The Palestinians’ statehood gamble at the ICC – analysis

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The Palestinians are pushing for European Union unilateral recognition of statehood as the best antidote to any pending Israeli annexation measures in the West Bank.

The specter of a possible Israeli-EU diplomatic showdown on this issue comes just as the question of Palestinian statehood has moved to an unlikely venue, the International Criminal Court.

The Palestinians did not start out attempting to gamble on statehood when they sought to open the door to war crimes suits against Israelis.

Until a few months ago, it has seemed the Palestinians were possibly succeeding in their war-crimes drive at the ICC, one of their chief arenas of diplomatic warfare against Israel. That was particularly true in December, when ICC Chief Prosecutor Fatou Bensouda said she believed Israelis and Palestinians had committed war crimes. Her statement addressed both Israelis and Palestinians, but it was seen as giving a nod in the direction of advancing war-crimes suits against Israelis.

In order to move forward on the issue, Bensouda asked the ICC pre-trial chamber to rule on the question of the court’s jurisdiction over actions in east Jerusalem, the West Bank and Gaza, as defined by the pre-1967 lines.

The Palestinians claim this territory should be part of the permanent borders of their future state. The UN has stated multiple times it considers this territory to be part of “occupied” Palestine, even though it does not recognize Palestine as a state.

In advance of the pre-trial ruling, more than 40 legal briefs were filed before the ICC by the February 14 deadline, asking for the right to weigh in on the question of jurisdiction. At the heart of many of the briefs is the question of whether Palestine is a state and whether territory in question is part of that state. The responses posted on the ICC website so far have been fairly evenly split, with about half of the briefs supporting Israel – holding that the court has no jurisdiction, in part because Palestine is not a state. The other half argue in favor of the Palestinians and Palestinian-statehood recognition.

So in a turn-around-of sorts, before the Palestinians can see the results of their efforts to open war crimes suits against Israelis, they have to worry about possible negative diplomatic and legal fallout on the issue of statehood.

In the court of public opinion, the international community has long considered that the state of Palestine exists, albeit under “occupation.”

The Palestinian Authority counts that it has full diplomatic relations with 138 countries, beginning from 1988 when the Palestinians issued their declaration of independence and recognized themselves as a state.

Their success in the international arena was underscored in 2012, when in a massive Palestinian diplomatic victory over Israel, some 138 UN member states agreed that Palestine was a state.

Those nations, representing 71% of the 193 UN member states, did not have the power to technically grant the Palestinians membership status. But the UN General Assembly could make a public statement that it considered Palestine to be state and it upgraded the Palestinian status at the UN to that of a non-member state.

It’s as far as the UN can go, because only the UN Security Council can grant membership status. The US, which has veto power at the UNSC, has blocked such Palestinian attempts.

But to the naked eye, the Palestinians operate at the UN, in many ways, as if they are a member state. This includes the ceremonial flying of their flag and the plaques and documents which speak of the “State of Palestine.” They are members of other UN bodies such as UNESCO and signatories to many UN treaties and statutes, including the Rome Statute, which governs the ICC.

Glaringly absent from the Palestinian roster of nations with whom they have full diplomatic relations, however, are the Western states – chief among them the US and many of the European countries, as well as the European Union as a bloc.

For the last 27 years, these countries have tied Palestinian statehood recognition to the peace process with Israel. Such recognition was supposed to come hand in hand with an agreement for a two-state solution. The US has held to this line. The Europeans have mostly agreed, and still do, in spite of their opposition to US President Donald Trump’s peace plan. A number of European countries, led by Luxembourg, are pushing to separate Palestinian statehood from the peace process, should Israel annex. But any such action would need EU consensus and, based on the briefs filed before the court, there are at least four countries that oppose the unilateral recognition of Palestinian statehood outside the context of the peace process. These include Hungary, the Czech Republic, Germany and Austria.

Out of the four, the Hungarian and Austrian briefs are the most telling. Hungary is one of the 138 nations the Palestinians count in their roster of countries that recognize their statehood. It was something Hungary granted to the Palestinians already in 1988, when it was part of the Soviet bloc. As part of that recognition, the Palestinians have an embassy in Hungary.

But Hungary also abstained from the 2012 UNGA resolution and has nodded in the direction of recognizing Jerusalem as Israel's capital by opening a trade office there in 2019, considered an extension of its Tel Aviv embassy.

In its brief to the court, Hungary noted it had recognized the Palestinian declaration of independence because it recognized the Palestinian right to self-determination, but that did not constitute statehood recognition. It similarly said the UNGA resolution in 2012 did not constitute statehood recognition.

“It is the Hungarian position that the territorial boundaries shall be settled through direct negotiations between the parties,” Hungary stated. It added that it doubted the Palestinians fulfilled all the “constitutive elements of Statehood.”

The Palestinians do not have full diplomatic relations with Austria, nor has Austria even recognized the Palestinian declaration of independence.

But Austria has supported Palestinian statehood moves at the UN, approving it as a member state of the United Nations Educational, Scientific and Cultural Organization and supporting the 2012 resolution.

Yet in its brief to the court, Austria, like Hungary, also clarified such moves did not constitute statehood recognition and cast a new meaning on its 2012 vote.

Moving forward, the question of Palestinian statehood before the ICC is a diplomatic wild card that could legally weaken or strengthen Palestinian claims.

The ICC, which initially granted the Palestinians state rights before the court, could expand that legal understanding in further support of Palestinian statehood. Or it could speak out against it. It could also accept jurisdictional or dismiss it without clearly addressing the statehood issue.

But either way, the Hungarian and Austrian briefs speak to the strong possibility of Palestinian failure in gaining EU unilateral recognition of Palestinian statehood.

They have also cast a shadow of doubt on the Palestinian statehood success at the UN. By defining Palestinian de facto statehood as merely cosmetic, they have placed a question mark on votes and actions that until now had seemed as if they squarely supported Palestinian unilateral statehood.