

The U.S. efforts in the General Assembly came at the same time that the United States is seeking support for the Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy, a non-binding text that sets out principles for the use of AI.⁴⁵ That instrument, which the United States drafted and proposed on its own, now has the backing of fifty-four countries.⁴⁶

SETTLEMENT OF DISPUTES

The United States Comments on Matters Pending at the International Court of Justice and the International Criminal Court Pertaining to the Israeli-Palestinian Conflict

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The United States has commented on several pending matters at the International Court of Justice (ICJ) and the International Criminal Court (ICC) relating to the Israeli-Palestinian conflict. Participating in advisory proceedings at the ICJ, the United States has urged the court not to issue an opinion that would interfere with the political resolution of the dispute between Israel and the Palestinians through the negotiating framework endorsed by the Security Council and the General Assembly.¹ In a statement regarding a contentious case at the ICJ, the United States categorically repudiated South Africa's claims that Israel violated the Genocide Convention.² And responding to the news that the ICC prosecutor had applied to the court for arrest warrants for Israeli Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant,³ the United States "fundamentally reject[ed] the

⁴⁵ See Jacob Katz Cogan, *Contemporary Practice of the United States*, 117 AJIL 702, 728 (2023).

⁴⁶ See U.S. Dep't of State Bureau of Arms Control, Deterrence, and Stability, *Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy*, at <https://www.state.gov/political-declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy> [<https://perma.cc/2P5L-6LQM>]; see also Sydney J. Freedberg Jr., *US Joins Austria, Bahrain, Canada, & Portugal to Co-lead Global Push for Safer Military AI*, BREAKING DEFENSE (Mar. 28, 2024), at <https://breakingdefense.com/2024/03/us-joins-austria-bahrain-canada-portugal-to-co-lead-global-push-for-safer-military-ai>.

¹ See United States, *Written Statement, Request by the United Nations General Assembly for an Advisory Opinion on "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem"* (July 25, 2023), at <https://icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-20-00-en.pdf> [<https://perma.cc/V5TX-VNYM>] [hereinafter U.S. Written Statement]; United States, *Written Comments, Request by the United Nations General Assembly for an Advisory Opinion on "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem"* (Oct. 25, 2023), at <https://icj-cij.org/sites/default/files/case-related/186/186-20231025-wri-05-00-en.pdf> [<https://perma.cc/5LND-SABZ>] [hereinafter U.S. Written Comments]; International Court of Justice, *Verbatim Record, Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, CR 2024/7 (Feb. 21, 2024), at <https://icj-cij.org/sites/default/files/case-related/186/186-20240221-ora-01-0-bi.pdf> [<https://perma.cc/SW87-QLR2>] [hereinafter U.S. Oral Statement].

² See U.S. Dep't of State Press Release, *This Week's International Court of Justice Hearings* (Jan. 10, 2024), at <https://www.state.gov/this-weeks-international-court-of-justice-hearings> [<https://perma.cc/7ACR-PXBT>].

³ See International Criminal Court Press Release, *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine* (May 20, 2024), at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state> [<https://perma.cc/JYP7-EBVH>]. The prosecutor also applied for arrest warrants for Yahya Sinwar, Head of Hamas, Mohammed Diab Ibrahim Al-Masri, commander-in-chief of Hamas's military wing, and Ismail Haniyeh, head of Hamas's political bureau.

announcement,”⁴ and the House of Representatives passed a bill that would impose sanctions on foreign persons engaged in or aiding the investigation and prosecution and that would also rescind U.S. funding for the ICC.⁵ The U.S. stance in these matters stood in contrast to its strong support for the cases brought at the ICJ and ICC against Russia and Russian President Vladimir Putin.⁶

In the ICJ advisory proceedings, the General Assembly asked the court for an opinion on two questions regarding the “legal consequences arising from the . . . policies and practices of Israel . . . in the Occupied Palestinian Territory, including East Jerusalem.”⁷ The United States argued that the court should “exercise its discretion to address the referral questions within [the] established negotiating framework” for the resolution of the Israeli-Palestinian conflict.⁸ That “land for peace” framework⁹ “has its roots in Security Council resolutions 242 and 338 and was further defined and memorialized in the bilateral agreements between the Israelis and Palestinians.”¹⁰ The U.S. statement explained the continued commitment of the Security Council and the General Assembly to a negotiated solution through this framework, detailed the parties’ recent efforts within the framework, and noted how the General Assembly’s resolution requesting the advisory opinion also endorsed the negotiating framework.¹¹ It urged the court to “avoid disturbing the established negotiating framework” and consequently not “address issues that form the very subject matter of the dispute and address matters the Security Council and General Assembly have repeatedly recognized must be

⁴ See U.S. Dep’t of State Press Release, Warrant Applications by the International Criminal Court (May 20, 2024), at <https://www.state.gov/warrant-applications-by-the-international-criminal-court> [<https://perma.cc/ZNC4-XUFW>] [hereinafter Blinken Statement].

⁵ See text at notes 33–37 *infra*.

⁶ See, e.g., U.S. Dep’t of State Press Release, Welcoming the International Court of Justice’s Order Directing the Russian Federation to Immediately Suspend Military Operations in Ukraine (Mar. 16, 2022), at <https://www.state.gov/welcoming-the-international-court-of-justices-order-directing-the-russian-federation-to-immediately-suspend-military-operations-in-ukraine> [<https://perma.cc/5GVJ-922Y>]; White House Press Release, Remarks by President Biden Before Marine One Departure (Mar. 17, 2023), at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/03/17/remarks-by-president-biden-before-marine-one-departure-32> [<https://perma.cc/XN4E-X7YC>]; Jacob Katz Cogan, Contemporary Practice of the United States, 117 AJIL 500, 520 (2023).

⁷ GA Res. 77/247, para. 18 (Dec. 30, 2022) [hereinafter Request for an Advisory Opinion]. The two questions were:

- (a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
- (b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

Id.

⁸ U.S. Written Statement, *supra* note 1, at 5, 6.

⁹ The “land for peace” principle “recognizes . . . [the interdependence between] *both* the withdrawal of forces from occupied territory *and* the end to conflict and respect and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area, and the right of each State to live in peace within secure and recognized borders.” U.S. Written Comments, *supra* note 1, at 10–11 (emphasis in original).

¹⁰ See U.S. Written Statement, *supra* note 1, at 6.

¹¹ *Id.*

resolved through direct negotiations between the parties,” including “permanent status issues at the heart of their dispute such as borders and security arrangement.”¹² The court’s advisory opinion on *Construction of a Wall*, the United States argued, properly avoided “prejudg[ing] or interfer[ing] with the existing framework for negotiations and its ‘land for peace’ principle.”¹³ The United States cautioned that, “[i]f the Court strays from this approach, there is substantial risk that . . . the Court’s advice could prejudice or inadvertently suggest to the parties that there is no utility to negotiations on the interdependent elements of the land for peace principle that the Security Council and General Assembly have so long endorsed and encouraged.”¹⁴ Consequently, “[w]hatever the Court’s opinion on the legal consequences of particular violations of international law,” it should not “issue an opinion that calls for a unilateral, immediate and unconditional withdrawal by Israel” because that “would be contrary to the established framework” that is “structured around the two interdependent and inseparable elements . . . [of] withdrawal . . . [and] peace and security.”¹⁵

The United States also took aim at the premise of the second question that the General Assembly referred to the court, which asked how Israeli “policies and practices,” such as “prolonged occupation [and] settlement and annexation of the Palestinian territory,” “affect the legal status of the occupation.”¹⁶ The premise was faulty, according to the United States, because “the legal *status* of the occupation under international humanitarian law results from the fact of occupation alone.”¹⁷ Under international humanitarian law, a belligerent occupation’s legal status “does not change if the occupation is prolonged or if alleged violations of international humanitarian law or other international law have been committed by the Occupying Power.”¹⁸ Consequently, the United States concluded, “to the extent the second question could be construed as asking the Court to declare that the Israeli occupation has been rendered unlawful or void, the Court should decline that invitation on the basis that such an assessment is not supported by international law.”¹⁹

¹² *Id.* at 16–17.

¹³ *Id.* at 23.

¹⁴ *Id.*

¹⁵ U.S. Oral Statement, *supra* note 1, at 54. Exercising discretion was appropriate as well because resolving issues that are subject to the negotiating framework “would place the Court in the role of a dispute resolution mechanism rather than adviser,” and “the Court has repeatedly recognized that its advisory jurisdiction is distinct and not the appropriate means of resolving a dispute between parties,” which requires their consent. U.S. Written Statement, *supra* note 1, at 25.

¹⁶ Request for an Advisory Opinion, *supra* note 7, para. 18.

¹⁷ U.S. Written Statement, *supra* note 1, at 27 (emphasis in original).

¹⁸ *Id.* Responding to claims made in other written statements, the United States argued that the court’s *Namibia* and *Chagos* advisory opinions did not support the court making a determination regarding the status of Israel’s occupation. In *Chagos*, the Court found that there was “an incomplete process of decolonization as to which neither the Security Council nor the General Assembly had taken particular action.” U.S. Written Comments, *supra* note 1, at 13. In *Namibia*, the court noted “South Africa’s refusal to withdraw from South West Africa after the General Assembly terminated the Mandate that served as the basis for its presence and the Security Council called upon South Africa to withdraw immediately.” *Id.* In the oral proceedings, the United States made clear its view that “international law does not impose specific time-limits on an occupation.” U.S. Oral Statement, *supra* note 1, at 56. At the same time, the United States reiterated its “strong opposition to any unilateral attempts to change the peacefully established status of territories by force or coercion anywhere in the world and . . . that the acquisition of territory by force is prohibited.” *Id.*

¹⁹ U.S. Written Statement, *supra* note 1, at 29.

The United States emphasized how the court should exercise its advisory function in the context of the questions posed by the General Assembly. In particular, the court should “reinforce the existing negotiating framework and emphasize the need for the parties to engage constructively.”²⁰ Therefore, the court should not follow the calls of those that “advocate for extensive and granular legal findings, including on matters that would go directly to the permanent status issues . . . and that would strike at the foundation of the ‘land for peace’ principle.”²¹ Any “[a]dvice that prejudices permanent status issues reserved for direct negotiation, such as the status of the territory, borders, and security arrangements, would not advance the objectives of the established negotiating framework, help develop the conditions for a negotiated peace, or ultimately serve the interests and functions of the United Nations.”²² The events of October 7, 2023, the United States argued, reinforced the need for bolstering, not undercutting, the negotiating framework, and so heightened the importance of the court taking the proper approach to answering the questions posed to it.²³

In contrast to its measured participation in the ICJ proceedings, the United States stridently rejected the ICC’s prosecutor’s application for arrest warrants against Prime Minister Netanyahu and Minister Gallant. President Joseph R. Biden, Jr. released a curt, but direct, statement describing the application as “outrageous.”²⁴ Disclaiming the applications’ implication (his characterization) that there is an equivalence between Israel and Hamas, the president stressed that “there is no equivalence—none—between Israel and Hamas. We will always stand with Israel against threats to its security.”²⁵ Secretary of State Antony J. Blinken similarly described the prosecutor’s action as “shameful,” referring, as the president did, to the implied equivalence of Israel’s and Hamas’s actions.²⁶

Secretary Blinken also disclaimed that the court had jurisdiction over the matter.²⁷ “The ICC was established by its state parties as a court of limited jurisdiction,” he said,

²⁰ U.S. Written Comments, *supra* note 1, at 15.

²¹ *Id.* at 14.

²² *Id.*

²³ *See id.*; U.S. Oral Statement, *supra* note 1, at 57. On July 19, 2024, after this essay was completed, the ICJ issued its advisory opinion. The State Department commented: “[W]e are concerned that the breadth of the court’s opinion will complicate efforts to resolve the conflict. . . . Moreover, the court’s advice that Israel must withdraw ‘as rapidly as possible’ is inconsistent with the established framework.” Jacob Magid, *US Warns ICJ Ruling on Israeli Presence in West Bank, East Jerusalem Will “Complicate” Peace Efforts*, TIMES OF ISRAEL (July 20, 2024), at https://www.timesofisrael.com/liveblog_entry/us-warns-icj-ruling-on-israeli-presence-in-west-bank-east-jerusalem-will-complicate-peace-efforts.

²⁴ White House Press Release, Statement from President Joe Biden on the Warrant Applications by the International Criminal Court (May 20, 2024), at <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/20/statement-from-president-joe-biden-on-the-warrant-applications-by-the-international-criminal-court> [https://perma.cc/YJ3L-Y9LM].

²⁵ *Id.*

²⁶ Blinken Statement, *supra* note 4.

²⁷ Using the term “jurisdiction,” Secretary Blinken was not speaking precisely, as complementarity under the Rome Statute is a principle of admissibility. *See* Rome Statute of the International Criminal Court, Art. 17, July 17, 1998, 2187 UNTS 90. Department of State Spokesperson Matthew Miller did make a jurisdictional objection. He said: “We do not believe the ICC has jurisdiction over either of the parties in this case because [Israel has not accepted the Court’s jurisdiction and] the Palestinian people do not represent a state [and so Palestine cannot be a party to the Rome Statute].” U.S. Dep’t of State Press Release, Department Press Briefing (May 20, 2024), at <https://www.state.gov/briefings/department-press-briefing-may-20-2024> [https://perma.cc/39V9-236T]; *see also* U.S. Dep’t of State Press Release, The United States Opposes the ICC Investigation into the Palestinian Situation (Mar. 3, 2021), at <https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation> [https://perma.cc/2SU8-SEWA]. Palestine became a state

and “[t]hose limits are rooted in principles of complementarity.”²⁸ Asserting that, “[i]n other situations, the Prosecutor deferred to national investigations and worked with states to allow them time to investigate,” Secretary Blinken claimed that this practice “do[es] not appear to have been applied here” despite Israel’s “ongoing investigations into allegations against its personnel.”²⁹ The prosecutor, Secretary Blinken asserted, “rush[ed] to seek these arrest warrants rather than allowing the Israeli legal system a full and timely opportunity to proceed.”³⁰ Secretary Blinken concluded that “[t]hese and other circumstances call into question the legitimacy and credibility of this investigation.”³¹ He also stated that the applications for arrest warrants “do[] nothing to help, and could jeopardize, ongoing efforts to reach a ceasefire agreement that would get hostages out and surge humanitarian assistance in, which are the goals the United States continues to pursue relentlessly.”³²

Members of Congress threatened legislative action against the ICC in anticipation of and then in response to the applications for arrest warrants.³³ In early June 2024, the House of Representatives passed a bill “to impose sanctions with respect to the International Criminal Court engaged in any effort to investigate, arrest, detain, or prosecute any protected person of the United States and its allies.”³⁴ The White House issued a statement of administration position “strongly oppos[ing]” the bill.³⁵ That statement concluded that “[t]here are more effective ways to defend Israel, preserve U.S. positions on the ICC, and promote international justice and accountability” than sanctions.³⁶ Early in his term, President Biden had revoked President Donald J. Trump’s executive

party in 2015 following its deposit of an instrument of accession. An ICC Pre-Trial Chamber ruled in 2021 that “the Court’s territorial jurisdiction in the [investigation concerning the] *Situation in Palestine* extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.” ICC, Decision, *Situation in the State of Palestine*, No. ICC-01/18, Pre-Trial Chamber I, at 60 (Feb. 5, 2021), at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF [<https://perma.cc/4345-Z7YF>].

²⁸ Blinken Statement, *supra* note 4.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Even before the ICC prosecutor applied for the arrest warrants, twelve U.S. senators sent a letter to the ICC prosecutor stating that the “United States will not tolerate politicized attacks by the ICC on our allies. Target Israel and we will target you. If you move forward . . . , we will move to end all American support for the ICC, sanction your employees and associates, and bar you and your families from the United States. You have been warned.” Letter of Twelve Senators to Karim A.A. Khan KC (Apr. 24, 2024), at <https://perma.cc/MBW6-YF5E>. In response to the senator’s letter, the Office of the Prosecutor’s stated that “independence and impartiality are undermined . . . when individuals threaten to retaliate against the Court or against Court personnel Such threats, even when not acted upon, may also constitute an offence against the administration of justice under Art. 70 of the Rome Statute.” Int’l Criminal Court, @IntlCrimCourt, X (May 3, 2024, 4:45 a.m.), at <https://x.com/IntlCrimCourt/status/1786316229688414518> [<https://perma.cc/2PYH-AX76>].

³⁴ See Illegitimate Court Counteraction Act, H.R. 8282, 118th Cong., 2d Sess. (2024); 170 CONG. REC. H3637-H3638 (June 4, 2024).

³⁵ Executive Office of the President, Statement of Administration Policy – H.R. 8282 – The Illegitimate Court Counteraction Act (June 3, 2024), at <https://www.whitehouse.gov/wp-content/uploads/2024/06/SAP-HR8282.pdf> [<https://perma.cc/2XGY-Z9AQ>].

³⁶ *Id.* Secretary Blinken had told a congressional committee in May that “we’ll be happy to work with Congress . . . on an appropriate response” to the ICC prosecutor’s arrest warrant requests, but he did not commit to imposing sanctions. Senate Foreign Relations Committee Hearing, American Diplomacy and Global Leadership: Review of the FY25 State Department Budget Request, at 49:16 (May 21, 2024), at <https://www.foreign.senate.gov/hearings/american-diplomacy-and-global-leadership-review-of-the-fy25-state-department-budget-request>.

order imposing sanctions on persons connected with the ICC and lifted the sanctions imposed on then-ICC Prosecutor Fatou Bensouda and Phakiso Mochochoko, the Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor.³⁷ The House bill is now pending in the Senate.

³⁷ See Jean Galbraith, *Contemporary Practice of the United States*, 114 AJIL 757, 775 (2020); Kristen E. Eichensehr, *Contemporary Practice of the United States*, 115 AJIL 115, 138 (2021); Kristen E. Eichensehr, *Contemporary Practice of the United States*, 115 AJIL 714, 729 (2021).