

Palestinians May Face Charges of War Crimes

In March 2013 Representative Ron DeSantis (R – FL) introduced, in the House of Representatives, the Palestinian Accountability Act, HR 1337, to withhold U.S. foreign aid from the Palestinian Authority. His essential argument was that the U.S. must demand accountability from recipients of foreign aid. The Palestinian Authority, he held, promoted violence and hatred against Israel, yet the U.S. continued “to dole out hundreds of millions of dollars” to it. The PA refuses to take the most basic steps towards peace.

The Act has not gone into effect, but the PA has still not accounted for its refusal to come to the negotiating table as a partner committed to peace with Israel. Instead, Mahmoud Abbas, president of the Palestinian Authority (PA) in the tenth year of his four-year term, as well as chairman of the Palestine Liberation Organization, chairman of the Central Committee of Fatah, a section of the PLO, announced on December 31, 2014 that he was officially requesting documents to sign the Rome Treaty (and 22 other international treaties), the Rome Statute establishing the International Criminal Court in July 1998. Thus, the PA can try to bring charges against the State of Israel and Israeli citizens in the International Criminal Court (ICC) in The Hague. According to the Treaty there are four international crimes: genocide; crimes against humanity; war crimes; and crimes of aggression.

From the political point of view this action by Abbas is a clear demonstration of the lack of accountability in any peaceful search for Palestinian political self-determination, a manifestation of his rejectionist behavior and refusal to come to the negotiating table with Israel. From a legal point of view it appears to be a precarious strategy for him.

The rule is that after an applicant signs the Rome Treaty, as the PA did, it takes two months before the application enters into force. If it is accepted complaints can be lodged before the ICC. A number of problems arise. First, the jurisdiction of the ICC is open only to states. It is true that on November 29, 2012 the UN General Assembly Resolution A/67/L.28 upgraded the status of the PA from a UN permanent observer entity to a "non-member observer state." This action was a non-binding Resolution, a symbolic expression of political opinion, not a legal document. It did not approve PA full-fledged membership of the international community.

Indeed, the PA does not constitute a real state as defined by the Montevideo Convention on the Rights and Duties of States approved on December 26, 1933. The Convention codified existing legal norms and the concept of statehood as accepted by customary international law.

Article 1 of the Convention sets out the four criteria as the conditions for statehood: permanent population; a defined territory; a stable government; a capacity to enter into relations with other states. It is evident that the PA cannot satisfy these four criteria.

With many Palestinians now residing in a number of countries it has no permanent population. The territory of a "Palestine" is disputed, not defined. In the light of the friction between Palestinian groups, particularly the hostility between Fatah and Hamas, the PA cannot be considered a governing body with exclusive authority over territory. It lacks capacity or is unwilling to enter into relations with Israel. Every objective analyst understands that Palestinian insistence on the "right of return" of refugees is a code word for the elimination of the state of Israel.

Even if the ICC accepts the PA enabling it to lodge complaints, charges cannot be brought automatically. It is only the prosecutor, Fatou Bensouda, a Gambian lawyer, who can

decide who gets indicted. She would consider if there is a reasonable basis to proceed. This process means determining that the situation meets the legal criteria established by the Rome Statute to warrant investigation. The stated criteria for consideration are jurisdiction, admissibility, and the interests of justice.

For Israel there are problems, but also real opportunities of which it could take advantage. If the PA claims that Israel committed war crimes or crimes against humanity on Palestinian territory the ICC could have jurisdiction over the issue. But this would provide Israel the opportunity to mount a counterclaim that "Palestine" is vulnerable to claims against itself.

This factor is important. Instead of the constant rhetorical accusations against Israel as a "criminal state," or an "apartheid state," Israel can make plain the facts that rarely appear in documents of the international community, or in the media, or in those issued by the World Council of Churches or charity groups such as Amnesty International, or are recounted in the speeches of Archbishop Desmond Tutu.

Charges of war crimes can in fact be brought against both Hamas and Fatah. The actuality of crimes committed by Hamas, with its Charter calling for the elimination of Israel, and its war of aggression, almost goes without saying. The continuing attacks by more than 4000 rockets and missiles against Israel civilians, the building of tunnels by the use of children, about 160 of whom have died in the digging, the use of international UNRWA buildings and schools from which to launch rockets, are war crimes witnessed on television and videos. No humane observer can feel anything but abhorrence at the execution on August 2, 2014 by Hamas of 18 "collaborators" who were never tried of any offence, or the execution on July 28, 2014 of 20 Gaza civilians for "antiwar protests."

President Abbas also faces a problem: be careful what you wish

for lest it come true. As head of a number of Palestinian organizations he is liable for their actions, terrorist as well as other activities. Even if he did not personally give the orders he is supposedly responsible for actions by the Al-Aksa Martyrs' Brigade that fired more than 2000 rockets against Israel, the Abu Nidal Brigades, and the Abdul Kader Husseini Brigade. The rockets fired by Fatah groups against Kibbutz Nir Or, Ashkelon, and other Israeli places on July 10, 2014 were, according to Abbas Zaki, a Fatah spokesman for Abbas, "a message to the Israeli enemy." Zaki is already notorious for his statement on Al-Jazeera TV in 2011 that Israel "must be removed from existence." President Abbas has given financial payments to terrorists and their families. He has named places and institutions in honor of killed terrorists.

By now Abbas must be aware that he faces the possibility of charges against him not only in the ICC, but also in U.S. courts. He can be tried in U.S. District Courts for hate speech made by members of his organizations. He can also be prosecuted in U.S. courts under RICO (Racketeer Influenced and Corrupt Organizations Act) laws for his activity in financing terrorists.

Any commentary on the Palestinian action must be one of regret, not pessimism. What is disheartening is that the Palestinian application for the ICC means negating the diplomatic peace process. This process has not been helped by the recent behavior of Sweden and Ireland who passed resolutions recognizing a "Palestinian state." These unilateral actions by the Palestinians and others contradict the 1995 Oslo Interim Accords: "Neither side (Israel and PLO) shall initiate or take any step that will change the status of the West Bank and Gaza pending the outcome of the Permanent Status negotiations."

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