

**The Palestinian Authority's
International Criminal Court Gambit:
A True Partner for Peace?**

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Chairman Ros-Lehtinen, Ranking Member Deutch, members of the Committee, on behalf of the Foundation for Defense of Democracies (FDD), thank you for inviting me to testify today.

After a decade of successful efforts to gain support from the international community for recognition of statehood, the Palestinians are now poised to leverage their gains and wage lawfare at the International Criminal Court (ICC). The goal for Palestinian president Mahmoud Abbas has been the same throughout this campaign: to force the Israelis to relinquish territory or other meaningful concessions, and to do so outside the scope of bilateral negotiations.

The dangers of this campaign cannot be understated. For one, these efforts are not likely to resolve the conflict peacefully. Rather, they will keep the embers of conflict glowing. More importantly, eschewing both the U.S. leadership and the bilateral diplomatic process reflects a troubling trend. While communication and cooperation still exists between Ramallah and Washington, it is clear that Abbas and his lieutenants no longer feel beholden to the United States, despite the hundreds of millions of dollars in assistance we provide every year. We must find ways of regaining our leverage in the West Bank, and to do so without undermining stability in the Middle East.

As I explain at the end of this testimony, Washington needs to construct a strategy to combat lawfare, both against America and its allies. We must also hold to account those responsible for this reckless initiative: Mahmoud Abbas and the Palestine Liberation Organization (PLO).

“PALESTINE 194”

Before expanding on my recommendations, it is important to review the history of the Palestinian international initiative. Indeed, the ICC bid is just the latest manifestation—perhaps the culmination—of a campaign the Palestinians have waged for ten years. Palestinian officials call it “Palestine 194,” shorthand for their push to become the 194th state at the United Nations.

It all began when newly elected president Mahmoud Abbas traveled to Brazil in 2005 for the first Summit of South American and Arab States, where he had a private conversation with Brazil’s president, Luiz Inácio Lula da Silva. Da Silva reportedly promised Abbas that he would lay the groundwork to gain Latin American support for a future Palestinian statehood declaration at the United Nations.¹ In the coming years, da Silva made good on his pledge. In 2008, Costa Rica officially recognized a Palestinian state.² In 2009, Venezuela followed suit as the Palestinians opened an embassy in Caracas.³ In 2010, Argentina, Bolivia, and Ecuador all expressed their support for a Palestinian state within the 1967 borders.⁴ More Latin American countries soon

¹ Jonathan Schanzer, *State of Failure*, (New York: Palgrave Macmillan, 2013), page 174.

² “United Nations Latin American and Caribbean Meeting in Support of Israel-Palestinian Peace Concludes in Montevideo, Uruguay,” *United Nations*, March 31, 2011.

(<http://www.un.org/News/Press/docs/2011/gapal1193.doc.htm>)

³ “Venezuelan-Palestinian Ties Forged,” *Al-Jazeera* (Qatar), April 28, 2009.

(<http://www.aljazeera.com/news/americas/2009/04/2009427234224190396.html>)

⁴ “Brazil, Argentina, Uruguay Recognize Palestinian State,” *Agence France Presse*, December 6, 2010.

(<http://www.google.com/hostednews/afp/article/ALeqM5j6LW4hivgKRMW-N8S1xV6P9AwVew>)

joined the parade, including Chile, Guyana, Peru, Paraguay, Suriname, and Uruguay.⁵ By 2011, more than a hundred countries had recognized an independent Palestine, and momentum was on their side.⁶ And Abbas made it clear that he had a plan. In May 2011, he penned an op-ed in *The New York Times*, in which he stated, “Palestine’s admission to the United Nations would pave the way for the internationalization of the conflict as a legal matter, not only a political one. It would also pave the way for us to pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice.”⁷

The ICC, while not mentioned specifically, was never far from the minds of the Palestinian leadership. After Operation Cast Lead in early 2009, the Palestinians began threatening to bring action against Israel at the ICC for war crimes. Shortly after the war, the Palestinian Authority (PA) Minister of Justice lodged an ad-hoc declaration with the ICC seeking jurisdiction to investigate Israeli actions taken during the operation.⁸ The ICC sat on this complaint for three years while it deliberated whether or not the Palestinians qualified for ICC jurisdiction. Finally, in 2012, ICC chief prosecutor Luis Moreno-Ocampo rejected the complaint on the grounds that the Palestinians were not an accepted “state” in the international community.⁹

This was a technicality that the Palestinians were already working to change. In the fall of 2011, the Palestinians announced that they would seek recognition as a state at the U.N. Security Council. When it became clear that the Palestinians would not have the necessary support to force a U.S. veto, however, the Palestinians called off the vote.¹⁰ Instead, they recalculated their strategy and decided to push for a vote at the U.N. General Assembly the following year. While the General Assembly could not grant them official statehood, it could gain them standing at the ICC. The General Assembly was undeniably the path of least resistance; the Palestinians had successfully lobbied for the support of a majority of the member nations, and the U.S. has no veto in the General Assembly. Predictably, the Palestinians easily sailed through a 138 to 9 vote in favor of upgrading their status to non-member observer state.¹¹

⁵ “Peru Recognizes Palestinian State,” *Reuters*, January 24, 2011. (<http://www.reuters.com/article/2011/01/24/us-palestinians-peru-idUSTRE70N5ZW20110124>); “Paraguay Recognizes ‘Palestine’ with Pre-1967 Borders,” *The Jerusalem Post*, January 29, 2011. (<http://www.jpost.com/International/Article.aspx?id=205690>); “Guyana Becomes 7th South American State to Recognize Palestinian Independence,” *Haaretz* (Israel), January 14, 2011. (<http://www.haaretz.com/news/diplomacy-defense/guyana-becomes-7th-south-american-state-to-recognize-palestinian-independence-1.336944>); “Suriname Recognizes Palestinian State,” *Ma’an News Agency* (Palestinian Territories), February 1, 2011. (<http://www.maannews.net/eng/ViewDetails.aspx?ID=356264>); & “Uruguay Recognizes Palestinian State,” *Reuters*, March 15, 2011. (<http://ca.reuters.com/article/topNews/idCATRE72F0SA20110316>)

⁶ Jonathan Schanzer, *State of Failure*, (New York: Palgrave Macmillan, 2013), page 176.

⁷ Mahmoud Abbas, “The Long Overdue Palestinian State,” *The New York Times*, May 16, 2011. (<http://www.nytimes.com/2011/05/17/opinion/17abbas.html>)

⁸ Victor Kattan, “Palestine and the International Criminal Court,” *European Council on Foreign Relations*, September 1, 2014. (http://www.ecfr.eu/article/commentary_palestine_and_the_international_criminal_court303)

⁹ Marlise Simons, “Court Rejects Palestinians in Their Bid for a Tribunal,” *The New York Times*, April 3, 2012. (<http://www.nytimes.com/2012/04/04/world/middleeast/international-criminal-court-rejects-palestinian-bid-for-tribunal.html>)

¹⁰ Chris McGreal, “UN Vote on Palestinian State Put Off Amid Lack of Support,” *The Guardian* (U.K.), November 11, 2011. (<http://www.theguardian.com/world/2011/nov/11/united-nations-delays-palestinian-statehood-vote>)

¹¹ Ethan Bronner & Christine Hauser, “U.N. Assembly, in Blow to U.S., Elevates Status of Palestine,” *The New York Times*, November 29, 2012. (http://www.nytimes.com/2012/11/30/world/middleeast/Palestinian-Authority-United-Nations-Israel.html?pagewanted=all&_r=0)

In the months that followed the 2012 vote, the Palestinians paid a political price. Israel withheld tax revenues, the U.S. condemned the maneuver, and the political upheaval in Ramallah over the move led to the resignation of Prime Minister Salaam Fayyad.¹² Fayyad believed that Abbas was putting the cart before the horse, focusing on the trappings of statehood, while failing to focus on the basic governance and bureaucratic needs of the fledgling government.¹³

With Fayyad out of the picture, Abbas pushed on. In June 2013, Abbas evoked the “successes” of the Palestine 194 campaign at a speech in Ramallah, vowing, “These steps will be followed by others.”¹⁴ Shortly thereafter, the new chief prosecutor of the ICC, Fatou Bensouda, announced that the Palestinians were eligible to join the ICC owing to their upgraded status at the U.N. General Assembly.¹⁵ Palestinian officials used her announcement as a means to threaten Israel, stating that unless Israel met their demands, they would turn to the ICC.¹⁶

DIPLOMACY, UNITY, AND WAR

With diplomatic tensions rising, Secretary of State John Kerry stepped in and announced the resumption of diplomatic negotiations. One of his preconditions for the talks was that the Palestinians halt the 194 campaign. Indeed, preventing the advance of the 194 campaign was among the reasons for launching this new peace process. Reluctantly, the Palestinians agreed to put their efforts on ice while the talks took place.¹⁷

However, it was a promise they would not keep. Abbas came under significant pressure from some of his own allies who believed the 194 campaign was the only way to extract concessions from Israel. Notably, Mohammad Shtayyeh, one of the chief architects of the Palestinian bid at the Security Council, pressured the beleaguered president to re-launch the campaign.¹⁸

¹² Isabel Kershner, “Israel to Transfer Tax Funds to Palestinians,” *The New York Times*, January 30, 2013. (<http://www.nytimes.com/2013/01/31/world/middleeast/israel-to-transfer-tax-funds-to-palestinians.html>); & Isabel Kershner & Jodi Rudoren, “Palestinian Prime Minister Resigns, Adding Uncertainty to Government,” *The New York Times*, April 13, 2013. (<http://www.nytimes.com/2013/04/14/world/middleeast/salam-fayyad-palestinian-prime-minister-resigns.html?pagewanted=all>)

¹³ “After Fayyad,” *Chicago Tribune*, April 21, 2013, (http://articles.chicagotribune.com/2013-04-21/opinion/ct-edit-fayyad-20130420_1_fayyadism-corruption-moribund-palestinian-economy)

¹⁴ “Abbas: Palestinians Will Never Give Up on Jerusalem,” *Wafa News Agency* (Palestinian Territories), June 5, 2013. (<http://english.wafa.ps/index.php?action=detail&id=22561>)

¹⁵ “Prosecutor: Palestine Could Join ICC,” *Ma’an News Agency* (Palestinian Territories), June 22, 2013. (<http://www.maannews.net/eng/ViewDetails.aspx?ID=607163>)

¹⁶ Grant Rumley, “Palestine’s Plan B,” *The National Interest*, July 30, 2013. (<http://nationalinterest.org/commentary/palestines-plan-b-8792>)

¹⁷ Ben Birnbaum & Amir Tibon, “The Explosive, Inside Story of How John Kerry Built an Israel-Palestine Peace Plan—and Watched It Crumble,” *The New Republic*, July 20, 2014. (<http://www.newrepublic.com/article/118751/how-israel-palestine-peace-deal-died>)

¹⁸ David Lerman & Nicole Gaouette, “Mideast Peace Deal is a Fading Mirage as Palestinians Turn to UN,” *Bloomberg*, January 5, 2015. (<http://www.bloomberg.com/news/2015-01-05/mideast-peace-deal-is-a-fading-mirage-as-palestinians-turn-to-un.html>)

According to one account, the internal pressure campaign, coupled with a marked lack of diplomatic progress, began to take a toll on Abbas in March 2014.¹⁹

In meetings in Washington with both President Obama and Secretary Kerry, it became clear that Abbas had lost faith in the American diplomatic effort.²⁰ Abbas wanted Israel to release a fourth batch of Palestinian prisoners, which had been a precondition at the start of the talks. After three other swaps, the Israelis were now reticent to follow through. Abbas's calculation ultimately boiled down to this: if the U.S. couldn't get concessions out of Israel, perhaps the international community could.²¹

The next month, Abbas effectively dissolved the Kerry talks when he announced that the Palestinians would join 15 international organizations and conventions.²² The move had little practical impact—the organizations and conventions were relatively innocuous in that they provided little ammunition for the Palestinians' legal assault against Israel—but it was a means to convey to the United States and Israel that the international campaign was back in play. More importantly, Palestinian officials warned Western journalists and academics that this first tranche represented a step in the direction of joining the ICC.²³

The implication was that the Palestinians would press for action against Israel for building settlements in territory the Palestinians claim for their national project—activity they say is a war crime.²⁴ Indeed, Palestinian officials routinely pointed to Israel's settlements in the West Bank as a violation of international law. As PA Foreign Minister Riyad al-Maliki noted, "If Israel would like to go further by implementing the E1 [settlement] plan and the other related plans around Jerusalem then yes, we will be going to the ICC."²⁵

Along with jumpstarting the international campaign for recognition, Abbas also took the dangerous step of forging a unity government with the terrorist group Hamas on June 2, 2014.²⁶

¹⁹ Ben Birnbaum & Amir Tibon, "The Explosive, Inside Story of How John Kerry Built an Israel-Palestine Peace Plan—And Watched it Crumble," *The New Republic*, July 20, 2014.

(<http://www.newrepublic.com/article/118751/how-israel-palestine-peace-deal-died>)

²⁰ Michael Wilner, "At White House, Abbas Says Israel's Recognition is Settled," *The Jerusalem Post*, March 17, 2014. (<http://www.jpost.com/Diplomacy-and-Politics/Abbas-to-Obama-Time-is-not-on-our-side-for-two-state-solution-345624>)

²¹ Ben Birnbaum & Amir Tibon, "The Explosive, Inside Story of How John Kerry Built an Israel-Palestine Peace Plan—And Watched it Crumble," *The New Republic*, July 20, 2014.

(<http://www.newrepublic.com/article/118751/how-israel-palestine-peace-deal-died>)

²² Grant Rumley, "Suicide by Statehood," *Foreign Policy*, April 2, 2014.

(<http://foreignpolicy.com/2014/04/02/suicide-by-statehood/>)

²³ Grant Rumley, "Palestine's Plan B," *The National Interest*, July 30, 2013.

(<http://nationalinterest.org/commentary/palestines-plan-b-8792>)

²⁴ Eugene Kontorovich, "Palestinians Seek to Take Advantage of ICC's Unique 'Israel' Provision," *The Washington Post*, January 5, 2015. (<http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/05/palestinians-seek-to-take-advantage-of-icc-unique-israel-provision/>)

²⁵ Louis Charbonneau, "Palestinians Say They May Have No Choice But to Take Israel to Hague Court," *Reuters*, January 23, 2013. (<http://www.reuters.com/article/2013/01/23/us-palestinians-israel-un-idUSBRE90M1EX20130123>)

²⁶ William Booth & Anne Gearan, "Palestinians Form New Unity Government that Includes Hamas," *The Washington Post*, June 2, 2014. (http://www.washingtonpost.com/world/middle_east/palestinians-form-new-unity-government-including-hamas/2014/06/02/c681d5c6-ea46-11e3-9f5c-9075d5508f0a_story.html)

This was perhaps the clearest signal to the Israelis and the United States that he was no longer interested in negotiating. Indeed, he knew that the Israelis would never negotiate with him so long as Hamas was in the picture, given Hamas' stated aim of destroying the Jewish state. Under fire from the U.S. and Israel, Palestinian officials insisted the new interim government was one made up only of technocrats that would serve as caretakers until elections were held.²⁷

That move, coupled with Hamas's kidnapping and murder of three teens in the West Bank in late June, put the region on a war footing.²⁸ The Israelis' frantic search for the three youths²⁹ and the murder of a Palestinian teen by a mentally ill Israeli³⁰ paved the way for a 50-day war between Israel and Hamas. During the conflict, Hamas fired 4,564 rockets into Israeli airspace, prompting Israeli air strikes and a limited ground invasion to destroy commando tunnels and other military infrastructure.³¹ The fighting claimed the lives of 2,104 Palestinians and 72 Israelis.³²

From the onset of the clashes in July, it was clear that the Palestinian Authority's strategy was to refrain from the fight, even as it prepared to charge the Israelis with war crimes. One day after the Israelis launched Operation Protective Edge, Abbas claimed that Israel was committing "genocide."³³ Ten days into the fighting, Riyad Mansour, the Palestinian ambassador to the U.N., threatened to go to "judicial bodies" should the U.N. fail to protect Palestinian citizens in Gaza. "We will have no recourse but to turn to the judicial bodies of the United Nations and the international system," he said.³⁴

Lawyers also began making the case for Israeli war crimes, including here in the United States, well before the war was over.³⁵ The most high profile among them was a French lawyer who lodged a complaint in late July at the International Criminal Court on behalf of the Palestinian justice minister, accusing the Israeli army of war crimes. "Israel, the occupying power, is

²⁷ "Palestinian Authority to Start Formation of Technocratic Unity Government," *Middle East Monitor*, April 24, 2014. (<https://www.middleeastmonitor.com/news/middle-east/11067-palestinian-authority-to-start-formation-of-technocratic-unity-government>)

²⁸ Orlando Crowcroft, "Hamas Official: We Were Behind the Kidnapping of Three Israeli Teenagers," *The Guardian* (U.K.), August 21, 2014. (<http://www.theguardian.com/world/2014/aug/21/hamas-kidnapping-three-israeli-teenagers-saleh-al-arouri-qassam-brigades>)

²⁹ "Israel Arrests 37 in West Bank as Manhunt Drags On," *The National* (UAE), June 23, 2014.

(<http://www.thenational.ae/world/middle-east/israel-arrests-37-in-west-bank-as-manhunt-drags-on>)

³⁰ Marissa Newman, "3 Suspects Indicted in Killing of Muhammad Abu Khdeir," *The Times of Israel*, July 17, 2014.

(<http://www.timesofisrael.com/3-suspects-indicted-in-killing-of-muhammad-abu-khdeir/>)

³¹ Ben Hartman, "50 Days of Israel's Gaza Operation, Protective Edge – By the Numbers," *The Jerusalem Post*, August 28, 2014. (<http://www.jpost.com/Operation-Protective-Edge/50-days-of-Israel's-Gaza-operation-Protective-Edge-by-the-numbers-372574>)

³² "Gaza Crisis: Toll of Operations in Gaza," *BBC*, September 1, 2014. (<http://www.bbc.com/news/world-middle-east-28439404>)

³³ "Abbas Says Israel Committing 'Genocide' in Gaza," *Agence France Presse*, July 9, 2014.

(<http://www.maannews.net/eng/ViewDetails.aspx?ID=711480>)

³⁴ "Statement by Ambassador Dr. Riyad Mansour Before the United Nations Security Council, Emergency Meeting," *Permanent Observer Mission of the State of Palestine to the United Nations*, July 18, 2014.

(<http://palestineun.org/18-july-2014-statement-by-ambassador-dr-riyad-mansour-before-the-united-nations-security-council-emergency-meeting/>)

³⁵ Manal Tellawi, "'They Were War Crimes': The Specific, Legal Case for International Charges against Israel," *Salon*, August 4, 2014.

(http://www.salon.com/2014/08/04/they_were_war_crimes_the_specific_legal_case_for_international_charges_agai_nst_israel/)

carrying out a military operation which in principle and form violates the basis of international law,” the lawyer claimed.³⁶

In late July, Palestinian media reported that the Palestinian leadership had decided to sign the Rome Statute and pursue the Israelis at the ICC.³⁷ This proved to be untrue. Subsequent reports indicate that the ICC had yet to receive a nod from the Palestinian Authority to pursue the matter. In an email, ICC chief prosecutor Fatou Bensouda said that the Palestinian leadership had not granted her office jurisdiction to investigate alleged war crimes.³⁸

This did not stop others from making such charges, however. One month after the war ended, Human Rights Watch accused Israel of war crimes, citing attacks on three U.N.-run schools that resulted in Palestinian casualties. The Israeli military said during the conflict that Palestinian fighters used the schools as cover to launch rockets.³⁹ Amnesty International joined the chorus, alleging that the Israel Defense Forces (IDF) destroyed buildings on purpose and without military justification.⁴⁰

POST-WAR MANUEVERS

From the perspective of the Palestinian leadership in Ramallah, the Israeli war against their political foes in Gaza represented new opportunities. For one, it weakened Hamas both militarily and politically. When the guns fell silent, the PA wasted little time reasserting itself as both the leaders of the caretaker unity government and the trusted non-militant faction that could oversee Gaza reconstruction.⁴¹ This enabled the PA to once again claim sovereignty over Gaza and project leadership after 50 days of taking a back seat to its political rivals.

The Ramallah leadership also used the war as a predicate for a renewed push at the United Nations. In August, the head of Fatah’s Foreign Relations Committee, Nabil Sha’ath, laid out the roadmap for the Palestinians. They would first look to submit a resolution to the U.N. Security Council demanding a timeframe for a full Israeli withdrawal from beyond the 1967 lines, and should that fail, they would apply for accession to the ICC.⁴² A few weeks later, Hamas’s prime

³⁶ “Palestinian Minister Goes to ICC Over Israel Offensive,” *Agence France Presse*, July 25, 2014.

(<http://www.maannews.net/eng/ViewDetails.aspx?ID=716175>)

³⁷ “PA to Sign Rome Statute of ICC,” *The Times of Israel*, July 31, 2014. (<http://www.timesofisrael.com/pa-to-sign-rome-statute-of-international-criminal-court/>)

³⁸ “Is the PA Stalling Gaza War Crimes Probe?” *Al Jazeera* (Qatar), September 12, 2014.

(<http://www.aljazeera.com/news/middleeast/2014/09/pa-leadership-speaking-with-two-voices-2014911101131329372.html>)

³⁹ “Human Rights Watch Accuses Israel of War Crimes in Gaza,” *Reuters*, September 11, 2014.

(<http://www.reuters.com/article/2014/09/11/us-mideast-gaza-war-idUSKBN0H60XZ20140911>)

⁴⁰ Yonah Jeremy Bob, “Amnesty International: Strikes on Gaza High-Rises Amount to War Crimes,” *The Jerusalem Post*, September 12, 2014, (<http://www.jpost.com/Arab-Israeli-Conflict/Amnesty-International-Strikes-on-Gaza-high-rises-amount-to-war-crimes-384086>)

⁴¹ Jodi Rudoren, “Rival Palestinian Factions Agree to Resolve Differences, Leaders Say,” *The New York Times*, September 25, 2014. (http://www.nytimes.com/2014/09/26/world/middleeast/palestinian-factions-agree-to-resolve-differences-leaders-say.html?_r=0)

⁴² “PLO to Pursue Diplomatic Efforts Following Ceasefire Deal,” *Ma’an News Agency* (Palestinian Territories), August 28, 2014. (<http://www.maannews.net/eng/ViewDetails.aspx?ID=723892>)

minister, Ismail Haniyeh, called on Abbas to sign the Rome Statute.⁴³ Abbas now had the blessings of the major Palestinian factions—including Hamas—to accede to the ICC.⁴⁴

With a speech planned at the U.N. General Assembly in September, Abbas was reportedly mulling an ICC application.⁴⁵ The speech itself read like a legal incrimination of the Israelis. “This last war against Gaza was a series of absolute war crimes carried out before the eyes and ears of the entire world, moment by moment, in a manner that makes it inconceivable that anyone today can claim that they did not realize the magnitude and horror of the crime,” he proclaimed.⁴⁶ However, he stopped short of taking his case to the ICC at that time.

In October, the Ramallah leadership released a copy of their draft resolution for the U.N. Security Council. The resolution called for a total Israeli withdrawal from the West Bank and East Jerusalem by November 2016, and for all parties to “abide by their obligations under international humanitarian law.”⁴⁷ The Israelis promptly condemned the resolution, and Israeli Prime Minister Benjamin Netanyahu warned that if Abbas chose to pursue the U.N. and then the ICC, he would face “dire consequences.”⁴⁸

PALESTINE 194 MEETS THE ICC

Netanyahu’s threats apparently fell on deaf ears. In December 2014, Ramallah upgraded its status at the ICC to become an observer. This status granted the Palestinians the ability to ratify the Rome Statute while also keeping them out of the court’s jurisdiction.⁴⁹ By the end of the year, they combined this move with the “Palestine 194” campaign by forwarding a new resolution for statehood to the U.N. Security Council.

The resolution, itself, was not a surprise. The Palestinian leadership had made no secret of the fact that they were circulating a draft and seeking input from the members of the Security Council, the Arab League, and others. However, when it became clear that the Palestinians were likely to lose the vote again, they adopted a more aggressive version with sharper language that

⁴³ “Haniyeh: Weapons of the Resistance are Outside of Any Agreement,” *Ma’an News Agency* (Palestinian Territories), September 5, 2014. (<http://www.maannews.net/arb/ViewDetails.aspx?ID=725620>)

⁴⁴ “Abbas Said Close to Deciding on ICC War Crimes Probe,” *The Times of Israel*, September 22, 2014. (http://www.timesofisrael.com/abbas-said-close-to-deciding-on-icc-war-crimes-probe/?utm_source=dlvr.it&utm_medium=twitter)

⁴⁵ “Abbas Said Close to Deciding on ICC War Crimes Probe,” *The Times of Israel*, September 22, 2014. (http://www.timesofisrael.com/abbas-said-close-to-deciding-on-icc-war-crimes-probe/?utm_source=dlvr.it&utm_medium=twitter)

⁴⁶ “Palestinian Authority President Abbas’ Address to the UN General Assembly in New York,” *The Jerusalem Post*, September 26, 2014. (<http://www.jpost.com/Middle-East/Full-text-of-Palestinian-Authority-President-Abbas-address-to-the-UN-General-Assembly-in-New-York-376388>)

⁴⁷ Jack Moore, “UN Draft Resolution Demands End of Israeli Occupation of Palestine by November 2016,” *The International Business Times*, October 1, 2014. (<http://www.ibtimes.co.uk/un-draft-resolution-demands-end-israeli-occupation-palestine-by-november-2016-1468112>)

⁴⁸ “Netanyahu: No Chance for Peace Deal if Israel Sued for War Crimes,” *Jewish Telegraph Agency*, October 3, 2014. (<http://www.jta.org/2014/10/03/news-opinion/israel-middle-east/netanyahu-no-chance-for-peace-deal-if-israel-sued-for-war-crimes>)

⁴⁹ Somini Sengupta, “Palestinians Become Observers at Meeting on International Criminal Court,” *The New York Times*, December 8, 2014. (http://www.nytimes.com/2014/12/09/world/middleeast/palestinians-become-observers-at-meeting-on-international-criminal-court.html?_r=0)

demanded a one-year deadline for negotiations to resume, a full Israeli withdrawal from the West Bank by 2017, and a Palestinian capital in east Jerusalem.⁵⁰ The resolution, which was called for hastily on December 30, was defeated. The Palestinians failed to muster the nine votes necessary to pass, instead garnering eight.⁵¹ Had the motion gained the nine votes, the United States (which voted against the motion⁵²) was poised to exercise its veto.⁵³

One day after the defeat, Abbas announced he had signed the Palestinians' applications to several international conventions and bodies, including the Rome Statute of the ICC.⁵⁴ The U.N. acknowledged it received the applications, and Secretary General Ban Ki-Moon confirmed in early January that the Palestinians would become full members of the ICC on April 1, 2015.⁵⁵

The Palestinians had warned that if their Security Council resolution failed, they would turn to the ICC. But few observers understood how quickly they would do so. They have now prompted a process at the ICC of "examining the information available in order to reach a fully informed determination on whether there is a reasonable basis to proceed with an investigation." The investigators are limited to reviewing actions taken since June 2014—the events leading up to the Gaza War (including the kidnapping of the three Israeli teens), the war itself, and presumably any other IDF actions in the West Bank or Gaza subsequent to the conflict.⁵⁶ However, the ICC probe can be expanded, dating back to when the Palestinians gained recognition at the General Assembly, on November 29, 2012.⁵⁷

Recently, Mahmoud Abbas told reporters in Cairo that he would consider halting the ICC push should a new round of negotiations be launched soon.⁵⁸ But at a recent meeting with Turkish President Recep Tayyip Erdoğan, he vowed to pursue the "Palestine 194" campaign and the ICC in tandem.⁵⁹ This has long been the Palestinian strategy, and there is no reason to believe that it will change any time soon without a change in Washington's policies.

⁵⁰ Michael Gordon & Somini Sengupta, "Resolution for Palestinian State Fails in United Nations Security Council," *The New York Times*, December 30, 2014. (<http://www.nytimes.com/2014/12/31/world/middleeast/resolution-for-palestinian-state-fails-in-security-council.html>)

⁵¹ Lorenzo Ferrigno, "Security Council Rejects Palestinian Statehood Resolution," *CNN*, December 30, 2014. (<http://www.cnn.com/2014/12/30/world/palestinian-statehood-draft-vote/>)

⁵² Michael Gordon & Somini Sengupta, "Resolution for Palestinian State Fails in United Nations Security Council," *The New York Times*, December 30, 2014. (<http://www.nytimes.com/2014/12/31/world/middleeast/resolution-for-palestinian-state-fails-in-security-council.html>)

⁵³ Marissa Newman, "Kerry Said to Hint at Sanctions If Palestinians Push UN Bid," *The Times of Israel*, December 29, 2014. (<http://www.timesofisrael.com/kerry-said-to-hint-at-sanctions-if-palestinians-push-un-bid/>)

⁵⁴ Peter Beaumont, "Palestinian President Signs Up to Join International Criminal Court," *The Guardian* (U.K.), December 31, 2014. (<http://www.theguardian.com/world/2014/dec/31/palestinian-president-international-criminal-court>)

⁵⁵ Yonah Jeremy Bob, "Ban Ki-Moon Says Palestine to Join ICC on April 1," *The Jerusalem Post*, January 7, 2015. (<http://www.jpost.com/Arab-Israeli-Conflict/Ban-Ki-moon-says-Palestine-to-join-ICC-on-April-1-386958>)

⁵⁶ "Israel-Palestinian 'War Crimes' Probed By the ICC," *BBC*, January 16, 2015. (<http://www.bbc.com/news/world-middle-east-30851121>)

⁵⁷ Yonah Jeremy Bob, "Analysis: Palestinians May Face 2012 Cut-Off at ICC," *The Jerusalem Post*, April 4, 2014. (<http://www.jpost.com/International/Analysis-Palestinians-may-face-2012-cut-off-at-ICC-347508>)

⁵⁸ Moshe Cohen, "Report: Abbas 'Willing' to Give Israel a Break on ICC," *Arutz Sheva* (Israel), January 15, 2015. (http://www.israelnationalnews.com/News/News.aspx/189985#.VL_6gUfF9ps)

⁵⁹ "Abbas Says Palestinians to Submit New Statehood Bid 'Soon'," *The Times of Israel*, January 12, 2015. (<http://www.timesofisrael.com/abbas-says-palestinians-to-submit-new-statehood-bid-soon/>)

OPPOSITION FROM WASHINGTON AND JERUSALEM

The response from Israel has been predictably hostile. As Netanyahu stated, “Israel rejects the absurd decision of the ICC prosecutor ... to go after Israel. It’s absurd for the ICC to ignore international law and agreements, under which the Palestinians don’t have a state and can only get one through direct negotiations with Israel.” In other words, Israel objects to both the 194 campaign and the ICC bid because both are violations of the Oslo Accords. The Israelis argue that the Palestinians are looking to force conditions for a Palestinian state on the Israelis rather than achieving a state through negotiations.⁶⁰

In response to the Palestinian ICC bid, the Israelis took the step of freezing the next monthly transfer of tax revenue, which Israel collects on behalf of the PA, totaling some \$125 million.⁶¹ Israel’s response will also likely include the mobilization of a special office, established in 2009 within Israel’s Ministry of Justice, to handle all lawfare issues, including “all international legal proceedings against Israel, Israeli soldiers or officials.”⁶² To that end, Israel is reportedly mulling a counteroffensive, including a “large-scale prosecution in the United States and elsewhere” of Abbas and other Palestinian officials.⁶³ It is unclear whether their partnership with Hamas in the unity government is the principal basis for the complaint, or if the Israelis have other plans.

The U.S., for its part, opposed the bid on both sides of the political aisle. President Obama assured Netanyahu that the U.S. and Israel were united in their opposition to Palestinian accession to the ICC.⁶⁴ Legislators from both parties have also condemned the ICC bid. Notably, 75 senators recently sent a letter to Secretary of State John Kerry, calling for a cut in aid to the Palestinian Authority.⁶⁵

Madam Chairman, I should also note that you and other leaders from the House Foreign Affairs Committee issued a rather strong rebuke of the move in a letter to Mr. Kerry, as well.⁶⁶

⁶⁰ Justin Jalil, “Netanyahu Derides ‘Preposterous’ ICC Probe of Israel,” *The Times of Israel*, January 17, 2015. (<http://www.timesofisrael.com/netanyahu-derided-preposterous-icc-probe-of-israel/>)

⁶¹ Allyn Fisher-Ilan, “Israel Withholds Funds, Weighs Lawsuits against Palestinians,” *Reuters*, January 3, 2015. (<http://www.reuters.com/article/2015/01/03/us-mideast-palestinians-israel-idUSKBN0KC07Q20150103>)

⁶² Ido Rosenzweig & Yuval Shany, “Establishment of a Legal Department by the Israeli Security Cabinet to Deal with Issues of International Jurisdiction,” *Terrorism & Democracy*, 2009. (<http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-12/establishment-of-a-legal-department-by-the-israeli-security-cabinet-to-deal-with-issues-of-international-jurisdiction/>)

⁶³ Allyn Fisher-Ilan, “Israel Withholds Funds, Weighs Lawsuits against Palestinians,” *Reuters*, January 3, 2015. (<http://www.reuters.com/article/2015/01/03/us-mideast-palestinians-israel-idUSKBN0KC07Q20150103>)

⁶⁴ “Obama, Netanyahu Discuss Iran Talks, Palestinian ICC Move,” *Reuters*, January 12, 2015. (<http://www.reuters.com/article/2015/01/13/us-usa-israel-obama-idUSKBN0KM00A20150113>)

⁶⁵ Julian Pecquet, “Palestinian Authority on the Hot Seat,” *Al-Monitor*, January 30, 2015. (<http://www.al-monitor.com/pulse/originals/2015/01/palestinian-authority-congress-aid-icc-foreign-affairs.html>)

⁶⁶ House Foreign Affairs Committee, Press Release, “House Foreign Affairs Committee Leaders Write Secretary Kerry on Palestinian Authority,” January 27, 2015. (<http://foreignaffairs.house.gov/press-release/house-foreign-affairs-committee-leaders-write-secretary-kerry-palestinian-authority>)

Alarm in Washington over the Palestinian ICC bid is well founded, primarily because it hits close to home. The U.S. is threatened with lawfare challenges similar to those threatening Israel. Indeed, the ICC prosecutor has, since 2007, been investigating alleged crimes committed in Afghanistan, including torture and “cruel treatment” of detainees, which could target U.S. officials.⁶⁷

In short, the campaign against Israel has wider ramifications. The United States and its allies are all vulnerable to lawfare. Lawmakers must ensure that the Palestinian bid at the ICC fails.

RECOMMENDATIONS

Madam Chairman, while I support economic measures against the Palestinian leadership for its reckless behavior, threats to cut assistance have not had the desired impact in recent years. The reason for this is simple: Washington is dependent on the Palestinian Authority for continued security cooperation with Israel. Abbas knows this. This is why he feels comfortable testing the patience of legislators, and even the president. I suggest the following steps as a means to reassert American leverage, protect American interests, empower new moderate Palestinian leadership, and safeguard Israeli security concerns.

1. **Adopt a more systematic approach to lawfare.** As my FDD colleague Orde Kittrie notes, the U.S. government’s approach to lawfare has thus far been piecemeal and insufficiently proactive. Congress should strongly consider establishing a lawfare office similar to that established by Israel. Such an office could enhance the efficacy of the U.S. government’s lawfare-related activities in defense of both U.S. officials and those of our close allies.
2. **Leverage America’s “Article 98” agreements with foreign governments.** Countries that enter into these agreements with the U.S. agree not to surrender U.S. persons to the jurisdiction of the ICC. The U.S. has concluded such agreements with at least one hundred countries.⁶⁸ Congress should ensure that the U.S. enters into as many of these agreements as possible, and perhaps modify them to include its key allies, such as Israel. Congress might even consider conditioning U.S. military assistance on an assurance that the receiving countries include “Article 98” agreements for the U.S. and its allies. Knowing it would face severe difficulties getting access to accused U.S. and Israeli officials could deter the ICC from opening formal investigations, particularly when it is clear the charges are unfounded.
3. **Declassify intelligence on recent Palestinian terrorism, illicit activity, and human rights abuses.** Congress can work with the U.S. intelligence community to identify terrorism, illicit financial activity, and human rights abuses in both the West Bank and the Gaza Strip dating back to November 29, 2012, when the U.N. General Assembly recognized Palestine as a non-member Observer State. This, coupled with open source reports,⁶⁹ would provide the Israelis

⁶⁷ Brett D. Schaefer & Steven Groves, “U.S. Refusal to Ratify Rome Statute Vindicated by ICC Afghanistan Report,” *Heritage Foundation Issue Brief*, December 11, 2014.

(<http://www.heritage.org/research/reports/2014/12/us-refusal-to-ratify-rome-statute-vindicated-by-icc-afghanistan-report>)

⁶⁸ “International Criminal Court – Article 98 Agreements Research Guide,” *Georgetown University Law Library Website*, accessed January 30, 2015. (http://www.law.georgetown.edu/library/research/guides/article_98.cfm)

⁶⁹ Lazar Berman, “Human Rights Watchdog: Hamas, PA Tortured Hundreds in 2014,” *The Times of Israel*

and the ICC with evidence of possible war crimes committed within the territories of the “State of Palestine.” More importantly, it would send a message to the Palestinian leadership that they have as much to lose as anyone by pursuing this dangerous track. One recent report suggests significant human rights abuses.⁷⁰

4. **Promote Palestinian political change.** Mahmoud Abbas is a huge part of the problem. Once considered a reformer, Abbas is now 10 years into a 5-year presidential term. He is also the head of the Fatah faction and the PLO. He has a stranglehold on Palestinian politics. Washington only holds on to him for fear of not knowing what comes next. We must now prepare the ground for new Palestinian Authority elections. But we must also push for real political change. So long as the Palestinian political system remains ossified, the Palestinians will be taken in by gimmicks like the “Palestine 194” campaign and the ICC. Only real political reform will put the Palestinians in a position to drop the theatrics and get back to the business of state-building. Notably, former Palestinian Prime Minister Salam Fayyad understood this, and consequently opposed the “Palestine 194” campaign.
5. **Strengthen the PA and weaken the PLO.** In the past, we have punished the PA for unilateral Palestinian maneuvers. But it is actually the PLO that is pursuing Israel at the ICC, and it is the PLO that is waging the Palestine 194 campaign. Moreover, the PLO still has terrorist groups under its umbrella.⁷¹ Rooted in a terrorist past, its leaders are unelected, its decision-making is opaque, and its finances are obscured from the public eye. Its very existence enables a dysfunctional system. At any given time, we don’t know whether it is the PLO, the Fatah faction, or the PA that is speaking in the Palestinians’ name. If the goal is to hold the Palestinian leadership responsible for its actions, it is time to empower the Palestinian government we seek to engage, and to make the PLO obsolete. To that end, we must shut down the PLO embassy in Washington, and to take steps to weaken the organization worldwide.
6. **Reform Gaza.** We cannot only focus on the West Bank political structures. The Hamas-Fatah split remains a challenge that will encumber both regional peace and Palestinian reform. Hamas must be removed from the Gaza Strip if meaningful change is to take root. Washington can help bring about Hamas’s demise by working with the Israelis, Egyptians, and the PA to actively undermine the terrorist group in Gaza—financially, politically and militarily.
7. **Reassert Washington’s role as arbiter of the peace process.** I don’t believe that peace between the current leaders is likely. Nor do I believe that this administration has earned the trust of either side. However, the next set of leaders may well make progress. But even if deadlock persists, Washington cannot abdicate its role as the honest broker. Once we return to that role, we may have an opportunity to call for a halt to all unilateral activity and guide this conflict toward a more constructive dynamic.

January 29, 2015. (<http://www.timesofisrael.com/human-rights-watchdog-hamas-pa-tortured-hundreds-in-2014/>)

⁷⁰ Khaled Abu Toameh, “Hamas, Palestinian Authority Step Up Human Rights Violations,” *Gatestone Institute*, January 9, 2015. (<http://www.gatestoneinstitute.org/5019/hamas-palestinian-authority-human-rights>)

⁷¹ Kenneth Katzman, “The PLO and its Factions,” *Congressional Research Service*, June 10, 2002. (<http://www.iwar.org.uk/news-archive/crs/11562.pdf>)

On behalf of the Foundation for Defense of Democracies, thank you for the opportunity to testify today. I look forward to answering your questions.