Fighting the Palestinians’ Weaponization of the ICC

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The Palestinians have weaponized the International Criminal Court (ICC). Leveraging the decision of the United Nations General Assembly to bestow Palestine with the title “Non-Member Observer State,” the Palestinian leaders decided to join the ICC, which accepted its application with open arms. Then, on May 15, 2018, the Palestinians exercised their “right as a State Party to the Rome Statute to refer the Situation of Palestine for immediate investigation” to the ICC prosecutor, who had previously opened an informal “preliminary examination” on her own initiative.

The Palestinians’ referral checked many of the boxes defining the crimes subject to ICC jurisdiction, particularly crimes against humanity and war crimes. They charged that the “unlawful occupation of the territory of the State of Palestine and the establishment and maintenance of settlements by Israel in Occupied Palestinian Territory (“OPT”), including East Jerusalem, has (sic) involved the enactment and maintenance of a multi-layered system of violence and intimidation against the Palestinian population, the destruction and unlawful appropriation of their properties, the severe violation of their fundamental rights on discriminatory grounds and the institutionalization of a separate structure of life and dual system of law and other measures deliberately intended to change the demographic composition of the OPT, including in particular in East Jerusalem. It has also involved the widespread and systematic attack on the Palestinian civilian population, through the commission of crimes, to create and perpetuate such a regime. These acts qualify under the Rome Statute as both war crimes and crimes against humanity.”

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On May 24, 2018, the ICC’s Presidency assigned the “Situation in Palestine” to the ICC’s Pre-Trial Chamber, which took steps to begin informing alleged “victims” as to the ICC’s role and activities, so they can “properly exercise their rights.”

The ICC’s chief prosecutor Fatou Bensouda’s office issued its “Report on Preliminary Examination Activities” for 2018 on December 5, 2018, which included a section on the Palestinian situation. It appears that a decision is near on whether to open a formal investigation into Israeli actions in the West Bank and Gaza mentioned in the report, including demolition of Palestinian property, eviction of Palestinians from the West Bank and East Jerusalem, plans to evacuate residents of the Bedouin village Khan al-Ahmar, settlements construction, the 2014 Gaza war, and more recent violence in and around the Gaza Strip border with Israel stemming from Palestinian protests. Experts believe that the prosecutor will open such an investigation with the Pre-Trial Chamber’s blessing in the near future.

Israel’s Foreign Ministry stated its official position with respect to any ICC proceedings brought against it: “Israel is not a member of the International Criminal Court and our clear stance is that the court does not have authority to deal with the Israeli-Palestinian conflict, among other things because the Palestinian Authority is not a state.”

Is Palestine a genuine state? Not really, but that does not matter to the ICC

Israel is right that the Palestinian Authority is not a state in any meaningful sense. Given the Palestinian Authority’s split with Hamas which controls Gaza, the Palestinian Authority is a dysfunctional entity without full control under a unified government of the territory or population it claims comprises the “State of Palestine.” However, such an inconvenient fact is unlikely to stop the ICC from proceeding with a formal investigation and possible charges against Israeli political leaders, security police, and Israeli Defense Force (IDF) military personnel. The problem is that many states – with the notable exception of the U.S. for now – will abide by the decisions of the ICC and enforce any arrest warrants against Israelis traveling outside of Israel that the ICC may choose to issue.

The Rome Statute lacks any specific definition of what constitutes a “state.” Nevertheless, there are functional factors that may be viewed as indicia of statehood that the ICC will almost certainly rely upon to entertain Palestine’s criminal referral of Israeli actions to the ICC. These indicia include the UN General Assembly’s recognition of Palestine as an observer state, Palestine’s chairmanship of the Group of 77 and China, the Palestinian Authority’s exercise of de facto governmental, security and administrative functions of significant parts of Palestinian territory, and the ICC’s acceptance of Palestine’s accession as a state party for the purposes of the Rome Statute treaty in the first place. The election of Palestinian Authority Attorney General Dr. Ahmad Barak to serve as a member of the “Advisory Committee on Nominations” of judges on the International Criminal Court serves as confirmation of ICC state parties’ acceptance of Palestine as an equal state party to the Rome Statute.

Moreover, as for the split of governance and control between Hamas and the Palestinian Authority over portions of Palestinian territory (Gaza vs. the West Bank), the Palestinians will argue that they came together in support of Palestine’s membership in the ICC and its criminal referral.

Even so, if the Palestinian referral proceeds to more formal stages as expected, Israel could assert multiple objections on various grounds that do not have to rely on the lack of Palestinian statehood argument alone. Israel can also go on the offensive.

### **Potential Israeli defenses**

First, the Pre-Trial Chamber judges cited the Palestinians’ definition of the territorial boundaries of the “State of Palestine” as comprising “the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip.” The prosecutor’s 2018 report appeared to assume that this definition applies to the ICC’s proceedings, referring to “crimes allegedly committed by officials of the Israeli authorities in the West Bank, including East Jerusalem, which may fall under the purview of article 7 of the Statute on crimes against humanity. Specifically, these allegations relate to the crime of persecution, transfer and deportation of civilians, as well as the crime of apartheid.”

If the ICC formally accepts this definition of the “State of Palestine” for purposes of the geographical scope of its investigation and/or prosecution of charges against Israelis, it would be prejudging an issue over disputed boundaries that is still open for final negotiations between Israel and the Palestinians.  Pursuant to UN Security Council Resolution 242, which remains in force, Israel was only expected to withdraw “from territories” to “secure and recognized boundaries.” Those boundaries were to be the subject of direct negotiations between Israel and the Palestinian leadership. The ICC does not have the legal authority to make judgments based on territorial parameters claimed only by one side to the controversy before it.

Second, the Palestinians should not be allowed to come before the ICC and plead for “justice” when their own hands are so unclean. Hamas’s call for Israel’s annihilation and its rocket launches from the Gaza territory that it controls against civilians in Israel, Hamas’s support of suicide bombings and murders of Israeli civilians using guns, knives and vehicles, and Palestinian leaders’ incitement to violence and rewarding of terrorists demonstrate their complete disdain for the most basic rule of law.

Third, as to the violence resulting from Palestinian protests in and around the Gaza border fence with Israel, Hamas, not Israel, has effective control of the Gaza side of the border fence and has been encouraging violence across the border with Israel rather than trying to contain it. Israel does not have its own security forces in place on the ground in Gaza to stop, as a law enforcement matter, the Hamas-instigated violence there and Hamas-instigated attempts by Palestinian militants to illegally cross into Israel en masse. Thus, the Israeli military has no choice but to deal with Hamas and other Palestinian terrorist groups as hostile forces in the context of an armed conflict. As opposed to the body of strict international human rights law governing law enforcement by an “occupying” force, the body of international law governing the use of force against combatants and even civilians thrust into a combat situation are more permissive. Moreover, while the Israeli-Palestinian conflict is of interest to the international community and the subject of multiple UN resolutions and reports, it is fundamentally a localized conflict between neighboring combatants over disputed land. This affects whether the ICC has any jurisdiction over alleged “war crimes” committed during the course of the conflict in Gaza, the West Bank or East Jerusalem.

Fourth, the ICC has already demonstrated bias in its appointment of the Palestinian Authority Attorney General to the “Advisory Committee on Nominations” of judges on the International Criminal Court while the Palestinians’ referral is still pending before the Court. The potential for Dr. Ahmad Barak to use his position on the ICC committee to unfairly influence the selection of future judges who may be called upon to rule on the Palestinians’ case is patently obvious. Moreover, given the UN Human Rights Council’s incontrovertible bias against Israel, any reliance by the ICC prosecutor or judges on Israel-bashing reports by the Council or its so-called “fact-finding” groups, including the flawed findings released last month by the UN Commission of Inquiry on Gaza Violence, will inherently taint the ICC’s decisions.

Fifth, and most importantly, under the ICC’s principle of complementarity the ICC should step aside. Complementarity involves the existence of national institutions fully capable and willing to handle in a genuine fashion the potential cases being considered for investigation by the ICC prosecutor’s office. Israel’s judicial system is robust, independent, and perfectly capable and willing to investigate and prosecute Israelis accused of the international crimes alleged by the Palestinians. The ICC prosecutor’s 2018 report stated, without criticism, that “[W]ith respect to crimes allegedly committed by members of the IDF, the information available indicates that all of the relevant incidents are or have been the subject of some form of investigative activities at the national level within the IDF military justice system.” In any event, the report left out the critical additional fact that Israel’s civilian High Court thoroughly examined the Israeli Defense Force’s rules of engagement governing use of force in connection with the violent clashes in Gaza. The Israeli High Court upheld their legality, with the caveat that the government must conduct independent investigations of individual cases of alleged infractions of the rules of engagement in practice. There is no credible evidence to indicate that Israel cannot or will not undertake without delay such investigations at the national level in an impartial, fair and independent manner as measured under reasonable objective criteria, obviating any grounds for the ICC to determine that the Palestinian charges are “admissible” for the ICC to handle itself.

### **Potential offense strategies**

In the highly politicized context in which the ICC is being pressured to take charge of the Palestinians’ referral rather than dismiss it on any of the grounds described above, however, these defenses may not be enough. Israel will need to take the offensive, treating Palestine as the “state” it claims to be for the purpose of filing charges against its leaders and armed terrorists.

True, Israel itself is not a party to the Rome Statute. The Palestinians may object on the grounds that Israeli citizens thus lack standing to bring their own charges before the ICC. However, the Palestinians invoked the ICC’s judicial process in the first place. If and when the ICC decides to accept jurisdiction of the Palestinians’ referral of alleged crimes by Israeli citizens after the prosecutor completes her preliminary examination and, with approval of the Pre-Trial Chamber, launches a formal investigation and possible prosecution, fundamental fairness should allow Israeli citizens to have their own day in the same Court. The ICC must assume jurisdiction over any counter-referrals filed by aggrieved Israeli citizens against the Palestinian state party’s officials and armed groups for their own alleged violations of ICC crimes. The ICC can do no less if it is to fulfill its overriding purpose of putting an end to impunity for the perpetrators of such grievous international crimes as war crimes and crimes against humanity, whomever the perpetrators might be.

The offense strategy is already beginning to unfold. A group of Israeli farmers from the areas surrounding the Gaza Strip, for example, have lodged an official war crimes complaint with the ICC against Hamas leaders Khaled Mashal, Saleh Arouri, and Zaher Jabarin for promoting “fire kite” terror over Israeli lands.

The ICC prosecutor herself has already indicated receptiveness to examining alleged Hamas war crimes. Testimonies of Israel Defense Forces’ combat soldiers are being submitted to the ICC in that connection.

In addition, charges that Hamas is violating the ICC crime of “aggression” could be brought against Hamas leaders and armed militants. This crime includes “Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.” That should readily cover Hamas’s repeated rocket launches from its territory into Israel. The definition of “aggression” also includes “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”  The systematic pattern engaged in by Hamas and other Palestinian members of terrorist armed groups involving suicide bombings and murders of Israeli civilians via vehicles, knife attacks and gunfire should easily fit within that definition.

In addition to charges of war crimes, crimes against humanity, and aggression against Hamas leaders and other militants as outlined above, charges could be filed against Palestinian Authority President Mahmoud Abbas and other Palestinian Authority and Hamas leaders for using use torture and arbitrary arrests to quash dissent by peaceful activists and political opponents residing in the territories within Palestinian administrative control, as documented in detail by Human Rights Watch.

It will not be difficult at all to prove the absence of any independent, impartial Palestinian judicial system as measured under normal international standards. Indeed, which Palestinian “judicial” body would be used as a benchmark for determining the adequacy of “national” institutions for complementarity purposes in dealing with any Israeli charges against Palestinians for their alleged war crimes and crimes against humanity? Would it be Hamas’s make-believe “legal” system in Gaza, the Palestinian Authority’s fundamentally flawed legal system in the West Bank or both? There is no national judiciary run by a unified Palestinian government.

Thus, if Israel is to be regarded by the ICC as an occupying party responsible for the welfare of the inhabitants of the “occupied” Palestinian territories, whether Israel agrees or not with this conclusion as a legal matter, Israel should be able to leverage the status conferred by the ICC and ask the ICC to step in to fill the void left by the Palestinians’ own lack of a viable judicial system. How else would Palestinian inhabitants who have been victimized by Palestinian leaders’ crimes against humanity receive legal protection and justice?

The time is drawing near when the Palestinians’ lawfare strategy against Israel is likely to fully bloom, with the help of the ICC. Israel will need to be prepared immediately both to defend itself and to move to offense. This article has laid out a framework for such a multi-tiered response.