

The Palestinian ICC Bid and U.S. Interests

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Chairwoman Ros-Lehtinen, Ranking Member Deutch, and honorable members of the Subcommittee, thank you for the opportunity to discuss the Palestinian Authority's (PA) effort to use the International Criminal Court (ICC) against Israel. I am a professor of international and constitutional law at Northwestern University. One of my areas of focus is international criminal law, and I have written extensively in peer-reviewed and other law journals in the U.S. and abroad about the International Criminal Court, and possible Palestinian efforts to join it.

The Palestinian ICC campaign threatens not just Israel, but the U.S. diplomatic and security interests as well. Like Israel, the U.S. has chosen not to join the ICC, and thus has the same interest as Israel in avoiding being subject to its jurisdiction. The Palestinian bid could set dangerous precedents in this regard. The notion that ICC jurisdiction over US troops could be conferred by a majority vote of the GA should be alarming. Similarly, to pursue an investigation of Israel, the Court would have to define down important limitations on its jurisdiction. Such decisions would set precedents that could then be used aggressively against US troops and officials, who are already the subject of an examination by the Prosecutor.¹

On the diplomatic front, the Palestinian Authority's ICC bid represents a rejection and termination of negotiations with Israel as the exclusive method of determining all "final status" issues. That repudiates what has been for decades central pillar of U.S. diplomacy with regards to the conflict. Moreover, it represents a violation of two provisions of the Oslo Accords: not to seek a final determination of the status of disputed territory outside of negotiations,² and exclusive Israeli jurisdiction over its nationals in the West Bank.³ The Palestinians are asking to have both their statehood and borders declared by the ICC, without Palestinian compromise or Israeli consent, and to give to the Court a jurisdiction over Israeli civilians that the PA does not possess. As the guarantor of the Oslo Accords, the U.S.'s diplomatic credibility with its allies, and in the ME Peace Process, depends on responding to this breach.

The rest of this testimony will examine the dangerous precedents the ICC proceedings could set for the U.S. The testimony will then show why there is a considerable risk such

¹ICC Office of the Prosecutor, Report on Preliminary Examinations Activities, pg. 22, <http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf> (describing inquiry into the activities of U.S. forces in Afghanistan).

² Alan Baker, *International Criminal Court Opens Inquiry into Possible War Crimes in Palestinian Territories: A Response to UN Secretary General Ban Ki-moon from Amb. Alan Baker*, JERUSALEM CENTER FOR PUBLIC AFFAIRS (Jan. 21, 2015), <http://jcpa.org/article/international-criminal-court-opens-inquiry-possible-war-crimes-palestinian-territories/>.

³See generally, G.R. Watson, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* (Oxford University Press, 2000). While the Oslo Accords were signed with the Palestine Liberation Organization, the PA has always conducted itself, and been treated by, the international community as a party to the agreement. The PA officially changed its name to the State of Palestine after the UN vote, but continues to assert its rights under Oslo.

disregard will materialize – the ICC’s built-in and demonstrated bias against Israel; and finally consider remedial options available under existing U.S. law, which are surprisingly powerful, and could even authorize a cut-off of funds to the United Nations.

Dangerous Precedents For The U.S.

While much of the discussion of the Palestinian bid has focused on its negative consequences for Israel and the peace process, the legal dangers to the United States are also considerable. The United States, like Israel, is not a member of the ICC. In deciding not to join the Rome Statute, non-members sought to limit their exposure to ICC jurisdiction. For the ICC to act against Israeli nationals, it would have to establish a number of novel precedents and rulings, which could then serve as precedents for proceedings against the U.S. Thus, in a real sense, Israel is a proxy for the U.S. in this legal battle.

1. Empowering the General Assembly

The PA has sought ICC jurisdiction over Israel through the expedient of having the U.N. General Assembly pass a resolution referring to it as a state.⁴ The Prosecutor, at least, seems willing to allow the GA to expand the Court’s jurisdiction to territories that would otherwise not qualify as states under principles of international law. This exposes all non-members to a broad and indefinite danger of falling within ICC jurisdiction. In effect, the Prosecutor’s view is that ICC jurisdiction over non-member states could be conferred by a vote of the General Assembly. This is both surprising and dangerous, as the GA otherwise lacks any substantive powers. Given its composition and voting patterns, the U.S. and other great powers would certainly not entrust the General Assembly with such a role. Moreover, the Prosecutor’s view contradicts the clear policy of the Rome Statute, where the only U.N. body with control over the Court’s jurisdiction is the Security Council.⁵ This suggests that at most, only Security Council decisions about U.N. membership can conclusively determine “statehood” for ICC purposes.

Now, in the Prosecutor’s view, all an entity needs to do to be able to invoke the ICC’s jurisdiction is win a bare majority vote of the General Assembly. It need not control territory or satisfy any of the objective criteria of statehood. In this view, the Islamic State, the Taliban, or Boko Haram are all but one G.A. vote away from joining the ICC and seeking investigations of the U.S and its allies. While this may seem far-fetched, Palestinian ICC membership was also seen as unlikely even a decade ago.

A more immediate threat of this type for the U.S. would include Cuba joining the ICC,

⁴U.N. Doc. A/RES/67/19 (Nov. 29, 2012) *available at*, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19.

⁵*See Rome Statute Art. 13(b)& 16, available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (providing that the Council can both refer investigations and suspend investigations). Crucially, only situations referred by the Council need not occur in the territory of sovereign states. Art. 12(b).

and referring alleged U.S. crimes in Guantanamo Bay.⁶ Whether the naval base is in the “territory” of Cuba for ICC purposes seems ambiguous, as it has never exercised any sovereignty there since the creation of the Court. However, the Palestinian precedent would favor jurisdiction, as it shows no actual exercise of sovereignty is required.

2. *Complementarity*

The two primary jurisdictional barriers to an ICC investigation are defined in Art. 17 of the Rome Statute: complementarity (the existence of good faith national investigations or prosecutions) and gravity (the crimes must be of a particularly serious nature, even given that most of the crimes within the Court’s jurisdiction are inherently grave).

Complementarity was thought to be a major safeguard against ICC investigations into Western democracies with well-functioning legal systems. Such countries have “nothing to fear”⁷ from the ICC, jurists have often assured, because presumably they deal reasonably with their own crimes.⁸

Israel, certainly, is a robust and open democracy with a well-functioning military justice system. It investigates and prosecutes violations of the laws of war by its armed forces. Thus any ICC investigation over alleged crimes committed by Israel in Gaza would, if it proceeds, have to find this level of “complementarity” insufficient, perhaps on the theory that merely focusing on direct perpetrators and not the chain of command is insufficient. This theory would also make it difficult for the U.S. to assert complementarity.

One of the primary goals of the Palestinian effort is an investigation of Israeli civilian communities in the West Bank (“settlements”). This also threatens to define complementarity in a way dangerous to the U.S. While Israel has a proven track record of investigating war crimes by its forces, after open and serious consideration of the question, it does not regard the existence of these civilian communities to amount to the “deportation or transfer” of civilians into occupied territory in contravention of Art. 49(6) of the Geneva Conventions. Such a view is at least reasonable, because there is simply no contrary precedent, as there have never been any prosecutions for this offense.

If such good faith views of substantive law do not satisfy complementarity, the implications go far beyond Israel. Many Western democracies have policies or programs that, in their view, are consistent with international law, even when this view is widely contested. For example, the U.S. is not prosecuting or investigating anyone for drone strikes against terror groups abroad because it is of the good faith opinion that the program is legal. Yet this view is not widely shared in international law circles. If complementarity does not insulate a country’s honest and independent judgment about

⁶A prominent scholar of the Court has explicitly supported such jurisdiction. See WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 285 (2010).

⁷*International Criminal Court Bill[Lords]*, WWW.PARLIMENT.UK, <http://www.publications.parliament.uk/pa/cm200001/cmstand/d/st010501/am/10501s02.htm> (last visited Feb. 1, 2015).

⁸ See e.g., *Id* (remarks of Solicitor-General of the United Kingdom).

the requirements of international law, it will also not protect the U.S. in any case where its interpretations do not command the Prosecutor's assent.⁹

3. Gravity.¹⁰

The ICC's mission is to deal with the world's worst crimes – with “atrocities that deeply shock the conscience of humanity,” in the words of the Rome Statute's preamble. This focus on mass atrocities is ensured through the gravity requirement. While the crimes within the Court's jurisdiction are all serious, it can only deal with those situations where they are committed with particular “gravity” – that is, the worst of the worst.¹¹ The gravity requirement has been particularly important in limiting the ICC's jurisdiction over nationals of Western democracies. For example, the Prosecutor did not proceed with a war crimes investigation of British soldiers over alleged unlawful killings in Iraq because the number of victims – under 20 – failed to meet the gravity test.¹² The gravity test is particularly relevant to the U.S. given the Prosecutor's ongoing preliminary investigation into alleged U.S. abuse of detainees. In the account in the Senate's recent report, such alleged victims number in the dozens. This would surely fail the gravity test, unless the bar is lowered to squeeze in Israel.

It remains unclear precisely how to measure the “gravity” of a situation or crime. In practice, the prosecutor looks primarily at the number of victims and the nature of the crimes. Genocide and crimes against humanity top the list; among war crimes, those involving killing, sexual violence and other forms of physical brutality are the gravest. Again, even the killing of innocent civilians has been found not to satisfy gravity when the number of victims is too small.¹³

An investigation of Israeli settlements would set the gravity bar so low, anything else would qualify. It would effectively eliminate gravity as a limit on jurisdiction, letting the court mix mass atrocities with minor infractions. For the act of “transferring” civilians into occupied territory does not involve any killing or physical abuse. Indeed it lacks victims in the classic sense. It is a classic victimless crime: at least in the conventional

⁹The question is whether the ICC would pay the same deference to good faith national determinations of disputable questions of international law as federal courts must pay to state court determinations of constitutional law in *habeas corpus* cases. See, e.g., *Williams v. Taylor*, 529 U.S. 362 (2000); *Teague v. Lane*, 489 U.S. 288 (1989). The rule the Palestinians hope to apply to Israel would effectively give the ICC power to ignore reasonable good faith national interpretations of international law when it happens to disagree with those interpretations.

¹⁰ The discussion here is based on Eugene Kontorovich, *When Gravity Fails: Israeli Settlements and Admissibility in the International Criminal Court*, 47 ISRAEL LAW REVIEW 379-99 (2014).

¹¹ See Rome Statute Art. 17, available at http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

¹² See Prosecutor's Letter In Response To Allegations Of War Crimes Committed During the Invasion of Iraq, INTERNATIONAL CRIMINAL COURT: OFFICE OF THE PROSECUTOR (Feb. 9, 2006) available at http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

¹³ *Id.*

account, even consensual property transactions between Jews and Arabs constitute illegal settlements. Indeed, the reason NGOs fly over Israeli settlements photographing new construction is because the nominal victims, the Palestinians, might not otherwise even know of the alleged injurious act of house building.

The lack of gravity is underscored by the Prosecutor's failure to investigate such conduct in other areas, despite clearly having jurisdiction. Turkey has a massive settlement enterprise in occupied northern Cyprus. The Republic of Cyprus has been a member of the Court since its inception, and in 2014, a group of Cypriot refugees and a member of the European parliament filed a formal complaint to the ICC.¹⁴ Yet the prosecutor has taken no action, despite having clear jurisdiction back to 2002. Similarly, the Prosecutor excluded any settlement related issues from the investigation of Russian crimes in Georgia, despite an open settlement program in Abkhazia.¹⁵

The failure of the ICC – and indeed any tribunal anywhere – to act against “settlements” where it has jurisdiction underscores their relative lack of gravity. If anything, the Cypriot situation presents a much stronger case for gravity, as the majority of the population in the occupied territory are now settlers, thus implicating the prohibition's core policies of preventing fundamental demographic change.¹⁶ The widespread notion that the Prosecutor may nonetheless open an investigation into Israel's actions only underscores the general expectation that the ICC will fail to act in accordance with its general practice and established law.

Yet, if allowing private citizens to buy or build houses in eastern Jerusalem 1000 yards across the Green Line were one of the “gravest” crimes, it would be very hard to maintain that the torture of even a few detainees would not also meet the test. Indeed, many advocates of the ICC have never been fond of the gravity requirement, seeing it – correctly – as a limit on the powers of the institution. International law scholars like William Schabas have long called for interpreting the requirement very narrowly, and the Palestinian initiative may be seen as the perfect occasion.

¹⁴MEP Costas Mavrides & Cypriots Against Turkish War Crimes (*The Complainants*) v. *The Republic of Turkey (Accused of War Crimes)*, INTERNATIONAL CRIMINAL COURT: COMMUNICATION TO THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT REGARDING THE SITUATION IN OCCUPIED CYPRUS (July 14, 2014), available at <https://dl.dropboxusercontent.com/u/92018228/Communication%20-%20ICC%20Turkey.pdf>.

¹⁵ Eugene Kontorovich, *ICC Prosecutor Says Full Inquiry into Russian War Crimes Might Come Soon, But Omits Some Crimes* (Dec. 10, 2014), <http://www.ejiltalk.org/icc-prosecutor-says-full-inquiry-into-russian-war-crimes-might-come-soon-but-omits-some-crimes/>.

¹⁶ Ahmet Atasoy, *Population Geography Of The Turkish Republic Of Northern Cyprus*, MUSTAFA KEMAL UNIVERSITY JOURNAL OF SOCIAL SCIENCES INSTITUTE 16(8): 29-62, at 38 (2011); Ambassador Ronald Schlicher, *Turkish Cypriot Census Debate Focuses On Natives Versus "Settlers"*, May 18, 2007, available at http://www.wikileaks.org/plusd/cables/07NICOSIA434_a.html.

4. Monetary Gold *Principle and the rights of non-members*¹⁷

The Palestinian effort at the ICC is not about seeking “justice,” but about having an international institution anoint them as a state and fully endorse their negotiating positions about borders – without any negotiation or concession on the Palestinian part. From that position, they could then expand their negotiating demands. Thus the core of the effort is securing ICC jurisdiction over Israeli settlements, which would require the Court to determine that all of the West Bank is already Palestinian territory.

Even if there were currently Palestinian state, it is clear that its borders remain undetermined, and that the areas of the settlements in particular are excluded from them. Indeed, this is why international organizations and countries call for negotiations to establish borders – because they do not currently exist. The common denominator of all international pronouncements on the issue is that the border, when established, will not be the 1949 Armistice Lines. Indeed, under current agreements Israel maintains jurisdiction over these areas, and thus they cannot be presumed to be Palestinian, even assuming there was a Palestinian state.¹⁸

But regardless of where the border will be, should be, or is, the ICC is powerless to determine the borders of “Palestine.” That is because doing so would also determine the borders and legal rights of Israel. Under a well-established principle of international law (known as the *Monetary Gold* rule, after the International Court of Justice case where it was announced) an international court cannot adjudicate a matter that affects the rights of a third country if that country does not accept its jurisdiction.¹⁹ Thus the court that does decide many border controversies in the international system – the ICJ – does so only when all sides agree to submit a dispute to it. Indeed, the ICC was never given the power to determine the rights of states, but rather only to determine individual criminal responsibility.

The current Palestinian effort seeks to give the ICC massive unilateral powers even beyond those of the ICJ (much as it also depends on creating new powers for the General Assembly). Such a role for the ICC was never contemplated. If the Court thinks it can ignore the fundamental *Monetary Gold* rule, it poses a threat to all non-member states (and even to members who joined on the understanding that the court would only determine the guilt of individuals, not the borders of sovereigns).

¹⁷ The discussion here is based on Eugene Kontorovich, *Israel/Palestine – The ICC’s Uncharted “Territory.”* 11 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 979-99 (2013).

¹⁸ See The Israeli-Palestinian Interim Agreement On The West Bank And The Gaza Strip, Annex IV – Protocol Concerning Legal Affairs, Art. I § 2 (Sept. 28, 1995), available at <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20IV.aspx#article1>.

¹⁹ *Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*, INTERNATIONAL COURT OF JUSTICE (June 15, 1954) available at, <http://www.icj-cij.org/docket/index.php?sum=279&p1=3&p2=3&case=19&p3=5> (Monetary Gold Removed From Rome in 1943).

Can The ICC be A Fair Tribunal?

Bias built into the Rome Statute

The Court's foundational statute²⁰ (the Rome Statute) contains a provision specifically designed to target Israel.²¹ The history bears reviewing. The elaborate definition of war crimes in the Rome Statute (Art. 8) is borrowed largely from the Geneva Conventions and other related treaties.²² Yet at the 1999 drafting conference, a group of Arab states secured one significant change in the Rome Statute provision corresponding to IV Geneva Art. 49(6), prohibiting an occupying power from "deporting or transferring" its civilian population into the occupied territory. This was an odd provision to tinker with, since it had seen no prosecutions in any international or national courts in its history.

Yet the Arab states prevailed at negotiations to have the ICC provision prohibit "directly or indirectly deporting or transferring"²³ (they had originally asked for even broader language).²⁴ In law the difference between direct and indirect effects is quite significant. The Rome Statute language has no parallel or precedent in international law, and was generally understood as seeking to go beyond what is prohibited by Geneva Conventions to encompass the self-motivated migration of Israelis into the West Bank (and back then, Gaza). It was designed to make "facilitation" a crime – i.e., to turn the negative prohibition on "transfer" into a newfangled positive obligation on a government to discourage or prevent its nationals from migrating into a territory under its control, discriminating on the basis of nationality or ethnicity. The novelty of the provision is evident from the observation that the U.S. would have been guilty of violating it during its 45-year occupation of West Berlin, when it enabled and even encouraged Americans to move to the city.

Thus the Rome Statute from the start was uniquely written to target Israel, the only nation to be thus honored. The notion that the provision is understood to target Israel is further supported by the experience of Cyprus, an original state party to the Rome Statute. Despite Cypriot efforts to petition the prosecutor, no one thinks there is a real chance that Turkey might have to answer for its massive settlement enterprise in the occupied north

²⁰ Rome Statute, available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

²¹ See Art. Article 8(2)(b)(viii):

²² See *War crimes under the Rome Statute of the International Criminal Court and their source in international humanitarian law – Table*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Oct. 31, 2012), available at, https://www.icrc.org/en/document/war-crimes-under-rome-statute-international-criminal-court-and-their-source-international#.VM8BmGTF_Iw.

²³ ROY S.K. LEE, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE : ISSUES, NEGOTIATIONS AND RESULTS 112-13 (1999).

²⁴ Proposal submitted by Algeria et al. on article 8(2)(b)(viii): War crime of deporting or transferring population, PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT: WORKING GROUP ON ELEMENTS OF CRIMES, PCNICC/1999/WGEC/DP.25 (Aug. 10, 1999) available at, http://www.legal-tools.org/uploads/tx_ltpdb/doc16864.pdf.

of the island.²⁵ Observers implicitly understand that the “directly or indirectly” provision is a legal bullet with Israel’s name on it. Yet if the Court were to investigate Israeli settlements, despite multiple jurisdictional barriers, while ignoring Turkish ones, where there is a 12-year backlog of jurisdiction, it would deprive the proceedings of any legitimacy.

Moreover, that a group of Arab states (including, ironically, Morocco,²⁶ author of perhaps the most ambitious settler enterprise in Western Sahara, which the Palestinians happen to support) expanded the provision shows that they understood that the Geneva language fits at best imperfectly with the diverse patterns of Jewish migration into the West Bank (which include both government-supported building projects and private construction and purchase, property belonging to Jews from before 1949, outposts built in defiance of government regulations, and so forth). To be sure, the Court might ultimately interpret the Rome Statute provision to be entirely congruent with the Geneva one, which itself has never been interpreted. But Israel quite reasonably does not want to be the test subject for interpreting new rule designed solely for it.

The Geneva provision, incidentally, was designed to protect against fundamental demographic changes in the occupied territory (what the Nuremberg prosecutions called “obliterate[ing] the former national character of these territories.”) The re-write of it for the ICC is unfaithful to those policies, as it is rather hard to purposefully effect fundamental demographic change through mere indirection or facilitation, as the example of Israel proves. The Israeli settlements have not come close to effecting such a change; after nearly five decades, the settler population remains a small fraction (less than 10%) of the total population of the territories the Palestinians claim are occupied. Indeed, Palestinian claims of demographic ascendancy not just in the territories, but also between the river and the sea, belie the notion of fundamental demographic change. In occupied Cyprus, by contrast, settlers have reached a major demographic tipping point, constituting roughly half the population. If the Court were interested in setting precedent on settlements, this would be a logical place to start.

Bias from weakness

Now we’ll turn to the Court as an institution. In the wake of the Palestinian turn to the International Criminal Court, several commentators have argued that there is no reason to think the institution is out to get Israel. That is true, simply because the Court has done so little in its twelve-year history, that it is hard to say anything with confidence about its inclinations and proclivities. Prosecutions of Israelis (nationals of a non-member state)

²⁵ Eugene Kontorovich, *Cyprus & the ICC – international reactions*, THE VOLOKH CONSPIRACY (Aug. 8, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/08/cyprus-the-icc-international-reactions/>.

²⁶ Eugene Kontorovich, *The EU is right about Western Sahara – which means it is wrong about Israel*, GLOBALPOST (Nov. 21, 2013, 1:16 AM), <http://www.globalpost.com/dispatches/globalpost-blogs/commentary/eu-holds-contradictory-view-settlements-west-bank-and-western>.

would be a kind of activity the Court has never engaged in without the request of the Security Council, so there is even less data.

Yet there is reason to think that the Court is a most improper venue for sorting the Israeli-Palestinian conflict. Indeed, even absent any bias, the Court is structured in a way that cannot do equal justice, and is thus properly seen as a Palestinian tool against Israel. Moreover, recent statements by the Prosecutor give troubling evidence that she may be willing to replace legal analysis with the off-the-shelf political views of the “international community” on the conflict.

It is important to understand why, despite their systematic war crimes, the Palestinians see the ICC jurisdiction as a good gamble. Many distinguished jurists and academics not unsympathetic to the Palestinians have warned them that they have more to lose than gain from ICC proceedings. But they went ahead anyway, which means they have a different analysis – one that it is useful to understand.

The Court’s track record suggests it is incapable of rendering impartial justice in an ongoing bilateral conflict. The Court is not some well-established, Olympian seat of judgment. Rather, it is a weak, conflicted and floundering institution, beset by profound embarrassments that might affect its decision-making.²⁷ In 12 years, it has completed only three cases, with two convictions. Most recently, it has seen two of its highest-profile matters – the only ones involving sitting heads of state – disintegrate. These were the prosecutions of Kenya’s president for election violence, and of Sudan’s president, Bashir, for genocide. Both proceedings failed because of the persistent non-cooperation of the target regime. (Despite their current embrace of the ICC, the Palestinians have long been on record opposing the ICC’s arrests warrant against Sudan’s President Bashir.) The ICC has proven itself completely incapable of prosecuting a case against an unwilling regime, especially an authoritarian or illiberal one willing to intimidate witnesses and destroy evidence.

This is in part why the Palestinians have turned to the ICC, despite warnings from even some of their sympathizers that they will be subject to multiple possible prosecutions for war crimes. The Kenyatta case has created a playbook for countries wanting to frustrate ICC proceedings,²⁸ especially if they have little to fear in the way of sanctions. Quite simply, nothing suggests that the Palestinians have had a Damascene moment and decided to open themselves up to international justice and accountability. Rather, they have calculated that they can nominally accept legal exposure while maintaining de facto impunity. Noncooperation with ICC investigations is easy in a place like Gaza, where the

²⁷ Eugene Kontorovich, *A Court’s Collapse: The International Criminal Court gives up on its prosecution of Kenyan president Uhuru Kenyatta*, NATIONAL REVIEW ONLINE (Sept. 15, 2014, 4:00 AM), <http://www.nationalreview.com/article/387935/courts-collapse-eugene-kontorovich>.

²⁸ Tristan McConnell, *How Kenya took on the International Criminal Court*, GLOBALPOST (Mar. 25, 2014, 5:58 PM), <http://www.globalpost.com/dispatch/news/regions/africa/kenya/140325/how-kenya-beat-the-international-criminal-court>.

killing of “collaborators” is institutionalized. No one will say to ICC officials, “look, there was a Hamas launcher in this school here.”

Nor will the Palestinians be punished for non-cooperation – just as Kenya and Sudan have not been. Indeed, it is likely that the Palestinians will claim that as a “state under occupation” they simply cannot cooperate with investigators on-the-ground since they will claim they are (for these purposes) completely under Israel’s thumb. In Israel, on the other hand, a bevy of Israeli NGOs will be lined up to supply the prosecutor with the dirt on alleged Israeli misdeeds, and many jurisdictions are only looking for an occasion to impose sanctions on Israel.

In short, unless one ascribes to the Palestinian leadership a heroic level of altruism, their accepting the Court’s jurisdiction despite their well-documented war crimes suggests they anticipate the Court to be structurally biased towards them.

Bias from the General Assembly

Some have argued that, despite the rampant bias against Israel in United Nations organizations, there is no reason to suspect partiality from the Court, composed of jurists from around the world and charged with acting apolitically.

Unfortunately, the Prosecutor has already revealed that “political” decisions (i.e., General Assembly resolutions) will not be separated from the legal, but rather will be adopted in place of legal standard. In her recent memo on the Gaza flotilla matter,²⁹ the Prosecutor concluded that, despite Israel’s complete withdrawal, Gaza is occupied because the “international community” thinks it is. This disturbing move undermines the ICC’s independence by importing the political judgments of the GA and substituting them for legal standards.

The Prosecutor ignored existing legal definitions³⁰ and precedents about the definition and duration of “belligerent occupation,” and instead simply plugged in the conclusions of GA resolutions.³¹ “Belligerent occupation” is a legal term with legal definitions. One is supplied by the International Committee of the Red Cross, whose own manual provides that:

²⁹ *Situation on Registered Vessels of Comoros, Greece Cambodia: Article 53(1) Report*, INTERNATIONAL CRIMINAL COURT: THE OFFICE OF THE PROSECUTOR (Nov. 6, 2014), available at http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53%281%29-Report-06Nov2014Eng.pdf.

³⁰ Eugene Kontorovich, *Why Gaza is not remotely occupied (I)*, THE VOLOKH CONSPIRACY (Nov. 13, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/13/why-gaza-is-not-remotely-occupied-i/>.

³¹ Eugene Kontorovich, *Why Gaza is not remotely occupied (II)*, THE VOLOKH CONSPIRACY (Nov. 13, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/13/gaza-is-not-remotely-occupied-ii/>.

“Occupation ceases when the occupying forces are driven out of or evacuate the territory”³² (emphasis in the original).

Furthermore, the question of occupation in a territory where the “occupant” has no soldiers is not one of first impression. The International Court of Justice in 2005 ruled that Uganda’s control of areas of the Democratic Republic of Congo through an allied militia does not amount to an occupation,³³ despite Uganda’s significant clout there. By this standard, the control of Gaza by a *hostile* militia could not be considered an occupation. The Prosecutor never even bothered dealing with this important recent ICJ precedent.

The lazy substitution of General Assembly conclusions for actual legal standards continued and took more dramatic form when the Prosecutor accepted that Palestine is a “state” for ICC purposes. For one, the conclusion that it is a “state” directly contradicts her finding just a few months earlier that Gaza (and presumably the West Bank) has continuously been under Israeli occupation despite the complete withdrawal of Israel’s presence and rule. To be occupied, a territory must be under the “control” of the occupier, who functions as the government. To become a state, a territory must be governed by its own government. One cannot become a state under a condition of occupation.

The Prosecutor attempted to gloss over this glaring contradiction by saying that she did not actually determine that Palestine qualifies as a “state” under the well-established legal definitions of the term. Rather, she said that the U.N. General Assembly’s vote in 2012 to call Palestine a “non-member state” is dispositive of the question. In short, she substituted the determination of the General Assembly for her own. The GA is not a judicial body, but a rather political one. Its determinations are political, not legal. (It also has no power under the U.N. Charter, to create or recognize states.)

Statehood, however, is a legal term, with legal criteria (“the Montevideo test”), which involves judgment and the application of law to facts. Of particular relevance is the requirement that to *become* a state, a territory must have a functioning government exercising supreme control in at least part of its claimed territory. The requirements for the creation of a state do not mirror those for its extinguishing. Thus the possibility of a “state under occupation,” to use the Palestinian’s favored term, does not preempt the need for there to first be a state under Montevideo definitions. The Palestinians, however, claim all of their territory is and has always been under the control of Israel.

The U.N. General Assembly need not be troubled by such legal problems because it is an explicitly political body. It need not be coherent or consistent, unlike a Court. For the Prosecutor to take the judgments of such a body on the application of legal terms in the

³²*The Law of Armed Conflict: Belligerent Occupation*, INTERNATIONAL COMMITTEE OF THE RED CROSS (June 2002), available at https://www.icrc.org/eng/assets/files/other/law9_final.pdf.

³³*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, available at <http://www.icj-cij.org/docket/files/116/10455.pdf>.

Rome Statute to particular facts as binding upon the Court is to surrender her independence. The Court's statute demands and proclaims its independence. Yet decisions like this one violate the Court's independence, making it a mere organ of the U.N., and of the General Assembly at that.

There is no basis for the Prosecutor to defer to the General Assembly in this matter.³⁴ Unlike with other treaties, the existence of a "state" is a jurisdictional requirement under Art. 12. The Court must independently confirm the existence of its jurisdiction, according to Art. 19 and the customary practice of international courts with regard to jurisdiction. All this shows that whatever the case may be for membership in treaties, for the jurisdiction of the Court, the General Assembly's views cannot be conclusive.³⁵

Finally, the Rome Statute must trump "the practice of the Secretary General" (invoked by the Prosecutor to justify following the General Assembly). Under the Statute, any political role in determining statehood would logically fall to the Security Council rather than the General Assembly. The ICC Statute creates particular powers and duties for the Security Council, and none for the General Assembly. The Council can both initiate and suspend investigations. The Assembly, under the text of the statute, cannot do anything. Thus, the Council is an express part of the "ICC system" in a way the Assembly is not. Moreover, the Council's particular role is quite relevant — it is the only avenue available to the Court to obtain territorial jurisdiction over crimes that do not occur within a territory of a state that has accepted the Court's jurisdiction.

Thus the Security Council would be the obvious route under the ICC statute for creating jurisdiction over a situation like Palestine, where statehood is far from clear. The fact that such a route is politically unlikely is of course not a bug, but a feature. Putting such jurisdiction in the hands of the SC is done to make it difficult to exercise.

Thus the statute of Court, its structure, and the repeated actions of the Prosecutor, demonstrate a built in targeting of Israel, an inability to do justice between the parties, and a pattern of parroting the political, and notoriously anti-Israel, positions of the General Assembly.

Available Measures Under Existing Legislation

The United States' opposition to the Palestinian move is not based on any special solicitude for Israel. Rather, it is a natural consequence of the U.S. position that Palestine is not a state and thus such a move depends on the ICC violating its charter, and the

³⁴ Alan Baker, *International Criminal Court Opens Inquiry into Possible War Crimes in Palestinian Territories: A Response to UN Secretary General Ban Ki-moon from Amb. Alan Baker*, JERUSALEM CENTER FOR PUBLIC AFFAIRS (Jan. 21, 2015), <http://jcpa.org/article/international-criminal-court-opens-inquiry-possible-war-crimes-palestinian-territories/>.

³⁵ Moreover, it is far from clear the GA determined Palestine was a state, rather than that it should become one. *See id.*

Palestinians the Oslo Accords. As a non-member, the U.S. shares many common interests with Israel in establishing correct precedents here.

Thus a vigorous U.S. response is appropriate. Yet the best legislative response is not obvious. Most discussions on U.S. responses have focused on cutting funding to the Palestinian Authority. This is appropriate, but inadequate. Even if it leads to the Palestinians withdrawing from the Court, it may not stop the Court from proceeding anyway, on the theory that the jurisdiction already ostensibly given cannot be retracted. Furthermore, funding to the ICC is already restricted under current law.

This does not mean that aid to the Palestinians should not be cut – though future legislation should be structured to incentivize a Palestinian withdrawal from the Court and cancellation of their 12(3) declaration. Yet there is other, less appreciated possibilities for responses under existing U.S. law that may be more effective.

This section will explore how existing legislation affects the Palestinian bid.

Cutting off funding to the PA

The 2015 Omnibus appropriations measure bars the provision of Economic Support Funds to the Palestinian Authority if they “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.”³⁶ A “judicially authorized investigation” apparently refers to a full investigation authorized by the ICC’s Pre-Trial Chamber.³⁷ The Prosecutor’s current “preliminary examination” most likely does not qualify, especially if the word “investigation” in the statute is understood to track the use of that term in the Rome Statute. On the other hand, if the Pre-Trial Chamber does authorize an investigation – the next step in the process – the Palestinians have “initiated” it for purposes of the statute. That is because the Palestinian filing of a declaration under 12(3) of the Rome Statute begins the process leading to the investigation. A 12(3) declaration leads immediately to a preliminary examination, which is the only route to an investigation³⁸ (unlike merely joining the court, which does not trigger a preliminary examination). Thus “initiate” means take the first step. It cannot mean to take the last step, because the Palestinians cannot directly order an investigation. By definition, only the Court can launch a judicially authorized investigation, and thus reading the term to mean “commence” would simply not make sense. This is confirmed by the language about “supporting” an investigation. The Palestinians already have said they will provide support for an investigation by providing dossiers about alleged crimes.

³⁶ Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130.

³⁷ See Rome Statute Art. 15(3)-(4), available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

³⁸ *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, INTERNATIONAL CRIMINAL COURT (Jan. 16, 2015), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx.

That said, with the ICC, as with many courts, the process is often the punishment. Thus allowing funding to be cut off at the late stage of a full investigation would reward the PA for its breaches of Oslo and abuse of international institutions.

Cutting off funding to the UN

Existing law may require the suspension of all funds to the United Nations. The Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub.L. No. 101-246, 104 Stat. 70, provides:

“(a) Prohibition. – No funds authorized to be appropriated by this Act or any other Act shall be available for the United Nations or any specialized agency thereof which accords the Palestine Liberation Organization the same standing as member states.”

This law is widely described as requiring the defunding of UN organizations that admit the Palestinians as *members*. However, the language of the law is broader than mere grants of membership – it speaks of the “same standing” as members, which is a broader category than mere membership. This can be confirmed by comparison with other laws that specifically distinguish membership and standing.³⁹ Thus actions that fall short of full membership can fall within the “same standing” prohibition.

Under the position taken by the ICC Prosecutor⁴⁰ and, apparently, the UN Secretary General, the General Assembly vote in 2012 to call the PA a “non-member state” automatically gives them a privilege thus far only reserved to U.N. members. Applications to join the ICC are submitted to the Secretary General of the UN, pursuant to Art. 125(3) of the ICC’s Rome Statute. That same provision provides that only “States” can join. By accepting the PA’s instrument of accession, the Secretary General gave them the same “standing” as member states of the UN, which can join the ICC without question. Similarly, if the Prosecutor is correct that the GA vote allows the Palestinians to join the ICC regardless of whether they are in fact a state, then they enjoy the same standing as full-fledged U.N. members for ICC purposes. (The only other UN “non-member state” is not a member of the ICC; other non-members like Kosovo are also generally considered ineligible for ICC membership.) In practice, joining the ICC without an inquiry into statehood is a privilege solely of U.N. member states.

³⁹See Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130 (cuts off funding to Palestinians if they “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”); *see also* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, 108 Stat. 454 (cutting funding to “any affiliated organization of the United Nations which grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood”).

⁴⁰*The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, INTERNATIONAL CRIMINAL COURT (Jan. 16, 2015), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx.

“Standing” does not mean membership; it means the ability to be treated in a certain way and to access legal rights. In particular, in law, “standing” means the right to access courts, and is thus particularly suited to accession to the Rome Statute. Thus an action by a UN agency that puts the Palestinian Authority on the same footing as member states – that would in the absence of the action require U.N. membership with Security Council approval – gives them the “same standing” as member states. This interpretation of the statute makes sense, as it prevents UN agencies from skirting the funding restrictions by giving the Palestinians the trappings of membership without the formality. Indeed, any other interpretation would merely collapse “same standing” into “membership.”

According to the Prosecutor (and the Palestinians), the GA and/or Secretary General, gave the Palestinians the same “standing” – i.e., access to benefits – that has otherwise only been available to member states. In other words, the UN did not give the Palestinians U.N. membership, but they did give them “the standing” of UN members for the purposes of ICC accession. Under the plain language of the law, this triggers the complete cutting off of funding to the United Nations in its entirety.

It is not clear from the statute what the U.N. could do at this point to remedy the situation. One might suggest that a letter from the SC to the ICC registrar, communicating that the acceptance of accession was made in error, and the situation needs further examination, might suffice.

To be clear, the law only requires cutting off aid to the United Nations if the Prosecutor is right, and the GA vote gives the Palestinians automatic access to the ICC without any need for the Secretary General or Court to determine if they are a state. Of course, the position of the U.S. is that the GA vote had no such effect.

Thus whether the provision to cut off aid to the UN has been triggered depends on whether the American position, or the Prosecutor’s position, is correct. It would be useful for Congress to write to the relevant U.N. officials (the Secretary General, the President of the GA) and inquire whether they understood their action as giving the Palestinians the same standing as members for ICC accession purposes, thus requiring a termination of their funding, or whether the Prosecutor has misinterpreted matters.

American Servicemembers' Protection Act

The United States already has extremely strong laws on the books against cooperating with or funding the International Criminal Court. These laws were motivated by America’s choosing not to join the ICC, but still being concerned that it would be ensnared in its jurisdiction. Those concerns, long ridiculed by the Court’s supporters, seem far more real given the progress of the Palestinian move.

Most famously, the American Servicemembers' Protection Act of 2002 authorizes the President to “use all means necessary and appropriate to bring about the release” of Americans held by or for the Court. 22 U.S.C. 7427(a). This language, contemplating the

use of military force to rescue arrested American officials, led to the statute's being popularly known as the "Bomb The Hague Act."

Yet the use of force is authorized not just to release Americans, but also certain "allied persons." 22 U.S.C. 7427(b)(2). The definition of allied person includes government and military personnel of both NATO allies, and certain "major non-NATO allies" of which Israel is one. *See* 22 U.S.C. 7432(c).

Thus if a country were to fulfill a potential ICC arrest warrant for Israelis, the President would automatically be empowered to affect their release by any economic, political or military actions he saw fit. This is an unlikely scenario, but so is the Act's authorization of force to release Americans from custody in The Hague. However, as a piece of existing legislation that already groups Israel with America for ICC purposes, the American Servicemembers' Protection Act, could be a useful platform for further legislation. For example, new legislation could add Israel to the Act's provisions about cutting military aid to countries that cooperate with the ICC against the U.S.

I thank you for the opportunity to share these observations.