Are the Palestinians changing their legal tactics in the international courts?

October 27, 2021

By Alan Baker and Leah Bilke

JNS.org

<https://www.jns.org/opinion/are-the-palestinians-changing-their-legal-tactics-in-the-international-courts/>

Recent indications from the Palestinian leadership appear to point towards a change in their campaign to undermine and criminalize Israel and its representatives in international forums.

For some years, the Palestinian leadership has attempted to politically manipulate the International Criminal Court, with the aim of criminalizing Israel’s political and military leadership. Through a systematic policy of referring hundreds of personalized war-crimes allegations, they have managed to ceremonially present these claims to the former prosecutor of the International Criminal Court (ICC).

While the former ICC prosecutor opted to open a formal investigation following Palestinian referrals, several serious legal questions are still pending with regard to the ICC’s processing of such referrals. These include the question of the legal standing of the Palestinians vis-à-vis the ICC, in light of the ICC Statute requirement that only states may be party to it. Similarly, concomitant questions exist as to whether the Palestinians fulfill the requirements for statehood under international law.

There are indications that the court is not in a hurry to take up the issue. Therefore, the Palestinian leadership appears to be changing its legal tactics and veering toward an attempt to criminalize Israel itself at the International Court of Justice at The Hague (ICJ).

### From the ICC to the ICJ

The International Criminal Court was established in 1998 as an independent judicial body to try individual criminals accused of the most serious crimes of concern to the international community. The International Court of Justice is the United Nations’ principle judicial organ and is entrusted with solving issues of litigation between states, as well as issuing advisory opinions on legal questions referred to it by U.N. organs.

Based on recent statements by the Palestinian leadership, they appear to be considering an appeal to the ICJ to question the very legality of Israel’s status and actions in the territories in the light of international law and the Oslo Accords.

This indication of a change in legal tactics is evident in the [statement](https://unispal.un.org/DPA/DPR/unispal.nsf/0/172D1A3302DC903B85256E37005BD90F) by Mahmoud Abbas, head of the Palestinian Authority and the PLO, before the U.N. General Assembly on Sept. 24, 2021:

“[W]e will go to the International Court of Justice as the supreme international judicial body, on the issue of the legality of the occupation of the land of the Palestinian state and the relevant obligations for the United Nations and States around the world in this regard and all will have to respect the conclusions of the Court. Colonialism and apartheid are prohibited under international law and they are crimes that must be confronted and a regime that needs to be dismantled.“

Palestinian media sources have also reported a call by the Palestinian leadership to lawyers assisting the P.A. in Europe to prepare a petition to the ICJ aimed at “obliging Israel to implement the Oslo Accords,” claiming that the accords “have international validity since they were approved by the Israeli government and its Knesset.”

It is unclear from the Palestinian statements if the intention is to try to lodge with the ICJ contentious cases against Israel, as they did against the United States after the transfer of the U.S. embassy to Jerusalem (see below), or if they intend to seek, through the General Assembly and other U.N. organs, non-binding advisory opinions by the court, similar to their 2004 request for an advisory opinion on the Legal Consequences of the Construction of Israel’s Security Barrier.

It is also unclear if those advising the Palestinian leadership fully understand the distinction between the status and functions of the ICC and the ICJ.

However, any such change in legal tactics raises a number of issues that require addressing.

### The International Court of Justice

Article 92 of the U.N. Charter determines that all members of the United Nations are automatically considered to be members of the ICJ, and that non-members of the United Nations may become party to the ICJ statute pursuant to conditions determined by the U.N. General Assembly. According to article 34(1) of the statute, “Only states may be parties in cases before the Court.”

Pursuant to U.N. practice, states not party to the statute that wish to litigate against another state are required to deposit a declaration accepting and undertaking to respect the Court’s jurisdiction.

While the Palestinians are not members of the Court, they have already engaged the ICJ in the context of their 2004 [petition](https://www.icj-cij.org/en/case/131) to the U.N. General Assembly requesting an advisory opinion by the Court on the issue of Israel’s security barrier. In this context, the Court permitted them to enter submissions, despite their lack of status as a state.

More recently, they have submitted a substantive [application](https://www.un.org/unispal/document/relocation-of-us-embassy-to-jerusalem-palestine-vs-us-icj-order/) to the ICJ against the United States to litigate against the relocation of the U.S. embassy to Jerusalem, claiming that it violates the 1960 Vienna Convention on Diplomatic Relations. As part of this submission, they deposited a [declaration](https://www.icj-cij.org/en/states-not-parties) accepting the competence of the Court in regard to disputes arising from the Vienna Convention.

The question of whether the Palestinians, lacking state status, have the capacity to deposit such a declaration, is one of the jurisdictional issues presently under consideration by the Court, which [requested](https://www.icj-cij.org/en/case/176/press-releases) that the parties first address the question of the jurisdiction of the Court and that of the admissibility of the Application.

However, the fact that they are interacting with the ICJ, representing themselves as a state, in the same manner in which they have interacted with the ICC, is indicative of their assumption that their status and their petitions will be accepted.

### ICJ Jurisdiction

In the 1950s Israel informed the United Nations of its acceptance of the compulsory jurisdiction of the ICJ to adjudicate international disputes subject to a number of limitations, it stipulated a number of caveats:

a. Any dispute in respect to which the parties have agreed or shall agree to have recourse to another means of peaceful settlement and any dispute or matter which is in any manner related to any such dispute;

b. Any dispute relating to matters which are essentially within the domestic jurisdiction of the State of Israel;

c. Any dispute between the State of Israel and any other State whether or not a member of the United Nations which does not recognize Israel or which refuses to establish or to maintain normal diplomatic relations with Israel and the absence or breach of normal relations precedes the dispute and exists independently of that dispute;

d. Disputes arising out of events occurring between May 15, 1948, and July 20, 1949;

e. Without prejudice to the operation of subparagraph (d) above, disputes arising out of, or having reference to, any hostilities, war, state of war, breach of the peace, breach of armistice agreement or belligerent or military occupation (whether such war shall have been declared or not, and whether any state of belligerency shall have been recognized or not) in which the Government of Israel are or have been or may be involved at any time.

f. Any dispute in respect of which any other party thereto has accepted, or amended, a previous acceptance of the compulsory jurisdiction of the International Court of Justice, only in relation to or for the purpose of the dispute; or where the acceptance or the amendment of a previous acceptance of the Court’s compulsory jurisdiction, on behalf of any other party to the dispute, was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court.

Israel’s acceptance of the court’s compulsory jurisdiction was nevertheless revoked on Nov. 21, 1985, when Israel [notified](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en#3) the U.N. Secretary-General of its decision to terminate its former declaration. As such, Israel no longer accepts the compulsory jurisdiction of the ICJ.

Accordingly, it may be assumed that in light of Israel’s 1985 revocation of its acceptance of the Court’s jurisdiction, any Palestinian attempt to litigate against Israel at the ICJ regarding the status of the territories or the implementation of the Oslo Accords will not be accepted by the Court.

### Israel’s legal status in the territories

Abbas’s desire to petition the court on the “issue of the legality of the occupation of the land of the Palestinian state and the relevant obligations for the United Nations and States around the world in this regard” raises many questions.

A legal situation of “occupation” is, in and of itself, not inherently illegal. On the contrary, it is a legally acknowledged situation in international law and practice for which the international laws of armed conflict and international humanitarian law set out detailed provisions. The issue of Israel’s status in the territories since 1967, and whether such presence constitutes an “occupation” or some other form of interim administration pending resolution of the dispute regarding the territories, raises legal questions that have never been substantively resolved and that are the subject of an ongoing peace negotiation process.

To raise the question before the ICJ as to whether there exists a “Palestinian state” would appear to be presumptuous and even to pre-empt and prejudge the outcome of the negotiation process.

There exists no internationally accepted and binding document which attests to the existence of any Palestinian state. While numerous non-binding U.N. General Assembly resolutions have indeed called for and recommended the establishment of such a state, there is no commitment in the peace-process documentation as to whether, if and how such a state is to be established. On the contrary, in the still-valid 1993-95 [Oslo Accords](https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx), both the PLO and Israel are committed to negotiating between them an agreement on permanent status. Such permanent status could be one, two, three, or more states, a federation, a confederation, a condominium, or any other permutation.

It is improbable that the ICJ would want to or could constitutionally involve itself in prejudging issues that are still the subject of ongoing negotiations between the parties, with the full sanction of the international community.

### Violation of the Oslo Accords

The Palestinian leadership alleging before the United Nations and ICJ that Israel is violating the Oslo Accords would be ironic in light of the long list of fundamental breaches of those accords by the Palestinians, whether by continuing incitement, support for and advocacy of terror, economic boycott, sponsoring and supporting the BDS campaign and refusal to resume negotiations.

Their defense and citation of the Oslo Accords are even more ironic in light of their inability or lack of will to honor a host of specific commitments pursuant to the Accords. Such basic violations include Palestinian attempts to alter the status of the territories unilaterally; their active engagement in international diplomacy in violation of their commitments not to be so involved; their accession to international treaties and organizations; their expulsion by the Hamas terror organization from any capability of governing the Gaza Strip; and their consistent refusal to return to the negotiating table with Israel.

### Status of the Oslo Accords

However, in any event, in order to petition the ICJ and allege violations of the Oslo Accords, the Palestinians would need to indicate the existence of ICJ jurisdiction to deal with the Accords and prove that the agreement constitutes an “international treaty” duly registered with the Treaties Division of the United Nations.

In defining an international treaty, the 1969 Vienna Convention on International Treaties [defines](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

The Oslo Accords (1991-93) and their related documentation, inasmuch as they represent agreements between a sovereign state entity (Israel) and a non-state entity (the PLO), do not appear to fall within the definition of an international treaty as set out in the 1969 Vienna Convention. The accords contain no provision for registration with the United Nations or any other international body or state.

Israel has not registered the accords with the United Nations but considers them to be more than a mere contractual arrangement with a non-state entity. In Israel’s view, they constitute a sui generis agreement, in light of the fact that they were countersigned by leading international figures such as the presidents of the United States, Egypt and the Russian Federation, as well as by the official representatives of the European Union and the Kingdom of Norway, who signed as witnesses. Several U.N. resolutions have also endorsed them.

In light of the above, it remains improbable that the Palestinian leadership could establish any viable cause of action in the ICJ against Israel based on the Oslo Accords.

### ICJ advisory opinion

In light of the above-noted doubts regarding an attempt to engage the ICJ in a contentious case against Israel, the issues raised by Abbas as a basis for engaging the court may be taken up by resolutions of the U.N. General Assembly or other U.N. body in attempts to request advisory opinions pursuant to article 65 of the ICJ Statute. This would require the Palestinians and their supporters to garner a General Assembly resolution requesting such an opinion.

Such opinions may only be on legal questions and, in any event, as with the 2004 Security Barrier opinion, are not binding.

### Conclusion

Rather than seeking ways to attack and undermine Israel and its leadership through wild and hostile accusations and empty threats, and by the manipulation and abuse of the various U.N. institutions and international judicial bodies, the Palestinian leadership should resort back to the commitment made by PLO Chairman Yasser Arafat in his letter dated Sept. 9, 1993, to Israel’s Prime Minister Rabin, according to which:

“The PLO commits itself to the Middle East peace process, and to a peaceful resolution of the conflict between the two sides and declares that all outstanding issues relating to permanent status will be resolved through negotiations.“

Instead of providing the Palestinian leadership with a starring role on the international stage and encouraging their hostility, it is high time that the international community urged the Palestinian leadership to come before it with clean hands, to put its house in order, to present to the world a unified and responsible leadership capable of honoring its commitments in signed agreements and willing to resume a realistic and genuine negotiating process.