

The Palestinians Go to the ICC: Policy Implications

by [David Makovsky \(/experts/david-makovsky\)](/experts/david-makovsky)

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ABOUT THE AUTHORS



[David Makovsky \(/experts/david-makovsky\)](/experts/david-makovsky)

David Makovsky is the Ziegler distinguished fellow at The Washington Institute and director of the Koret Project on Arab-Israel Relations.



Brief Analysis

Although the prospect of the ICC actually prosecuting Israeli officials is uncertain at best, the PA has torpedoed any chances for near-term diplomacy merely by opening that door, and perhaps invited U.S. financial countermeasures as well.

On December 30, Palestinian Authority president Mahmoud Abbas signed twenty different international conventions, including the Rome Statute of the International Criminal Court (ICC). The name of the statute refers to the 1998 conference that established the treaty-based court, which began operations in 2002.

In principle, the PA's move enables the ICC to assert jurisdiction over future developments in the West Bank and Gaza Strip, and empowers any signatory to the Rome Statute -- currently including 160 countries -- to claim that Israel should be brought to the court on charges of war crimes. Palestinian officials have said that they want the ICC to investigate Israel's settlement policies. Once any such inquiries were concluded, it would be up to the ICC's chief prosecutor, Gambian lawyer Fatou Bensouda, whether to move forward with actual cases against Israeli officials.

Abbas's move comes on the heels of his failure last week to garner the votes needed for the UN Security Council to approve Palestinian statehood. Although that failure averted a potentially controversial U.S. veto, the ICC move raises other thorny problems.

ABBAS-NETANYAHU RELATIONS REACH NEW NADIR

While the Israeli-Palestinian relationship has not exactly known many highs in recent years, one could argue that the signing of the Rome Statute sends diplomacy to a new low, at least under the current leadership. The ICC is designed to deal with deliberate war crimes, such as state officials carrying out genocidal policies, so Israelis would not take too kindly to being painted with that brush if cases were brought against their leaders.

Moreover, the PA's latest move creates an entirely new arena for the Israeli-Palestinian conflict, casting the often-adversarial relationship in criminal terms. As part of the ICC's effort to apply a profound moral stain on those it

convicts, any future Israeli prosecutions in The Hague would be designed to ensure that the country's political and military leadership could not travel, among other limitations. In that vein, the Palestinians and their sympathizers would no doubt use any ICC conviction as further justification for the ongoing boycott, divestment, and sanctions (BDS) movement against Israel. Abbas may also be counting on one advantage conferred by signing the Rome Statute: technically, the PA does not have to be the one that actually submits the complaint to the ICC, since any motions related to the West Bank and Gaza can now be carried forward by any party.

On a personal level, the move is bound to deepen the mutual loathing between Israeli prime minister Binyamin Netanyahu and Abbas, likely shutting down any political space for further negotiations any time soon. And if negotiations are no longer feasible between Abbas and Netanyahu, it may move the entire Israeli-Palestinian discourse toward unilateralism as long as they remain in office.

In terms of Israeli political opinion, the PA's move is bound to face opposition across the political spectrum, since the thought of Israeli political figures or soldiers being hauled before The Hague is unacceptable to officials and voters of most any stripe. With an election looming on March 17, Netanyahu will likely depict the ICC maneuver as the latest manifestation of international pressure, proving that he needs to remain prime minister in order to thwart such actions. At the same time, the opposition -- led by Isaac Herzog and Tzipi Livni -- will cite the move as a political metaphor for what they call Israel's growing international isolation under Netanyahu, even as they staunchly oppose what Abbas has done.

As for Palestinian public opinion, a December poll by the Ramallah-based Palestinian Center for Policy and Survey Research showed 80 percent approval for Abbas moving to the ICC. All too often, Palestinians measure their own progress by how much political pain they can impose on Israel. And they may well believe that the ICC strategy will place new constraints on any Israeli decisionmaking about future military operations.

COUNTERMOVES AND A PROTRACTED ROAD AHEAD

Signing the Rome Statute is unlikely to produce short-term Palestinian legal victories for a variety of reasons, not least because other parties will probably make countermoves. For example, the United States, Canada, and perhaps other states will likely ask UN secretary-general Ban Ki-moon -- the point of deposit for Rome signatories -- to urge that the PA's move not go forward, perhaps by questioning the PA's legal right to sign. The U.S. Congress may pass resolutions as well, but it is unclear what impact they would have. The United States (along with Russia, Israel, and some thirty other countries) has signed but not ratified the Rome Statute -- this means it is not a member of the ICC, so Congress cannot threaten to defund the court.

Israel took the first step after Abbas signed the statute by announcing that it is withholding about \$150 million in Palestinian tax revenues. Israel has repeatedly warned the PA that any move toward the ICC would be met with financial sanctions and possibly increased settlement activity in sensitive areas. The U.S. Congress could decide to follow suit by withholding its \$400 million in annual aid to the Palestinians.

Beyond the financial realm, groups sympathetic to Israel can be expected to file counterclaims against Abbas in U.S. courtrooms for attacks against Israeli civilians or for the PA's relationship with Hamas, a designated terrorist organization. Yet it is far from certain that Israel would file a countersuit against Abbas at the ICC at the very time it is arguing that the court has no jurisdiction over the West Bank and Gaza.

There is also the legal question of when the ICC's jurisdiction, if accepted, would begin. It clearly has jurisdiction after the PA completes the process known as accession, which is likely to be in March or April.

Yet it is uncertain if the ICC even wants to wade into the murky waters of the Israeli-Palestinian dispute. The court has felt under attack recently, with its case against Kenyan president Uhuru Kenyatta collapsing within the past month. The Israeli-Palestinian conflict is renowned for its endurance, highly charged character, and complexity; for

example, if the ICC investigated West Bank settlements, would it be willing to take a position and draw borders between Israel and a Palestinian state? And would those boundaries include east Jerusalem?

The ICC has been careful to take on very few cases, and despite being in existence for over a decade, it has secured only two convictions, both against Congolese warlords of no significant state position. Each case took between six and seven years. Additionally, the court previously rejected taking on the 2011 Gaza flotilla case involving Turkey, stating that the number of fatalities was too few. To be sure, some thirty-three other ICC cases are at different stages of investigation, but these preliminary inquiries often take years before the lengthy trials even begin.

CONCLUSION

The political implications of Abbas's move to the ICC have just begun to ricochet, as his relations with Netanyahu sink further than ever and a new arena of conflict between Israel and the Palestinians seems to open. In the short term, internationalizing the conflict will have only one surefire result: making the prospects of Israelis and Palestinians resolving their own differences ever more distant.

David Makovsky is the Ziegler Distinguished Fellow and director of the Project on the Middle East Peace Process at The Washington Institute. ❖

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