RECENT RESOLUTION


“[I]n suits and ties we will take the Israelis to The Hague, we will handcuff them. . . . This is a war without bullets.”¹ This assertion — from a confidant of Palestinian Authority (PA) President Mahmoud Abbas, in the wake of United Nations Security Council Resolution 2334² — reflects the modern rise of Palestinian lawfare: its strategy of using law “to achieve . . . warfighting objective[s]” against Israel.³ Having failed over the last half century to shift the balance of power through negotiations and armed resistance, the PA has turned to new battlefronts — including the Security Council and the International Criminal Court (ICC) — where it deploys international law to advance its territorial claims and further Israel’s political isolation.⁴ Resolution 2334, which condemned Israel’s settlements as illegal, is but the most recent iteration of this strategy: its legal language vindicates the Palestinian political narrative and could provide the centrifuge in the PA’s “nuclear” program of ICC prosecutions.⁵ Prior to 2334, the United States had consistently opposed PA lawfare as an “obstacle[ ] in the path to [a negotiated] peace.”⁶ Its abstention on 2334 constitutes

an unwelcome reversal, likely to entrench PA maximalism and thwart America’s stated aim of “mov[ing] the parties closer to an agreement.”

2334 came after months of lobbying by the Palestinian delegation and passed unanimously by virtue of a U.S. abstention. Its preamble begins by “expressing grave concern” that settlements are “imperiling the viability of the two-State solution,” and, in response, it calls for an immediate reversal of “negative trends on the ground.” Its central operative provision adjudges all settlement activities “in the Palestinian territory occupied since 1967, including East Jerusalem . . . a flagrant violation under international law,” and it concludes by requesting quarterly reports from the Secretary-General on Israel’s compliance.

To situate the resolution in its historical context is to wade dangerously into a sea of “contested histories.” Where the Palestinians describe Zionist dispossession of an indigenous Arab majority, Israel sees historic resettlement amidst Arab aggression in the course of defensive conflicts. The War of 1967 provides a natural entry point, when Israel first captured East Jerusalem and the West Bank from Jordan. In the war’s immediate aftermath, Israel annexed the former, but formed — and still partially maintains — an independent military administration over the latter. Settlements since established range from army bases, to government-sanctioned cities, to smaller outposts sometimes constructed in violation of Israeli domestic law.

7 Id.
9 S.C. Res. 2334, supra note 2, pmbl.
10 Id. ¶ 4. 2334 also “[c]alls upon all States . . . to distinguish, in their relevant dealings” between Israel and “occupied” territories, id. ¶ 5, and “for immediate steps to prevent all acts of violence against civilians,” id. ¶ 6. It rejects “any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations.” Id. ¶ 3.
11 Id. ¶ 1.
12 Id. ¶ 12. The resolution is technically nonbinding, as it never invokes the Council’s enforcement power under Chapter VII of the U.N. Charter. See Elena Chachko, UNSCR 2334 on Israeli Settlements, LAWFARE (Dec. 24, 2016, 11:26 AM), https://www.lawfareblog.com/ unsr c-2334-israeli-settlements [https://perma.cc/P0XA-6Z45].
15 See ANITA SHAPIRA, ISRAEL: A HISTORY 310 (2012).
17 Id.
Over the course of this history, the Security Council has addressed settlements twice, each time during the Carter Administration. In 1979, it passed Resolution 446 declaring that settlements lack “legal validity,” and, the next year, reaffirmed its judgment in Resolution 465. Subsequent U.S. presidents have all opposed such measures, and as recently as 2011, the Obama Administration vetoed a similar resolution on the grounds that it would “encourage the parties to stay out of negotiations.” But with 2334, Ambassador Samantha Power claimed things had changed: Israel’s settlement expansions now imperiled the two-state solution, and the traditional U.S. veto was no longer appropriate.

2334 also marked a departure from the Administration’s broader policy of opposing the PA’s efforts to leverage international fora against Israel. In November 2012, America was among the minority of countries to oppose the PA’s successful bid for “non-member observer state” status at the U.N. General Assembly. The following summer, Secretary of State John Kerry persuaded Abbas to defer joining international organizations for nine months in exchange for Israel’s release of 104 Palestinian prisoners, among them convicted murderers and terrorists. Once the interim measure lapsed in 2014, the PA acceded to the Rome Statute and joined the ICC, a move Ambassador Power condemned as “devastating to the peace process.”

---

19 Following the War of 1967, the Security Council passed Resolution 242, calling for “withdrawal of Israel’s armed forces from territories occupied in the recent conflict,” S.C. Res. 242, ¶ 1(i) (Nov. 22, 1967), and affirming Israel’s “right to live in peace within secure and recognized boundaries,” id. ¶ 1(ii). See Arthur J. Goldberg, Resolution 242 After 20 Years, in NAT’L COMM. ON AM. FOREIGN POLICY, U.N. RESOLUTION 242: ORIGIN, MEANING, AND SIGNIFICANCE 3, 8–9 (2002) (arguing that omission of the definite article “the” before “territory” was intentional, requiring that Israel withdraw from some, but not all, of the territory captured in 1967).


22 Rice, supra note 6.


25 See KITTRIE, supra note 4, at 206.

26 Id. at 230 (quoting State, Foreign Operations, and Related Programs Appropriations for 2015: Hearings Before the Subcomm. on State, Foreign Operations, and Related Programs of the
court’s prosecutor, Fatou Bensouda, initiated a “preliminary examination” of the Israel-Palestine conflict shortly thereafter, the U.S. Senate responded by threatening to suspend all foreign aid to the PA.28

2334 thus constitutes the latest stage in PA lawfare. As a political matter, the resolution’s legal language vindicates the Palestinian story of dispossession and could facilitate prosecutions of Israeli officials at the ICC.29 On America’s role, the question isn’t whether the PA used or abused law, but whether U.S. involvement squares with its bedrock commitment to promoting reconciliation between the parties.30 And on this score, 2334 fails to pass muster. At least since 2000, the PA has exercised strategic patience, rejecting peace deals and consistently demanding far more than Israel has shown a willingness to concede.31 In 2334, President Obama blessed the strategy’s most recent tactical iteration, and rendered the prospects of bilateral reconciliation increasingly remote.

The legal question on which 2334 opines is the subject of immense scholarship and intense dispute, with colorable arguments on both sides.32 Until 2334, President Carter was the only U.S. president to deem settlements unlawful; President Reagan held the contrary view.33 Subsequent administrations have avoided statements of law, precisely


29 2334 may promote lawfare of various stripes. See generally Kitttrie, supra note 5 (arguing the call “to distinguish” between Israel and occupied territories could facilitate boycotts).

30 See Rice, supra note 6; see also JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 226 (2012) (arguing “fruitful” critiques of lawfare interrogate its pragmatic effects, not its purported “abuses”).

31 See infra notes 57–65 and accompanying text.


because they have deep political reverberations. Just as claims of legality legitimize the settlement project and demote Palestinian self-determination, counterclaims of illegality reinforce the Palestinian story of dispossession and dismiss Jewish historical connections to the land. In vindicating the now-"dominant" Palestinian narrative,

The resolution’s language also stabilizes the ground on which Bensouda might stand, were she to press for a “formal investigation” of Israel’s settlement activities. To move beyond the “preliminary examination” stage, the situation in the West Bank must satisfy the Rome Statute’s dual jurisdictional requirements of complementarity and gravity. The former restricts the ICC to cases where the state is “unwilling or unable” to investigate and punish violators, and here, Israel’s settlement activities appear distinctly vulnerable. Not only do most settlements reflect official state policy, but Israel’s High Court of Justice has also deemed their status largely nonjusticiable. In contrast, the gravity requirement more heavily favors nonjurisdiction, and it’s where could prove most impactful. To maximize the court’s legitimacy and limited resources, ICC prosecutors have so far focused primarily on physical brutalities like murder and sexual violence. And though gravity’s floor “has never been set,” transfer — designated a “nongrave” breach under the Geneva Conventions — sits at the “bottom of the [c]ourt’s implicit hierarchy.”

36 See Philip, supra note 32, at 113.
39 Id. art. 17(1)(a).
42 See Margaret M. deGuzman, Gravity and the Legitimacy of the International Criminal Court, 52 FORDHAM INT’L L.J. 1400, 1452 (2009).
43 Kontorovich, supra note 41, at 392.
44 Id. at 382.
Resolution 2334 could alter this calculus. When measured by objective qualities like “bodily . . . harm,” the gravity determination is indifferent to words — from the Security Council or elsewhere. But some scholars have suggested a more subjective criterion — “social alarm” — displace brutality as gravity’s proper center. As a proxy for global outrage, 2334’s renewed expression of grave concern about Israel’s flagrant violations could prove decisive. The approach certainly risks politicizing the court’s docket and straining its legitimacy, but it would also help defuse oft-cited concerns that the ICC has become an “African Criminal Court.”

Signaling her sensitivity to this problem, the prosecutor recently promised to reshuffle her prosecutorial priorities, with a particular focus on two crimes, both of which the settlements are alleged to violate: “illegal exploitation of natural resources [and] dispossession of land.” Any prosecution that might facilitate would impede a negotiated settlement by emboldening the PA and fortifying its maximalism.

The above considerations show 2334 to be the latest phase in PA’s lawfare strategy, a species of what Abbas first described during the Second Intifada as “internationalized” resistance. In an effort to prevail over its more powerful rival, the PA has played a game of patience, buying time by demanding more than Israel has ever shown a willingness to concede. The strategy finds its clearest expression in


47 See Kittrie, supra note 5.

48 See Mark Osiel, When Law “Expresses” More than It Cares to Admit: Comments on Heller, in Future Perspectives on International Criminal Justice, supra note 46, at 254, 256.


50 Policy Paper, supra note 45, at 14; Office of the Prosecutor, supra note 27, at 29. Complementarity would likely bar prosecution on these grounds. See Kontorovich, supra note 41, at 391.

51 See Kittrie, supra note 4, at 208; see also Jack Goldsmith, The Terror Presidency 63 (2007) (describing ICC as a tool created and deployed by weaker nations to challenge more powerful adversaries like Israel and the United States).

52 See Abbas’s Call, supra note 4, at 74–77; Abbas, supra note 14 (calling for an “internationalization of the conflict as a legal matter”).

53 See Uri Resnick, Dynamics of Asymmetric Territorial Conflict 146–59 (2013). The PA’s ultimate political objectives are deeply contested. On the one hand, Abbas has called for “an independent Palestinian state with Jerusalem as its capital, . . . and resolution] [of] the refugee problem in accordance with [General Assembly] Resolution 194” — in other words, a
the Palestinian resistance ideology of *tsumud* (“steadfast resolve”): a willingness to forgo the benefits of political and economic cooperation, and “[p]ostpon[e] expected victory to the ‘long run.’” Lawfare is but the most recent tactical iteration of the strategy, and it promotes PA patience on two accounts. First, while no single lawfare act can furnish total victory, individual successes like 2334 can accumulate to intensify Israel’s long-run political isolation. Second — and in stark contrast to terrorism — lawfare projects an aura of legitimacy that shields the PA against foreign pressure to negotiate in good faith without preconditions.

Abbas’s accession to the Rome Statute captures these underlying commitments. With only two months until Israel’s next elections, the timing of the move drew criticism from the *New York Times* for “setting back the cause of statehood even farther” and giving “Israeli hard-liners new ammunition” to reject peace talks. But as one commentator astutely noted, this was precisely the goal. To a PA committed to pre-1967 borders, sovereignty over all of East Jerusalem, and a Palestinian right of return to Israel proper, Prime Minister Benjamin
Netanyahu’s leftist political opponents are but “wolves in sheep’s clothing,” unlikely to offer terms more favorable than those of their predecessors. In 2000, when Palestinian Liberation Organization Chairman Yasser Arafat first rejected Prime Minister Ehud Barak’s peace offer at Camp David, President Clinton reported that it was Arafat’s “demand for a ‘right of return’ of refugees to Israel” that ultimately undermined negotiations. Eight years later, Abbas rejected Prime Minister Ehud Olmert’s offer “out of hand,” but never countered. At the time, and now still, it was “almost impossible to imagine . . . any Israeli government[] going further”; and yet Abbas insisted “[t]he gaps were wide.” In the shadow of these prior offers, Abbas sought in Netanyahu a wolf that would come as a wolf: an opponent more amenable to settlements, and more vulnerable to delegitimation.

In Resolution 2334, an outgoing U.S. administration — pressed for time and diplomatic opportunity — handed Abbas a lawfare victory that will fuel this project of patience. When the Trump Administration presses for good-faith negotiations, the PA can now cite to the Secretary-General’s quarterly reports concerning Israel’s noncompliance, each time riding the tide of “social alarm” until the winds of global politics shift back in its favor.


59 See Michael Hirsch, Clinton to Arafat: It’s All Your Fault, NEWSWEEK (June 26, 2001, 8:00 PM), http://www.newsweek.com/clinton-aramat-its-all-your-fault-153779 [https://perma.cc/sGTF-KUAX]; cf. RABINOVICH, supra note 55, at 164 (noting that a right of return for millions of Arab refugees to Israel-proper is incompatible with two-state solution).


still on its side, the Obama Administration understood this well, vetting a similar resolution on the grounds that it would “encourage the parties to stay out of negotiations.”

Six years later, when the prospects of an Obama-brokered deal had vanished, the Administration reversed course, entrenching the PA’s preconditions and rewarding its preference for international fora over bilateral talks.

But what of the Obama Administration’s stated concern that settlement expansions imperil a two-state solution? Critically, the argument assumes that recent settlement activities risk foreclosing a contiguous Palestinian state. Yet Israel’s political geography proves to the contrary. Around eighty percent of Israel’s settlers live within miles of the Green Line and could be kept within its borders by “swapping territory equal to about four percent of the West Bank.”

In the event of agreement, the remaining settlements, which cover less than one percent of the West Bank’s territory, would either be dismantled or allowed to remain within a Palestinian state. Removal would certainly meet resistance from the Israeli right; but even Netanyahu has acknowledged “some Jewish settlements . . . would not be part of [Israel].” Alternatively, the 100,000 or so Jews living outside the blocs could simply remain in the Palestinian state, just as almost two million Arabs live as a minority within Israel. Though the approach isn’t free of difficulty, it reveals that the truly intractable obstacle to peaceful coexistence isn’t settlements, but Abbas’s insistence on an Israeli-free Palestine. Settlement activity needn’t foreclose a contiguous Palestine.

first implementation report describing Israel’s activity as “deeply concerning” and “undermin[ing] the very essence of a two-state solution”).

65 Rice, supra note 6.


67 Landler, supra note 64 (“[T]he ‘territorial contiguity of a future Palestinian state’ is threatened.”).


69 Kershner, supra note 18 (citing the position of Shaul Arieli, an “expert on political geography who prepared maps for past negotiations with the Palestinians”).

70 Philip, supra note 32, at 191.


72 Philip, supra note 32, at 80, 108.

73 See id. at 192 (raising problems of loyalty, citizenship, and legal autonomy).

74 Rudoren & Gordon, supra note 62 (quoting Abbas stating “no single Israeli [can remain]”).

75 In fact, when Obama pressured Netanyahu into a ten-month moratorium on settlements in 2010, it was Abbas who declined to “come to the table until the [freeze] was close to expiring.”
Even crediting the contiguity objection, condemnation by yet another U.N. organ was unlikely to slow the settler movement; instead, it would foreseeably harden Israel’s resolve and expedite its settlement project. In celebrating 2334, Islamic Jihad, an Iran-funded terror group in the Gaza Strip, discerned what many within the Obama Administration professed not to see: that while the resolution alone wouldn’t deter settlement construction, it would advance the Palestinian lawfare objective of “isolat[ing]” Israel through “prosecutions” and “boycotts.”

The political gridlock between Israel and the PA has translated into immense human suffering for Jews and Arabs alike. And yet Abbas insists he will “wait for Hamas to accept international commitments” and “wait for Israel to freeze settlements.” So long as the international community embraces the Palestinian narrative without reservation and enshrines it into law, the PA will continue to wait for these unrealities; and in the interim, people will suffer. By abstaining on 2334, the United States countenanced this patience and the irredentism that lies beneath it. The result was to render peace an ever-distant dream.

Landler, supra note 64. On the basis of history and bargain theory, one might view settlement intensification as among the few means of driving the PA away from its maximalism and toward the negotiating table. See RESNICK, supra note 53, at 193 (arguing “demographic investments in disputed lands by a strong rival can actually expedite conflict de-escalation”); cf. RABINOVICH, supra note 53, at 248–49 (describing fear of settlement expansion as animating Arafat’s apparent willingness to negotiate).


77 See Chachko, supra note 23.


79 Diehl, supra note 61 (quoting Abbas) (emphasis added).