ICC is qualitatively different than going to the UN or invoking the Geneva conventions. At the UN the Palestinians and their supporters can get all the nonbonding resolutions they want at the General Assembly, but at the Security Council (which is the only

UN organ that could give meaningful, legally-binding support in their struggle with Israel, acting under Chapter VII of the Charter), they have always been stymied by the US veto. The ICC resembles the Security Council in its ability to provide meaningful support, but by design neither the US nor any other nation has the ability to block ICC action.

What Palestinian leaders want from the ICC ultimately is international criminal indictments, not just of individual members of the IDF and Israeli intelligence services, but most importantly, the national leadership of Israel—both its democratically elected leaders and its top military commanders and other officials of its security ministries. They want the Court to indict such officials and turn them into international fugitives, unable to leave Israel for fear of arrest. Their aim is to both harass them as individuals, and to delegitimize Israel by establishing as a fact that many of its top leaders have been indicted for war crimes and are being harbored by the Israeli government from international justice. So this has to be regarded as a serious escalation by the Palestinians.

Knowing that the US cannot veto ICC indictments, they are seeking them as an illicit form of pressure against their ostensible negotiating partner. And the ICC has already obliged them by opening a preliminary inquiry. Will the ICC go further and actually indict Israelis? It is too early to tell. Hopefully the ICC prosecutor and others who care about the ICC will resist the temptation to delegitimize the institution by ensnaring it in the political minefield of the Arab-Israeli struggle. But you can rest assured that a solid group of countries—the same ones that have forced three meetings under the Fourth Geneva Convention—intend to bring as much pressure to bear as possible on the Court to indict Israeli leaders. Whether the Court is able to resist such pressure—and whether it wants to—will be the greatest test it has faced in the 13 years since it came into existence.

The fact that Palestinian leaders are also now subject to ICC indictment is not a double-edged sword. Look no further than the ICC-indicted leader of Sudan, Omar Bashir, who is welcomed at Arab League summits and does not fear to travel in the Arab world. This demonstrates that, within their region, Palestinian leaders have nothing to fear from ICC indictments. But Israel's region is the West, and within the West such indictments are taken seriously and will be enforced to the degree possible. Fundamentally this is just another example of the Palestinians taking advantage of Western ideals and institutions, not to advance them, but to weaken and delegitimize them within their region.

All of this was foreseeable at the time that the ICC came into being. In fact, the US Congress foresaw it. That's why, in writing the American Servicemembers' Protection Act (ASPA), which aimed fundamentally to protect American military personnel and America's leaders from politically-motivated ICC investigations, Congress sought to provide similar protections to our Allies, and most importantly, to Israel. ASPA's authorization to use force to free persons detained by the ICC reads as follows:

SEC. 2008. AUTHORITY TO FREE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES AND CERTAIN OTHER PERSONS DETAINED OR IMPRISONED BY OR ON BEHALF

OF THE INTERNATIONAL CRIMINAL COURT.

(a) AUTHORITY.—The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.

(b) PERSONS AUTHORIZED TO BE FREED.—The authority of subsection (a) shall extend to the following persons:

(1) Covered United States persons.

(2) Covered allied persons.

(3) Individuals detained or imprisoned for official actions taken while the individual was a covered United States person or a covered allied person, and in the case of a covered allied person, upon the request of such government.

The term "covered allied person" was expressly defined in section 2013 of ASPA to include Israel, due to Congress's recognition of the risks that are now materializing:

(3) COVERED ALLIED PERSONS.—The term "covered allied persons" means military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a NATO member country, a major non- NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan, for so long as that government is not a party to the International Criminal Court and wishes its officials and other persons working on its behalf to be exempted from the jurisdiction of the International Criminal Court.

Mme. Chairman, members of the committee, over the last few decades, many provisions have been written into to law to leverage assistance to the Palestinian people in such a way as to incentivize peace and penalize terror. Since the Oslo Accords, about \$5 billion in U.S. assistance has been transferred to the Palestinians. What has it bought? Peace? Certainly not. Territorial agreement? Far from it. The abandonment of terrorism or the commitment to the destruction of the State of Israel? Not really. A better life for the Palestinian people? Absolutely not.

The time has come to stand by both the letter and the spirit of the law. We cannot stop the Palestinian Authority or the Palestinian people from being their own worst enemies; we cannot stop them from posturing on the global stage or manipulating the United Nations to no good end; we can, however, stop subsidizing these feckless and dangerous quests and we can and must ensure that the ICC does not become a political tool aimed at the harassment of our allies, and ultimately, you can be certain, ourselves.

Thank you.