# Setting the Wolf to Guard the Sheep: Electing the Palestinian Attorney-General to the ICC Nominations Committee for Judges

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<http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/>

* The recent election of the Palestinian Attorney-General as a member of the committee for nominating judges of the International Criminal Court gives rise to some basic questions regarding the Palestinian status vis-à-vis the Court.
* The Palestinian leadership has acknowledged the fact that a “State of Palestine” does not exist, but that does not prevent them from manipulating international bodies into accepting a fictional Palestinian state.
* The ICC, by its Statute, is open to states only. The Palestinian accession to the ICC was achieved through a political manipulation of a non-binding General Assembly resolution, even though there exists no Palestinian state.
* Since there is no Palestinian state, there can be no sovereign Palestinian territory. The issue of the final status of the West Bank and Gaza areas has yet to be agreed upon in negotiations, and thus the area cannot be seen to be Palestinian territory.
* The ICC cannot exercise jurisdiction over territory that is subject to a dispute settlement procedure.
* The Palestinian leadership is manipulating and abusing the ICC and turning it into their own “back-yard tribunal” for hounding Israel.
* The election of a Palestinian member to the Judges Nominating Committee is premature and should be deferred pending determination by the Court as to the legal standing of the fictional Palestinian state.

The election of the Palestinian Attorney-General, Dr. Ahmad Barrak, to serve as a member of the “Advisory Committee on Nominations” of judges of the International Criminal Court, if it were not so serious, could be seen as comical. It cannot but invoke the ancient Latin maxim “ovem lupo commitere,” or in its literal and colloquial version “to set the wolf to guard the sheep.”

This perhaps sums up the acute absurdity to which respected international institutions in the international community, and particularly the United Nations and the International Criminal Court, have descended. Sadly, they have permitted themselves to be abused and manipulated by an irresponsible Palestinian leadership, intent on hijacking international organizations for obvious and blatant political purposes.

However, the election of a Palestinian representative to the judges’ Nominations Committee, as unwise and ill-advised as it may be, is indicative of a far wider and more serious problem facing the International Criminal Court, with the admission of what purports to be “The State of Palestine” as a party to its Statute.

By any international, legal and factual criterion, this is nothing more than a political fiction invented and given prominence by the United Nations General Assembly and bequeathed to the ICC.

There exists no sovereign Palestinian state, and there exists no sovereign Palestinian territory over which the ICC could exercise its jurisdiction.

The acceptance in 2014 of the “State of Palestine” as a party to the 1998 Rome Statute of the ICC, and the issue of Palestinian status vis-à-vis the court, remain questionable and legally flawed, since membership of the Court, pursuant to its Statute, is restricted to states, and there exists no sovereign Palestinian state.[1](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn1)

The question therefore must be asked how could a fictional non-state entity be accepted by the ICC as a state party to the Rome Statute, and how, therefore, could its representative be appointed to the nominating committee for judges?

### **Palestinian Aims**

The Palestinian leadership has little interest in the vision, aims, and purpose of the ICC, set out in the preambular provisions of its 1998 Rome Statute, so laboriously negotiated and drafted over many years by the international community.[2](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn2) Nor are they interested in the detailed provisions of the Statute regarding membership, jurisdiction, admissibility, and the elements of crimes.

To the contrary, their only purpose for involving themselves with and engaging the ICC is to utilize the Court politically in their campaign to delegitimize Israel and its leadership.

This has been stated by senior Palestinian leaders,[3](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn3) and is especially evident in the 2014 Palestinian formal announcement of acceptance of the ICC’s jurisdiction “for the purpose of identifying, prosecuting and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem.”*[4](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn4)*

### **Does a Palestinian State Exist?**

It is widely acknowledged that the issue of the final status of the West Bank areas of Judea and Samaria and the Gaza Strip is an open negotiating issue between the Palestinians and Israel pursuant to the Oslo Accords (1991-3). These accords were countersigned by leading members of the international community (United States, EU, Russia, Egypt, Jordan, and Norway) and endorsed by the UN. They do not specify what the final status of the territories will be, and the issue remains open for negotiation between the parties.

Pending their final settlement, the territories cannot be regarded as Palestinian territories but as disputed territories, subject to a dispute-settlement process.

Hence, any determination – whether by the UN, by any of its specialized agencies, or by the ICC – as to any form of Palestinian status of the territories, cannot be seen as other than an attempt to prejudge the outcome of the permanent status negotiations.

The fact that there exists no sovereign Palestinian state has been repeatedly acknowledged by the Palestinian leadership itself, since their initial, and still binding commitment in the Oslo Accords (1993-5) to withhold initiating or taking any unilateral step to alter the status of the territory pending the outcome of the agreed-upon permanent status negotiations.[5](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn5)

The non-existence of a Palestinian state was even recently reaffirmed on December 22, 2018 by Palestinian chief negotiator and PLO Secretary-General Saeb Erekat, as reported by the “WafaPalestinian news agency,” in commenting on a ruling by the Constitutional Court of the Palestinian Authority dissolving the Palestinian parliament. Erekat declared that dissolution of the parliament “is part of the transition from the period of the Palestinian Authority into the “State of Palestine” period.”[6](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn6)

**However, this has not prevented the Palestinian leadership from advancing, through the institutions of the international community, what is a fictitious claim to statehood. Similarly, it has not prevented the international community from blindly accepting and advancing this parallel Palestinian attempt to by-pass their negotiating commitment, to achieve statehood unilaterally through international bodies.**

### **Palestinian Status vis-a-vis the Court**

The justification by the UN for this curious state of affairs was a non-binding UN General Assembly recommendation, couched in the second operative paragraph of resolution 67/19 of December 4, 2012, to:

*… [a]ccord to Palestine non-member observer State status in the United Nations, without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people, in accordance with the relevant resolutions and practice;**[7](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn7)*

While the UN General Assembly has absolutely no power to determine the establishment of states nor to declare statehood, and despite the obvious fact that no actual Palestinian state exists, the UN Secretariat nevertheless determined, in a curious internal legal memorandum following that resolution, that:

*As Palestine is a Member State of UNESCO, the Secretary-General would accept instruments of accession from Palestine for treaties that follow the Vienna formula.**[8](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn8)*

*Since the General Assembly has accepted Palestine as a non-Member observer State in the United Nations, the Secretary-General will be guided by this determination in discharging his functions as depositary of treaties that are open to “any State” or “all States” deposited with the Secretary-General.**[9](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn9)*

On the basis of that General Assembly resolution and the interpretation given by the UN Legal Counsel, the Palestinian leadership regarded this as a green light to declare, on the December 31, 2014, its recognition of the jurisdiction of the ICC “for the purpose of identifying, prosecuting and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem.”

This was immediately followed on January 1, 2015 with a formal letter of accession to the Statute of the ICC by the Palestinian leadership, which was accepted by the UN Secretary-General on 6 January 2015.[10](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn10)

**Thus, despite the factual non-existence of a Palestinian state, and despite a clear lack of legal grounds, and in contravention of the terms of the ICC Statute that refers to “States parties,” the Secretary-General of the UN and the ICC Prosecutor accepted the “State of Palestine” as a “state” party to the ICC Statute.**

This in itself enabled the election of the Palestinian Attorney-General to the Nominations Committee for ICC judges.

On the strength of their having been accepted as a state party to the statute, the Palestinians have proceeded to institute complaints against Israeli political and military leaders for war crimes that they claim have been committed during the various military confrontations, as well as for Israel’s settlement policy. In fact, the Palestinians appear to have adopted the ICC as their own private tribunal for hounding Israel.

On January 16, 2015, the ICC Prosecutor opened a preliminary examination of the “situation in Palestine.”[11](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn11)

### **Can the ICC Deal with the Palestinian Complaints?**

The question remains whether the ICC has the legal capability of extending its jurisdiction over the territories that, while claimed by the Palestinians to be their sovereign territory, are distinctly not so and remain formally territories in dispute.

Logically and legally, without any agreed-upon and internationally accepted and recognized permanent status of the territories, and without any accepted international determination that there indeed exists a Palestinian state duly exercising rights of sovereignty over its territories, it is highly questionable whether the ICC could exercise jurisdiction there and deal with the various Palestinian complaints.

In light of the above procedural and jurisdictional questions as to the very status of the Palestinians vis-à-vis the Court, and pending juridical determination as to whether such a non-state entity may be considered to be party to the ICC Statute, it might have been more prudent on the part of the ICC and its Prosecutor to defer the issue of electing a Palestinian representative to serve on the Advisory Committee on Nominations of judges. Today, this appears to be overly premature.

### **Assumption of Bona Fides and Impartiality by the Court**

Despite procedural or political action by the prosecutor to process Palestinian complaints, it may be assumed and hoped that the Court will act in the juridical and objective manner befitting an international juridical and non-political body. Any political involvement by the Court would endanger its juridical integrity – something the Palestinians are indeed attempting to achieve with every complaint that they refer to the Prosecutor.

As such, in light of the obvious lack of jurisdiction of the ICC in territories claimed by the Palestinians, as well as the inherent lack of gravity of the accusations of crimes,, it is highly unlikely that the court would be able to take such complaints seriously.

In this context the ICC Prosecutor’s statement of February 9, 2014 on the issue of political manipulation of the ICC, is relevant:

*By the very nature of the Court’s mandate, every situation in which I act in my capacity as ICC Prosecutor will be politically fraught. My mandate as Prosecutor is nonetheless clear: to investigate and prosecute crimes based on the facts and exact application of the law in full independence and impartiality.*

*Whether States or the UN Security Council choose to confer jurisdiction on the ICC is a decision that is wholly independent of the Court. Once made, however, the legal rules that apply are clear and decidedly not political under any circumstances or situation. In both practice and words, I have made it clear in no uncertain terms that the Office of the Prosecutor of the ICC will execute its mandate, without fear or favor, wherever jurisdiction is established and will vigorously pursue those – irrespective of status or affiliation – who commit mass crimes that shock the conscience of humanity. The Office’s approach to Palestine will be no different if the Court’s jurisdiction is ever triggered over the situation.*

*It is my firm belief that recourse to justice should never be compromised by political expediency. The failure to uphold this sacrosanct requirement will not only pervert the cause of justice and weaken public confidence in it, but also exacerbate the immense suffering of the victims of mass atrocities. This, we will never allow.**[12](http://jcpa.org/article/electing-the-palestinian-authoritys-attorney-general-to-the-iccs-nominations-committee-for-judges/" \l "_edn12)*

Given the election of the Palestinian attorney-general to the appointments committee for judges, one may indeed ask if there is no end to the absurdity and inclination of the ICC to prejudice its stature as a credible juridical body and advance its self-destruction.