

Why the ICC Prosecutor Is Wrong on Oslo

by [Dennis Ross \(/experts/dennis-ross\)](/experts/dennis-ross)

Jun 16, 2020

Also available in

[العربية \(/ar/policy-analysis/lmadha-tukhtiy-almdyt-alamt-l-almhkm-t-aljnayyt-aldwlyt-bshan-atfaqyat-awslw\)](/ar/policy-analysis/lmadha-tukhtiy-almdyt-alamt-l-almhkm-t-aljnayyt-aldwlyt-bshan-atfaqyat-awslw)

ABOUT THE AUTHORS



[Dennis Ross \(/experts/dennis-ross\)](/experts/dennis-ross)

Dennis Ross, a former special assistant to President Barack Obama, is the counselor and William Davidson Distinguished Fellow at The Washington Institute.



Brief Analysis

By making what appears to be a politically motivated case, the prosecutor's office runs the risk of undermining both the main Israeli-Palestinian legal framework and the ICC's role as an unbiased agent of international law.

Some issues require attention even in the midst of the COVID-19 pandemic and renewed efforts to transform how American police treat people of color. One such issue is the possibility that the International Criminal Court (ICC) may soon inject itself into the Israeli-Palestinian conflict. If so, it would set an unfortunate precedent: giving protagonists in historic conflicts incentive to gain leverage and score points against each other in court rather than resolving their differences through negotiation.

Last December, ICC prosecutor Fatou Bensouda announced her intention to open a criminal investigation against Israel for alleged war crimes, arguing that the court had criminal jurisdiction over the Gaza Strip and West Bank, including East Jerusalem, as the territory of the "State of Palestine." Before doing so, however, she requested that an ICC Pre-Trial Chamber affirm her argument, which she laid out [in a long document \(https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF\)](https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF) that conceded the issue's complexity and controversy.

The position on jurisdiction that the Office of the Prosecutor (OTP) has taken depends in part on its interpretations of the Oslo Accords and the Israeli-Palestinian peace process more generally. Having served as the lead American negotiator on Middle East peace and a participant or mediator in Oslo talks and other Israeli-Palestinian discussions from 1993 to 2001, I know the inside history and content of the accords intimately. In response to an invitation sent out by the Pre-Trial Chamber, I felt compelled to submit [an amicus curiae brief \(https://www.icc-cpi.int/CourtRecords/CR2020_01060.PDF\)](https://www.icc-cpi.int/CourtRecords/CR2020_01060.PDF) explaining that the OTP has misrepresented the terms and meaning of these agreements in a number of ways.

My hope was to convince the OTP to correct its errors, but that has not happened. In fact, the [OTP's April 30 response \(https://www.icc-cpi.int/CourtRecords/CR2020_01746.PDF\)](https://www.icc-cpi.int/CourtRecords/CR2020_01746.PDF) to opposing briefs doubled down on some of its most misleading arguments, attempting to redefine the Oslo Accords in some areas and simply ignoring them in others.

This problem has become more important in light of the [chamber's unusual request for clarification \(https://www.icc-cpi.int/CourtRecords/CR2020_02105.PDF\)](https://www.icc-cpi.int/CourtRecords/CR2020_02105.PDF) regarding a May 19 statement by Palestinian Authority president Mahmoud Abbas, who declared that the PA was “absolved” of its past agreements with the Israeli and U.S. governments. The judges appear to recognize that the Oslo Accords are relevant to the legal issue before them; as such, I think it's high time to set the record straight.

WHAT THE PROSECUTOR GETS WRONG

The OTP asserts that Oslo's goal was “to give effect to the Palestinians' right to self-determination.” In the prosecutor's view, this right—and Israel's wrongdoing in preventing its full realization—outweigh the fact that the Palestinians do not meet the established criteria for statehood under international law, namely, effective control over well-defined territory. According to this argument, the Palestinians should be treated as a state that has the right to give the ICC jurisdiction on its behalf.

This argument rests on the premise that self-determination, in the OTP's words, was Oslo's “object and purpose.” But that is inaccurate; the accords had several equally important goals, including Israeli security, peaceful coexistence, education for peace, and the development of effective Palestinian governance. Self-determination could not be fully advanced beyond Oslo's interim self-governance arrangements unless these other goals were fulfilled. The OTP ignores these prerequisites, however, treating Palestinian self-determination as an end in itself and one that necessarily affords it the right of statehood.

Ironically, the OTP concedes that these two concepts—self-determination and the right to statehood—are legally distinct, even as it ignores how the accords explicitly leave this matter to be negotiated by the parties. And when it mentions a key provision regarding Oslo's legal significance—namely, that neither side would be “deemed, by virtue of having entered into [the accords], to have renounced or waived any of its existing rights, claims, or positions”—the OTP strikingly interprets this as applying only to Palestinian positions and not to Israel's longstanding claims.

What's worse is that the OTP does not even mention the role that Palestinian terrorism and rejection have played in preventing the emergence of a state, giving legal relevance only to Israeli wrongdoing. I have been a vocal critic of Israeli actions that are [inconsistent with the spirit of the accords \(https://www.washingtoninstitute.org/policy-analysis/view/if-trump-wants-the-ultimate-deal-he-must-not-repeat-these-mistakes\)](https://www.washingtoninstitute.org/policy-analysis/view/if-trump-wants-the-ultimate-deal-he-must-not-repeat-these-mistakes), particularly the country's settlement policy. But any analysis that gives weight to only one side's wrongdoing comes across as politically motivated rather than legally credible. Nowhere does the OTP mention that the PA leadership either rejected or ignored various offers that would have provided for a credible Palestinian state, from the Clinton Parameters of December 2000 to the Olmert proposal of August 2008 and the Obama principles of March 2014. In each case, the Palestinians did not even offer counterproposals.

The OTP skips this part of the historical record, including the terrible toll wrought by the second intifada. Instead, it writes that “the process halted after March 2000”—news to all us who took part in negotiations after this date, from Camp David to the Annapolis process to Secretary John Kerry's efforts. The OTP then goes on to assert, “Notwithstanding any incomplete and ongoing political process, it is apparent from the Accords that the PA was to assume territorial control over most of the West Bank, excluding East Jerusalem, and Gaza, with modifications to accommodate for the settlements and borders.” Again, this is both inaccurate and in keeping with the prosecutor's imbalanced argument that Oslo binds only one side, Israel. The Palestinian obligations detailed in the accords were

intended as critical benchmarks to prove the PA was willing and able to take on additional rights and responsibilities. The agreements explicitly made any Israeli transfers of additional territory and authority contingent on Palestinian progress toward ensuring security, combating terrorism, and preventing incitement. These and numerous other obligations were never sufficiently fulfilled.

Even if the OTP's assumptions about Oslo's goals were well-founded, there is no ambiguity in what the agreements say about the prosecutor's most fundamental premise—that criminal jurisdiction can be delegated to the ICC. The accords state unmistakably that Palestinian criminal jurisdiction is circumscribed, that it does not include jurisdiction over Israelis, and that any jurisdiction not explicitly transferred to the Palestinians rests with Israel. Nowhere in the accords or the negotiating history that led to them is there any suggestion to support the OTP's convoluted distinction between “plenary” and “enforcement” jurisdiction. Nor have the Palestinians ever sought to claim or exercise this type of jurisdiction over Israelis in the decades since Oslo.

The pre-Oslo historical record is equally clear on this matter. Contrary to what the OTP seems to conclude, between the years of Jordanian rule in the West Bank and the Israeli control established after the 1967 war, there was no intervening moment in which “plenary jurisdiction” rested with the Palestinian people. The parties themselves never expressed such an understanding of the situation, and the agreements they signed unambiguously reflect that fact. It was clear at the time that any powers the Palestinians held were the result of, and drew their authority from, the agreements themselves.

The OTP is also at pains to suggest that the territorial conflict is a mere “border dispute,” so as to sustain the argument that undisputed borders are not needed for ICC jurisdiction. As the accords make clear, however, resolving the status of the territory as a whole was one of the core issues to be addressed in permanent-status negotiations, in which the parties would attempt to resolve their deeply held, competing claims to sovereignty. Settlements, security, and military locations were on the list of issues to be negotiated at this final stage, and the parties specifically reserved their rival territorial claims in the meantime. This sequencing demonstrates their understanding that negotiations were not about border minutiae, but about how sovereignty would be allocated over the territory that was understood to be held in abeyance pending a negotiated settlement.

In broader terms, the continuing relevance of the Oslo Accords has both factual and legal implications for the ICC dispute. Over the years, the Palestinian leadership has periodically threatened to terminate its agreements with Israel, yet the international community has continued to view these agreements as binding despite violations by both sides. Even the threats themselves—including the most recent one by President Abbas—indicate Oslo's continuing validity in Palestinian eyes. Likewise, the PA's actions on the ground over the years show that the accords have remained in force, with the structures and arrangements they established continuing almost without interruption.

The Palestinians' June 4 response to the ICC chamber reiterated this position, noting that the accords will stay in force **unless Israel proceeds with annexations (<https://www.washingtoninstitute.org/policy-analysis/view/wrestling-with-annexation-the-elusive-search-for-a-policy-rationale>)** in the West Bank. While the Palestinian submission states that they are “absolved” of their obligations under past agreements, it does not terminate the division of responsibilities created by Oslo. In fact, no formal termination with legal effect has ever been made, and no party has suggested that Abbas's statement extends Palestinian criminal jurisdiction beyond the terms of the accords.

Perhaps most important, if the Oslo Accords were actually terminated, the legal result would not be more expansive Palestinian authority. Rather, authority would revert back to Israel, as stated explicitly in the accords and acknowledged by the Palestinian leadership. In his May 19 statement, for example, Abbas noted that Israel must “shoulder all responsibilities and obligations” as “an occupying power.”

To be sure, Abbas has offered these reminders as a way of pressuring Israel not to go ahead with annexation of territories [prematurely allotted to it in the Trump peace plan \(https://www.washingtoninstitute.org/policy-analysis/view/mapping-west-bank-annexation-territorial-and-political-uncertainties\)](https://www.washingtoninstitute.org/policy-analysis/view/mapping-west-bank-annexation-territorial-and-political-uncertainties). Ironically, such annexations would directly contravene the Oslo mandate that neither side alter the status of the territory, which could wind up giving the Palestinians or other actors future grounds to argue that the accords have lapsed. For that reason alone, Prime Minister Binyamin Netanyahu [should carefully weigh the consequences of annexation \(https://www.washingtoninstitute.org/policy-analysis/view/netanyahu-sees-a-historic-moment-in-annexation.-but-he-might-not-be-seeing\)](https://www.washingtoninstitute.org/policy-analysis/view/netanyahu-sees-a-historic-moment-in-annexation.-but-he-might-not-be-seeing), including the risk that Israel will have to resume all obligations and costs in the West Bank.

SEPARATING THE POLITICAL AND THE LEGAL

The OTP's arguments are alarmingly disconnected from the terms of the Oslo Accords, the parties' understanding of them, and the reality on the ground. It is stunning to see the OTP make the case for Palestinian statehood at the same time that Prime Minister Mohammad Shtayyeh and other Palestinian officials announce their intention to unilaterally declare a state if Israel proceeds with annexation. It is a basic and widespread understanding, including among Palestinians themselves, that functional and legally valid statehood is a future aspiration, not a current reality. The ICC would do itself a great disservice by embracing so obvious a legal fiction.

What should concern everyone is that the OTP appears to be making more of a political case than a legal one. Whatever the political desires of the individuals involved in this matter, making political arguments is not the OTP's role. Doing so discredits the ICC, undermines its effectiveness, and threatens to undo the principle that international law is driven by legal standards and canons rather than political ideology and preferences. Should the court use specious grounds to establish jurisdiction in such a contentious case, it will surely cast a shadow on the legitimacy of any subsequent investigation.

Moreover, as someone who remains committed to resolving the Israeli-Palestinian conflict, I worry about an even more troubling aspect of the OTP's actions: their potential impact on existing and future peace agreements. At a time when the only legal framework governing relations between the parties is under assault from elements on both sides, the OTP's arguments play directly into the hands of those who wish to evade their obligations. In the interests of peace, the ICC should emphasize that legal agreements such as the Oslo Accords need to be respected, not undermined.

Washington can help reinforce this message. To be sure, the court is unlikely to heed direct entreaties from the Trump administration given the sanctions and travel restrictions that the president has authorized against ICC personnel involved in investigating American troops. But the administration can still work quietly with governments that are members of the court to convey the long-term costs of pursuing what appear to be politically motivated cases. Ultimately, such engagement could help preserve the ICC's international role.

Dennis Ross is the counselor and William Davidson Distinguished Fellow at The Washington Institute. ❖

RECOMMENDED



BRIEF ANALYSIS

[Khamenei Breaks His Silence on the Nuclear Negotiations](#)

Feb 17, 2022



Omer Carmi

[\(/policy-analysis/khamenei-breaks-his-silence-nuclear-negotiations\)](#)



ARTICLES & TESTIMONY

[The Ukraine Crisis Isn't Over: Russia Has Lied About Troop Withdrawals Before](#)

Feb 16, 2022



Anna Borshchevskaya

[\(/policy-analysis/ukraine-crisis-isnt-over-russia-has-lied-about-troop-withdrawals\)](#)



ARTICLES & TESTIMONY

[As China Thrives in the Post-9/11 Middle East, the US Must Counter](#)

Feb 16, 2022



Jay Solomon

[\(/policy-analysis/china-thrives-post-911-middle-east-us-must-counter\)](#)

TOPICS

[Arab-Israeli Relations \(/policy-analysis/arab-israeli-relations\)](#)

[Peace Process \(/policy-analysis/peace-process\)](#)

REGIONS & COUNTRIES

[Israel \(/policy-analysis/israel\)](#)

[Palestinians \(/policy-analysis/palestinians\)](#)

