



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

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Chairman Ros-Lehtinen, Ranking Member Deutch, and Members of the Committee, thank you for inviting me to discuss the Palestinian Authority's move to the International Criminal Court (ICC). It is an honor to appear before you today.

Before I briefly review the chronology of the events and then suggest some ideas on where we go from here, I think it is worth focusing on what's at stake, not just for the Palestinians, but for the ICC itself. I want to be clear from the outset that I see the Palestinian move for membership in the ICC as deepening the chasm between Israelis and Palestinians, and unfairly criminalizing the relationship between the two sides. Instead of bringing the parties closer together, the move creates a whole new arena of confrontation that could play out over years. We want the parties to solve their problems, and not to lock into a villain and victim narrative that would make conflict resolution impossible. This is bad not just for the Palestinians, but also for the ICC itself.

The purpose of the ICC is to deal with mass atrocities, and not serve as another politicized UN agency. It is hard to see how countries like the United States, whose membership the ICC actively seeks, will be attracted by such an overreach in applying the court's jurisdiction. The ICC Prosecutor Fatou Bensouda herself wrote in a *Guardian* op-ed, "It is my firm belief that recourse to justice should never be compromised by political expediency. The failure to uphold this sacrosanct requirement will not only pervert the cause of justice and weaken public confidence in it, but also exacerbate the immense suffering of the victims of mass atrocities. This, we will never allow." If the ICC wants to be taken seriously and not be viewed like the Geneva-based UN Human Rights Council, which regards Israel as an obsession at a time when 200,000 Syrians have been slaughtered, it should remain true to its origins and avoid politicization by inserting itself into a complex conflict such as the Israeli-Palestinian issue.

Here is the background to the Palestinian case. Just over a month ago, on December 31 -- the fiftieth anniversary of the founding of Fatah, the central component of the Palestine Liberation Organization -- Palestinian Authority (PA) leader Mahmoud Abbas signed twenty different international conventions, including the Rome Statute of the ICC. The name of the statute refers to the 1998 conference that established the treaty-based court, which began operations in 2002.

The main significance of the Abbas move is that it enabled the ICC to assert jurisdiction over future developments in the West Bank and Gaza Strip, and it empowered 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. Meanwhile, within approximately a week of Abbas signing the Rome Statute, UN secretary-general Ban Ki-moon publicly confirmed that the Palestinians will become an ICC member on April 1, 2015.

By January 16, ICC chief prosecutor, Gambian lawyer Bensouda, announced that she would start a preliminary examination into last summer's Gaza war. As such, Bensouda rejected an option at her disposal to first determine whether the PA is eligible to bring such a claim. Bensouda's decision does not come out of the blue. This past summer she penned an op-ed in the *Guardian* at the end of the Gaza war. On August 29, she wrote: "In November 2012, Palestine's status was upgraded by the UN General Assembly to 'non-member observer state' through the adoption of Resolution 67/19. My office examined the legal implications of this development and concluded that while this change did not retroactively validate the previously invalid 2009 declaration, Palestine could now join the Rome Statute." We don't know if the Bensouda preliminary inquiry will transition to a fuller examination in weeks, months, or years. Nobody knows but her. We should note the ICC has engaged in preliminary examinations against the United States in 2007 due to its role in Afghanistan. As far as can be determined, the examination was never completed. There are also other preliminary investigations against both Britain and Russia that were not completed.

When the Palestinians signed the Rome Statute, they attached a letter asking for an investigation into the Gaza war during last summer even though it predated their signing of the statute. It is curious that Abbas's letter calls for the investigation to occur on June 13, which not coincidentally is just hours after three Israeli youths were kidnapped and ultimately murdered at a hitchhiking post in the West Bank. Israel launched a manhunt for the boys the following day. The actual war began on July 8, when 210 rockets were indiscriminately fired by Hamas on Israeli cities. It is only thanks to the U.S.-funded Iron Dome anti-missile defense system that the Hamas rockets did not lead to scores of deaths. While the ICC previously inserted itself in the Congo war, where just in a few years there were over five million deaths, in Gaza we are talking about a death toll of 2,000 Palestinians -- approximately half of which are believed to be terrorists -- and sixty-five Israeli soldiers as well.

Israeli officials are enraged by the move to the ICC. There is no counter-move so far to bring Hamas for an ICC investigation. The net effect of this Palestinian approach is further deterioration in the relationship between Prime Minister Binyamin Netanyahu and President Abbas. It is hard to negotiate with someone when you want the world to equate him with Serbia's Milosevic. There are indications that the number of Likud Party ministers in the Israeli government who want the PA to collapse has gone up, but so far it does not include the prime minister or the professionals who deal with this issue. Yet if the relations were terrible between Israel and the PA before, it just got much worse.

It seems that the Palestinian move to ICC membership is part of a broader strategy. With Abbas turning eighty this spring, he has settled on a two-prong international strategy -- a move to the United Nations Security Council and bringing charges against Israel to the ICC -- and has given up on the idea of direct talks with Israel. It is unclear if he genuinely thinks the new strategy will be successful or rather believes it is at least an appropriate legacy as he heads into the twilight of his political career. One Israeli security official said that 2015 is the year of the "international intifada," alluding to the Arabic term used for uprising against Israel.

In addition to the ICC, PA officials seem to believe salvation will come from the Security Council. They believe that shortly after the formation of a new Israeli government, the French will renew their draft to impose "terms of reference" in a UN Security Council Resolution (UNSCR) for ending the conflict between Israel and the Palestinians. This would involve a return to the 1967 lines with some territorial exchanges or

swaps and two capitals in Jerusalem. The Palestinians are hoping the Obama administration will either vote for it or abstain, but not wield a veto, which it has only done once in its six years in office. While there are routine UN General Assembly resolutions on the issue, this would be the first time that there would be a Security Council resolution to serve as a template for gaining Palestinian statehood. Netanyahu has called the approach an imposed solution that Israel will reject. Yet questions remain whether the Palestinians could even accept a UNSCR that is to their overall liking but includes some elements they may not like. Can they accept the idea of a Jewish state? Limitations on relocation of Palestinian refugees? The Palestinians rescinded their support in December of a first draft of a proposed UNSCR that had even the smallest concessions.

In protest of the Palestinians' turn to internationalize the conflict at the ICC and the UNSC, Israel is currently withholding approximately \$127 million per month of Palestinian tax revenues that have been key to paying monthly salaries. PA foreign minister Riyadh Malki announced last week that the Palestinians are taking out loans to pay 60 percent of salaries for the month of January. Seventy-five U.S. senators have now called on Secretary of State John Kerry to withhold American aid as well. One should assume it is unlikely that the tax revenue will be released until a new Israeli government is formed, perhaps sometime in late May. Stopgap moves are required -- such as assistance from Europe and Arab donors -- until a new government is formed.

As noted above, the Israeli anger against the PA is genuine. It is hard to call someone a peace partner if you believe he is openly calling for you to be tried at The Hague. Conversely, ICC investigations can take years, and only two people have ever been convicted, both of whom were Congolese warlords active in the brutal second Congo civil war, where 5.4 million people died from 1998 to 2007.

Israel's situation is dramatically different. Israel is a democracy. According to the complementarity clause of the ICC, the court has no jurisdiction where there is a functioning judiciary to hold people accountable for their actions. Through the Tibon Committee set up after the Gaza war, Israel's Judge Advocate General (JAG) is in process of indicting four Israeli soldiers for potential abuses in 2014. The Israel Defense Forces (IDF) have publicly invited NGOs and others to come forward to the JAG if they believe they have evidence. In short, the ICC need only step in where there is no democratic judicial process, and this is not the case in Israel.

Israel went to "extraordinary lengths" to prevent civilian casualties during this summer's conflict in Gaza, according to Joint Chiefs chairman Gen. Martin Dempsey upon returning from a visit to Israel after the war. General Dempsey is in a better position to judge than I am, as he sent out a team to look into this issue. "I actually do think that Israel went to extraordinary lengths to limit collateral damage and civilian casualties," he said during a forum at the Carnegie Council for Ethics in International Affairs in New York. "In this kind of conflict, where you are held to a standard that your enemy is not held to, you're going to be criticized for civilian casualties," he added, according to Reuters. The Hamas tunnels "caused the IDF some significant challenges," Dempsey said, but Israeli forces also "did some extraordinary things to try to limit civilian casualties, to include...making it known that they were going to destroy a particular structure." He also listed IDF measures such as "roof knocking" and the dropping of warning leaflets as part of their attempts to protect civilian lives. "The IDF is not interested in creating civilian casualties. They're interested in stopping the shooting of rockets and missiles out of the Gaza Strip and into Israel," he argued. Finally, Dempsey recounted that an American delegation visited Israel three months ago to learn lessons from the conflict, "to include the measures they took to prevent civilian casualties and what they did with tunneling."

During the fifty days of fighting, Hamas fired thousands of rockets and mortars at Israeli towns and cities, including Tel Aviv, and used a sophisticated tunnel network to carry out attacks on military encampments in

southern Israel, close to the Gaza border. Some of the tunnels also had exits abutting Israeli civilian communities, giving Hamas the ability to attack them as well.

Meanwhile, Israel's ratio of civilian to military casualties in Operation Protective Edge was only one-fourth of the average seen in warfare around the world, a former commander of British forces in Afghanistan Col. (Res.) Richard Kemp told the Knesset Foreign Affairs and Defense Committee in September. "No army in the world acts with as much discretion and great care as the IDF in order to minimize damage. The US and the UK are careful, but not as much as Israel," he said.

Israel seems to be unfairly maligned with the ICC investigation. Moreover, it is being singled out, as there is no ICC investigation of the real bloodbath in Syria, for example. The UN Security Council has not even referred the Syria issue to the ICC.

Yet the consequences against Israel are going to be felt in the near term, not just down the road. The mere investigation by the ICC is designed to put Israel not just on the defensive, but also under a cloud, while giving a boost to the BDS -- boycott, divestment, and sanctions -- movement. This effort to delegitimize Israel is an existential threat -- not less than the Iranian nuclear issue.

However, Israel is correct to do its own internal inquiry and ensure that all is done to prevent innocent Gazans from being hit despite the fact that Hamas is deliberately putting their lives in jeopardy. As Israeli leaders say, Israel uses rockets to protect civilians while Hamas uses civilians to protect their rockets.

The PA is wrong to take their case to the ICC. While anger at the PA for making the move is justified, the question remains whether one is inviting bigger risks if the PA concludes that non-payment of salaries could lead it to disband. Abbas has threatened to do this many times, but so far the PA has remained intact. How long can the PA go without paying salaries without imploding? And if it does implode, who will fill the vacuum? It seems the force that will gain the most from the PA disbanding will be Hamas. In short, greater radicalism can ensue in the event of a vacuum. Therefore, one must not seek penalties that are counterproductive.

It is worth noting that as bad as things were during the Gaza war this past summer, Israel and the PA continued their security cooperation in the West Bank. Neither wants to see Hamas return to the West Bank or allow public unrest to reach a critical mass. There is a level of professionalism in the Palestinian security forces -- thanks in no small measure to the training of the U.S. Security Coordinator over the last decade -- and cooperation with their Israeli counterparts that was unthinkable in the 1990s, when the security services were completely politicized. There have been media reports that Israel was allowed to divert troops from the West Bank to Gaza because it knew that the PA security services maintained cooperation.

I would argue that this is still the bigger picture today, since both have an interest in preventing the West Bank from returning to chaos of the past. While there is little likelihood for tax revenues to be transferred until after the Israeli elections are over and a new coalition is formed later this spring (which will require stopgap aid from the Arab states and Europeans), most Israeli civilians and security professionals do not want security cooperation to collapse. This is not in Israel's interest. They would have to spend billions of shekels and a lot of manpower that they do not have to make up for the loss of security cooperation. At a time when the IDF must be vigilant against Hezbollah attacks in the north and Hamas attacks from the south, Israel would prefer not to have to divert manpower to the West Bank. It should be added that without this security cooperation, renewed chaos in West Bank cities would be devastating for the Palestinian Authority as well. Indeed, at a

speech in June in Jeddah, Saudi Arabia in front of the Organization of Islamic Cooperation, Abbas publicly defended security cooperation in very emphatic terms. "We don't want to go back to chaos and destruction, as we did in the second (Palestinian) intifada," he said. He continued, "I say it openly and frankly. We will not go back to an uprising that will destroy us."

In short, both sides depend on this security coordination. We cannot forget the bigger picture. Yet this does not mean that there should be no punitive measure taken against the PA for its move to the ICC. The key thing is to ask whether the penalty produces a result that you want or is counterproductive. Withholding funding -- over time -- will lead to the collapse of security cooperation and ultimately the PA, creating a vacuum that can be filled by radicalism. I remember arguing against a cut-off of funds before this distinguished panel in 2011. I said at the time that, sadly, the people who would be hurt the most by the cut-off would be then Palestinian prime minister Salam Fayyad. Indeed, Fayyad was scapegoated by other factions in the PA for the loss of money and forced out of office. So we should be very careful in wielding the cut-off of funds. Most of the American assistance to the Palestinians is for paying their debts to Israeli energy companies. About a quarter of the aid is humanitarian, unrelated to the PA. Even security aid to Palestinians goes to adequate training for security cooperation. It does not go to pay Palestinian salaries.

So what can be done? First, I think the ICC should make clear that it will not insert itself when the parties are engaged in conflict resolution. Secretary of State Kerry certainly has illustrated the depth of his commitment to resolving this conflict. Second, I think we should proclaim clearly and loudly that we do not accept the PA membership move at the ICC and encourage our allies to declare the same, while urging the ICC not to conduct its inquiry. Canada has told the ICC that it does not recognize Palestinian statehood, and so we will not be bound by its judgments and we will urge our allies to take a similar approach. More broadly, we should say an ICC that engages in such action will be viewed in an unfriendly manner by the United States. This is not how a relatively new international institution should act at a time that it wants its jurisdiction to be respected by the international community. Third, I would hope the U.S. Congress would bolster the American Service Members' Protection Act of 2002, which makes clear that our own servicemen and our allies -- of which Israel is listed -- will be protected from the reach of a potentially politicized body.

I hope the Palestinians recognize that signing the Rome Statute is unhelpful to their interests, and I hope the ICC realizes that its actions cannot occur in a vacuum. As long as there is a hope of conflict resolution, the ICC should avoid inserting itself. We should not forget that the international community must do everything in its power to bring Israelis and Palestinians together in order to solve their differences and not be a prod to deepen the chasm between the two peoples.