The new international law principle of relaxation

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For those who were skeptical about submitting US armed forces personnel to the jurisdiction of the International Criminal Court in The Hague, the April 30, 2020 statement of ICC Prosecutor Fatou Bensouda, should reinforce their concerns. Bensouda recommends the ICC recognize its territorial jurisdiction over “Palestine” as a prelude to examining war crimes allegations against Israeli citizens engaged in self-defense.

Her recommendation required Bensouda to first recognize Palestinian statehood, and in so doing, to abandon a longstanding principle of international law set forth in the Montevideo Convention of 1933: A “defined territory” is an essential aspect of statehood. So too, is the ability to effectively control such territory.

Bensouda disregarded accepted norms of sovereignty and instead proposed a more flexible approach, explaining, “Statehood should not be limited to a mere ‘empirical’ assessment of the existence of effective control.” Accordingly, the ICC’s jurisdiction should extend to such “less effective” states as “Palestine.”

Bensouda’s approach enables the Palestinians to overcome otherwise insurmountable territorial hurdles to achieving statehood under present conditions. After all, the most that can be said of the control of areas Palestinians claim as their own is that they remain contested and unsettled. Palestinian Authority President Mahmoud Abbas controls limited areas of Judea and Samaria (the “West Bank”), areas that some Palestinian activists complain are “Swiss cheese,” precisely because of the Authority’s lack of control and non-contiguity.

Meanwhile, Abbas’s rival, Hamas Chairman Ismail Haniyeh, controls the non-contiguous territory of the Gaza Strip. Both men have claimed, in varying degrees, title to the State of Israel itself. However, all of these areas remain under Israeli security oversight, including a blockade to prevent the smuggling of more sophisticated weaponry into the Strip.

How then, is the ICC to determine the territorial borders of “Palestine”? Under such circumstances – non-contiguous territory, undefined borders, and control by a mix of three different ruling entities – Bensouda’s conclusion regarding “Palestine’s” sovereignty is questionable.

Bensouda, whose visa the US State Department revoked in April 2019 in connection with her effort to investigate US forces in Afghanistan, is unpersuaded by these inconvenient facts.

How can a court like the ICC presume to exercise jurisdiction over countries like the United States and Israel that have avoided ratifying the Rome Statute treaty that created the ICC and the mechanism by which member states consent to the Court’s jurisdiction? The answer lies in Article 12 of the Rome Statute, which purports to create jurisdiction even over the nationals of non-parties to the Rome Statute for allegedly criminal conduct committed in the territory of any parties to the statute.

Hence the Palestinians’ strategy of “submitting” to the ICC’s jurisdiction so as to become a “state party” whose territory can become the launching pad for war crimes claims against Israeli nationals.

TO BORROW the name from one organization submitting a brief in the case opposing Bensouda’s recommendation, this is “lawfare,” by which Palestinians may succeed in their propaganda campaign where rockets and suicide bombers have failed.

Indeed, the Palestinians’ strategy ensures a double benefit. Pro-Palestinian activists know that almost all international forums are a “home game” for their cause. The Palestinian Authority joined the Rome Statute in 2014 as a “state” member knowing it would enjoy the full benefits of membership, including the ability to provoke an investigation of individual Israeli citizens’ “war crimes.”

Additionally, the international pro-Palestinian lobby guarantees that membership comes free of the costs of admission, including close scrutiny of the Palestinian Authority itself.

There is no shortage of compelling human rights issues for international lawyers to focus upon: the sentence to life imprisonment with hard labor or death for the sale of land to Jews by Arabs; persecution of Palestinian homosexuals; incitement in Palestinian school textbooks; the indoctrination of Palestinian children in summer terrorist training camps; and Hamas’s use of civilians as human shields.

At first glance, the United States and Israel might have been reassured by the international law principle of “complementarity.” Article 17 of the Rome Statute limits ICC jurisdiction if a state with a robust and independent judiciary is willing and able to prosecute a case.

There is wisdom in deferring to the normal well-functioning mechanism of a domestic judiciary. After all, why should the ICC expend resources and authority on a prosecution that could be achieved more effectively and efficiently in the defendant’s own country, where witness testimony and other evidence are more readily obtained?

Deference to complementarity would mean a modest role for the ICC. It would also avoid so-called “political questions” and ensure the ICC merely fills the gap when an individual accused of a war crime would otherwise evade prosecution in his or her own country. Hence the ICC prosecutions to date have focused on citizens of regimes lacking judicial independence and effectiveness.

Deference to complementarity is appropriate in Israel’s case, with its unfettered – indeed, some critics say, highly activist – judiciary. The Israeli Supreme Court has exercised judicial review of human rights petitions relating to the real-time conduct of its army in live combat operations, and criminally prosecuted and sentenced soldiers for violating the military law. In stark contrast, any of Israel’s neighbors would be more worthy beneficiaries of the attention of the robed legalists at The Hague.

When reviewing Article 17’s complementarity principle and Article 12’s non-party jurisdiction principle, it is clear the latter will prevail. Complementarity will be discarded as easily as the principles that states cannot be bound by treaties to which they do not consent, and that statehood requires a defined territory. Any American or Israeli soldier defendant before the ICC should assume the worst.