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ICC Prosecutor Makes Right Call on Palestinian Declaration, but Grave Concerns Remain

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In an effort to bring international pressure on Israel, the Palestinian Authority declared in 2009 that it would submit to the jurisdiction of the International Criminal Court (ICC) for alleged crimes committed in its territory. Three years later, the ICC prosecutor concluded that he does not have the authority under the Rome Statute to initiate an investigation because the issue of Palestinian statehood is in question.

This was the correct conclusion, but it does not permanently preclude the possibility of a future ICC investigation. The U.S. should use its influence to discourage actions in the United Nations, its affiliated bodies, and the ICC Assembly of States Parties that could support Palestinian claims of statehood and allow an ICC investigation to proceed in the future.

Using the ICC to Pressure Israel

The Palestinian National Authority formally notified the ICC registrar in a January 2009 declaration that it recognized the jurisdiction of the ICC with respect to “acts committed on the territory of Palestine since 1 July 2002.”¹ The ICC has jurisdiction over war crimes, crimes against humanity, genocide, and (if confirmed by future action by the ICC states parties) the crime of aggression.² Therefore, the Palestinian Authority’s request implicitly accuses Israel of committing at least some of those crimes.

After receiving the declaration, the ICC prosecutor initiated a preliminary examination of the request to determine whether the court had a basis for opening the investigation. This, as with other situations, involves an assessment of the facts surrounding the alleged crimes to determine whether the evidence is sufficient to initiate a formal investigation.

Before looking into the evidence for alleged crimes, however, the ICC prosecutor has to determine whether the court has jurisdiction. For most preliminary examinations, this step would be pro forma: The state committing the alleged crimes would

be an ICC state party, or the alleged crimes would have been committed in the territory of a state party, or either of those states would have voluntarily submitted to the Court’s jurisdiction, or the U.N. Security Council would have referred the case. In this instance, there is no referral from the Security Council, and neither Israel nor Palestine is an ICC state party. Therefore, the Palestinians made their declaration to grant the ICC jurisdiction pursuant to Article 12 of the Rome Statute.

But this particular situation raised an unusual concern because only “states” can submit themselves to ICC jurisdiction. “Palestine” is not a universally recognized state. As stated by the ICC prosecutor’s Office:

[T]he Rome Statute is open to accession by “all States”, and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a “State”, it is the practice of the Secretary-General to follow or seek the General Assembly’s directives on the matter. This is reflected in General Assembly

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resolutions which provide indications of whether an applicant is a “State”. Thus, competence for determining the term “State” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary-General who, in case of doubt, will defer to the guidance of [the] General Assembly.... The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term “State” under article 12(3) which would be at variance with that established for the purpose of article 12(1).³

In short, the prosecutor determined that the ICC, absent a U.N. Security Council referral, currently lacks jurisdiction because Palestine is not an ICC member state and that his office lacks the authority to determine whether Palestine qualifies as a state for the purposes of declaring itself subject to ICC jurisdiction.

An Ongoing Concern

Although it might be tempting to conclude that the issue is resolved, the prosecutor went beyond his proper determination that his office could not decide the issue of Palestinian statehood and that the court therefore cannot act on the Palestinian declaration. The statement includes language that can only be interpreted as a road map for how

the Palestinians could circumvent this problem.

Specifically, he stated that his office “could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue.” He conveniently outlined a path for resolving this situation, suggesting that “the relevant bodies at the United Nations or the Assembly of States Parties” could make a “legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1).” The prosecutor also noted:

The Office has been informed that Palestine has been recognised as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nations bodies. However, that the current status granted to Palestine by the United Nations General Assembly is that of “observer”, not as a “Non-member State”. The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but

the Security Council has not yet made a recommendation in this regard.

The obvious implication is that the court could act if Palestine is granted U.N. membership, but the prosecutor also implies that changing the status of Palestine from an “observer” entity to that of a “non-Member State” observer could suffice. Ominously for Israel, this change in status—unlike the process for granting U.N. membership, which requires approval by the Security Council where the U.S. has a veto—merely needs approval by the General Assembly.⁴

Thus, while the prosecutor correctly determined that the ICC currently lacks jurisdiction over alleged crimes in the Palestinian territories, his additional comments reveal an underlying sympathy for the Palestinians in their quest to use the ICC against Israel. The Palestinians no doubt appreciate this encouragement and will utilize his advice.

A Proportional Response

The intent of the Palestinian declaration to the ICC is to intimidate and isolate Israel, damage its reputation, and force it to engage in a detailed defense of its actions in Gaza and the West Bank over the past decade to prove their legality. This is part of a larger Palestinian strategy to delegitimize Israel internationally

1. Palestinian National Authority Ministry of Justice, “Declaration Recognizing the Jurisdiction of the International Criminal Court,” January 21, 2009, at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf> (accessed April 4, 2012).
2. Brett D. Schaefer, “The Kampala Aftermath: The U.S. Should Remain Wary of the ICC,” Heritage Foundation *Background* No. 2448, August 9, 2009, at <http://www.heritage.org/research/reports/2010/08/the-kampala-aftermath-the-us-should-remain-wary-of-the-icc>.
3. Office of the Prosecutor, “Situation in Palestine,” International Criminal Court, April 3, 2012, at http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf?utm_source=CICC+Newsletters&utm_campaign=a607f24fda-March_ICC_Situations_Under_Analysis_EN3_23_2012&utm_medium=email (accessed April 4, 2012).
4. Brett D. Schaefer and James Phillips, “How the U.S. Should Respond to the U.N. Vote for Palestinian Statehood,” Heritage Foundation *Background* No. 2574, July 6, 2011, at <http://www.heritage.org/research/reports/2011/07/how-the-us-should-respond-to-the-un-vote-for-palestinian-statehood>.

and sidestep direct peace negotiations, an intent most recently displayed in the Palestinian request for membership in the United Nations last fall.

The U.S. indefinitely blocked that effort by threatening to use its Security Council veto. However, the Palestinians were successful in their membership bid in the United Nations Educational, Scientific, and Cultural Organization (UNESCO).⁵ They and their supporters have also been very aggressive in using the Human Rights Council to attack Israel and its actions. A council decision earlier this year to launch a new investigation of Jewish settlements in the West Bank led Israel to cut working relations with the council.⁶

U.S. Administrations and Congresses have steadfastly supported defending Israel against politically motivated assaults. Frequently, the U.S. does so through the judicious use of America's veto in the Security Council. But when the veto is not available, the U.S. needs to use other tools, including its financial leverage.

To enhance U.S. influence, Congress should:

- **Maintain current prohibitions on funding U.N. organizations that grant membership to Palestine.** Current law prohibits U.S. funding of the United Nations or any affiliated body that accords Palestine full membership or the same status as member states.⁷ The funding prohibition has been applied to UNESCO and has been critical in forestalling Palestinian efforts to join other U.N. specialized agencies, and Congress should resist efforts by the Obama Administration to weaken this law.
- **Strengthen current restrictions on U.S. cooperation and support of the ICC.** Current law also limits U.S. cooperation with the ICC.⁸ Although the ICC is not technically a United Nations organization, it is possible that the funding prohibition could apply to the court. However, Congress should remove all doubt and

prohibit any funding, cooperation, or other support to the ICC if the Assembly of States Parties recognizes "Palestine" as a state or otherwise facilitates the Palestinian declaration. As with the above funding prohibitions, this restriction should not be subject to presidential waiver.

The purpose of U.S. membership in international organizations is to advance American interests. When a U.N. body threatens key U.S. interests, the U.S. should send a clear signal about the ramifications.

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5. Brett D. Schaefer, "What Palestinian Membership Means for UNESCO and the Rest of the United Nations," Heritage Foundation *Backgrounder* No. 2633, December 13, 2011, at <http://www.heritage.org/research/reports/2011/12/what-palestine-membership-means-for-unesco-and-the-rest-of-the-united-nations>.

6. "Israel Ends Contact with UN Human Rights Council," BBC, March 26, 2012, at http://www.bbc.co.uk/news/world-middle-east-17510668?cid=nlc-dailybrief-daily_news_brief-link16-20120327 (accessed April 4, 2012).

7. U.S. Code Title 22, Section 287e, states: "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." (Adopted as Public Law 101-246 in 1990.) "The United States shall not make any voluntary or assessed contribution: (1) 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, or (2) to the United Nations, if the United Nations grants full membership as a state in the United Nations to any organization or group that does not have the internationally recognized attributes of statehood, during any period in which such membership is effective." (Adopted as Public Law 103-236 in 1994.)

8. Brett D. Schaefer and Steven Groves, "The U.S. Should Not Join the International Criminal Court," Heritage Foundation *Backgrounder* No. 2307, August 18, 2009, at <http://www.heritage.org/research/reports/2009/08/the-us-should-not-join-the-international-criminal-court>.