The Failure of the International Criminal Court (ICC)

November 18, 2019

By Ambassador Alan Baker

Jerusalem Center for Public Affairs

<http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/>

In the aftermath of the atrocities committed by Nazi Germany during the Second World War, and following the 1945-6 Nuremburg trials of the major Nazi war criminals, leading international jurists started to devise a statute for an independent, international juridical body that would adjudge all such criminals.

However, pending the establishment of a permanent international criminal tribunal, the atrocities committed during the conflicts in Yugoslavia (1991-2001), Rwanda (1990-1993), Sierra Leone (1991-2002), Cambodia (1975-1979), and Lebanon (2004-2005) accentuated the urgent need for international criminal adjudication of the war criminals involved in those atrocities. To this end, individual, temporary ad-hoc tribunals, similar to the Nuremburg Tribunal, were established by the UN to deal with each specific conflict. Such tribunals included the “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991” (ICTY),[1](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn1) the “International Criminal Tribunal for Rwanda” (ICTR),[2](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn2) the “Special Court for Sierra Leone,”[3](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn3) the “[Extraordinary Chambers in the Courts of Cambodia](http://www.eccc.gov.kh/en),” and the “S[pecial Tribunal for Lebanon](http://www.stl-tsl.org/).”[4](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn4)

### The Importance of a Permanent International Court

The Cold War delayed advancing the vision and drafting of a statute for one, universal, and independent international criminal court, rather than individual criminal tribunals to deal with specific conflicts. Due to the difficulties in negotiating the details of a statute between the major political blocs, the Court was ultimately established after the break-up of the Soviet Union, with the adoption of the 1998 Rome Statute, following a series of international conferences sponsored by the UN.[5](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn5)

### Dependence on the United Nations

Regrettably, and despite the best intentions of its founders, as well as some noble sentiments set out in the preambular paragraphs of its Statute, the very independence and impartiality of the Court – so central for any such vital and important juridical body – was flawed from the outset.

The central preambular provision of the Court’s founding statute determined, on the one hand, that the Court would be an “independent permanent International Criminal Court,” but it backtracked and neutralized such independence by bringing the Court into a curious “relationship with the United Nations system.”[6](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn6)

The Statute even strengthened this relationship and linkage by “[r]eaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”[7](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn7)

While a reaffirmation of this central provision of the UN Charter may well be an important component of any international instrument, its inclusion in the central preambular provision of the founding document of the International Criminal Court, ostensibly independent of the UN, is somewhat puzzling and lacks logic.

This issue of the Court’s independence vis-à-vis the UN arose in 1997, during the debates in the UN General Assembly’s Sixth (Legal) Committee, when the representative of Trinidad and Tobago, one of the founding fathers of the vision of an international criminal court, stated:

The proposed international criminal court should be an independent body and not subordinate to or a subsidiary of the Security Council.[8](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn8)

### UN Funding

While the Court is ostensibly independent of the UN, the Statute nevertheless determines that, in addition to assessed contributions by the states parties to the Statute, the Court is financed by:

[F]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.[9](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn9)

Approval of funding, like any other action requiring approval in the UN General Assembly, is, of necessity, a process driven by the political and economic interests of its members and subject to political bargaining that is totally unconnected to the needs of the Court. Clearly then, placing the court’s financing at the political mercy of the General Assembly can only serve to undermine and to prejudice any pretention of independence of the Court.

### Assembly of States Parties

In a similar manner, the establishment by the Statute of an “Assembly of States Parties” as “the Court’s management, oversight, and legislative body composed of representatives of the states that have ratified the Rome Statute,” places the judicial independence of the Court at the whim of a political majority of such an obviously political, non-judicial entity.[10](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn10)

For all intents and purposes, this “Assembly of States Parties” whose meetings take place generally at UN headquarters, is a cut-and-paste version of the UN General Assembly, with identical political groupings for purposes of voting, consultation, political wheeling-and-dealing, and geographical representation.

In a recent critique of the functioning of the “Assembly of States Parties,” published in 2017 by the Journal of International Criminal Justice, entitled “Challenges to the Independence of the International Criminal Court from the Assembly of States Parties” it was stated:

The Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court (ICC) plays a significant role in relation to the ICC and, by extension, international criminal justice.

Non-governmental organizations and some states have expressed concern about the potential for the ASP process to unduly influence the exercise of the judicial and prosecutorial functions of the ICC.

This article uses three examples stemming from recent ASP sessions to analyse the ASP’s potential to influence the work of the Prosecutor and the Chambers of the ICC: (1) the ASP’s legislative function with reference to ASP changes to the ICC Rules; (2) the non-cooperation of Rome Statute parties with the ICC; and (3) the budget approval process. It argues that the ASP risks undermining the ICC’s judicial and prosecutorial independence.[11](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn11)

On the issue of the Court’s independence, four former presidents of the ICC’s Assembly of States Parties stressed, in a recent op-ed article published by The Atlantic Council:

States have to stand up for the ICC in its mission to be judicially independent, even, or in particular, in situations where that may be politically inconvenient.[12](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn12)

On October 29, 2018, at a UN General Assembly Plenary discussion on the functioning of the Court, similar sentiments were expressed by the Philippines, announcing its decision to withdraw from the Court due to the politicization of human rights. Sudan also criticized the ICC, saying that the perception of the Court is that the ICC is part of the UN. Canada also stressed that the Court must “operate without obstruction, beyond power, politics, and geopolitics.”[13](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn13)

Since the Court was established by way of a multilateral treaty and derives its power and authority from its founding treaty, the ICC Rome Statute, legal logic would assume that, like any other multilateral treaty, it should be an entirely separate and independent entity, and not dependent upon the links or whims of the United Nations.

The Court’s character as an independent international institution should be all the more evident considering that its Statute is not merely another multilateral treaty establishing another multilateral organ, but establishes a juridical institution that cannot and should not be dependent upon a political framework, such as the UN. This cannot but influence the Court’s judicial work.

However, in light of the structural linkage to the UN system, and the fact that the United Nations is the center of that system, this curious linkage and self-inflicted dependency on the UN Charter principles are being interpreted to mean that there is a need to coordinate the Court’s judicial role with the UN’s responsibility to maintain peace and security.

The fact of this linkage to the UN and the dependence on a political organization implies that the Court cannot claim to be an independent and apolitical juridical organ. As such, this belies the basic principle of independence underlying such a serious juridical body.

Clearly, any such entity negotiated under the sponsorship of the UN and based on UN groupings and political pressures, cannot be independent or impartial, since every vote is ultimately determined on the basis of political interests and deals.

In an editorial comment in 2005 in the American Journal of International Law, entitled “Judicial Independence and Impartiality in International Criminal Tribunals,” Prof. Theodor Meron, former President of the International Criminal Court for former Yugoslavia observed:

Judicial independence is critical for the rule of law. First, judges who are independent of political or other pressures, will adjudicate the disputes brought to them with an eye to the guiding legal principles and without any undue influence by external sources.[14](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn14)

The linkage with the UN has plagued the Court since its inception and has increasingly enhanced the perception that the ICC has, in fact, become a quasi-UN agency. The ICC is dependent on the UN for funding, dependent on the UN voting system for election of its judges, and tied to the UN through a formal relationship agreement with the UN.

### The Politicization of the Court – Acceptance of a Non-Existent State of Palestine

In addition to having developed a cumbersome bureaucracy and a vast array of expenses, the UN linkage has caused the Court to become politicized. This linkage has also enabled manipulation by political elements intent on furthering their own partisan aims, in a similar manner as within the UN and other organizations within the UN system.

Such dependency is amply reflected in the manner in which it has been obliged by the UN to handle the issue of Palestinian accession to its Statute and the resultant manipulation, abuse, and politicization of the Court by the Palestinian leadership in its obsession with Israel.

The acceptance of a non-existent Palestinian state as a fully-fledged member state in the Court is perhaps an example of how the Court is dependent upon political determinations of the UN’s General Assembly and Secretary-General. It cannot function in the independent ambiance that one assumes should serve as the basis for the functioning of such an important international judicial body.

### Acceptance of Palestinian Membership in the Court

In a statement issued on April 2, 2012, former ICC Prosecutor Louis Moreno Ocampo declined to accept a 2009 Palestinian application for membership to the Court in light of the non-existence of a Palestinian state. However, he was obliged to refer the question of Palestinian statehood to “competent organs of the United Nations or eventually the Assembly of States Parties to resolve the legal issue relevant to an assessment of article 12.”[15](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn15)

The constitutional linkage of the ICC to the UN, in effect, required the Prosecutor to refer the question for political determination to the UN, rather than to refer it for substantive juridical determination to the appropriate body of judges of the Court.

The Palestinian accession to the Statute as a “state” party was subsequently accepted in 2015 by the UN, acting as depository of the ICC Rome Statute, and subsequently by the ICC Prosecutor and Assembly of States Parties. The basis for accepting Palestinian accession to the Statute was a non-binding resolution of the UN General Assembly 67/19 on the “Status of Palestine in the United Nations” that upgraded the status of the Palestinian delegation to the UN to “non-member observer state status.”[16](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn16)

Curiously, while upgrading the Palestinian status to that of a non-member state, the same General Assembly resolution acknowledged that there is not yet such a state, pending a negotiated settlement of the status of the territories. To this end, the Assembly reaffirmed the call for negotiations “for the achievement of a just, lasting, and comprehensive peace settlement between the Palestinian and Israeli sides.”[17](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn17) But this did not prevent acceptance by the Court of a Palestinian “state” member.

The UN General Assembly, as a political and not a law-making body, does not have the legal powers or prerogative to declare or establish statehood. Nor does it have the legal capacity to proffer legal grounds for acceptance of accession by a non-state of Palestine to the ICC Statute.

Since the ICC’s Statute is open to “States Parties” only, and since there exists neither a Palestinian state, nor any agreed-upon and accepted sovereign Palestinian territory, the assumption that “Palestine” can be party to the Statute is legally flawed. Similarly, the assumption that the Palestinians can engage the jurisdiction of the Court vis-à-vis territories that are acknowledged by the UN to be disputed and pending final settlement, is no less legally flawed. Thus, the ICC cannot constitute grounds for accepting referrals of Palestinian complaints.[18](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn18)

This Palestinian attempt to engage the Court and to claim that the territories are part of a Palestinian state is also at variance with the Oslo Accords, according to which, “Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.”[19](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn19)

In this context, the UN has endorsed the Oslo Accords in various resolutions. By acknowledging Palestinian statehood and by signaling to the ICC that it could accept a non-existent Palestinian state as a full “State Party” to the Rome Statute, the UN has, in fact, legally undermined its own endorsement of the Oslo Accords.

Despite the lack of legal grounds and in clear contravention of the terms of the ICC Statute, which relies upon “States parties” for the functioning of the Court, the Palestinian non-state was accepted as a fully-fledged state party to the Court.

### Palestinian Referrals of Complaints against Israel

Pending the outcome of Israeli-Palestinian negotiations on the permanent status of the territories as agreed upon in the 1995-1999 Oslo Accords, there exists no agreed-upon legal or political determination regarding the sovereign status of the disputed territories. The topic remains an agreed negotiating issue between the Palestinians and Israel, pending the outcome of the permanent status negotiations.

Acceptance by the ICC of the Palestinian declaration claiming that the territories are Palestinian sovereign territory for the purpose of extending the Court’s jurisdiction to actions in the territories not only lacks any legal validity but also attempts to prejudge the outcome of an open negotiating issue.[20](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn20)

The Court has never yet judicially determined the legal validity or standing of the Palestinians vis-a-vis the Court, nor has it made any juridical determination as to whether the Court may extend its jurisdiction over territory that is disputed but claimed by the Palestinians to be their territory. However, the Prosecutor has proceeded, pursuant to the court’s procedural rules, to institute preliminary examinations of these complaints and the applicability of the Statute to such situations.

Logically and legally, without any internationally accepted and recognized, agreed-upon permanent status of the territories, and without any binding international determination that there exists a Palestinian state with its own sovereign territories, it is highly unlikely that the Court would be able to exercise jurisdiction.

However, on the strength of their having been accepted as a state party to the Statute, the Palestinians have adopted the ICC as their own “back-yard tribunal” for baiting Israel. They regularly submit referrals against Israel’s political and military leaders accusing them of war crimes committed during the various military confrontations, as well as regarding Israel’s settlement policy. In so doing, they are politicizing the Court and treating it in the same manner in which they treat the various other international institutions and organizations with which they are involved, much to the detriment and credibility of the Court.

### Assumption of Bona Fides by the Court

Despite procedural or political action by the prosecutor to process such complaints, it is hoped that the Court’s judges would act in an objective manner befitting an international juridical and non-political body. Clearly, any perception of politicization of the Court would endanger its juridical integrity – something the Palestinians are indeed attempting to achieve with every complaint.

Indeed, in an unusually apt statement issued by Fadi El Abdallah, Spokesperson and Head of Public Affairs Unit of the ICC on September 12, 2018, in response to criticism of the Court by John Bolton, former U.S. National Security Advisor, he stated:

The Court is an independent and impartial judicial institution. The ICC, as a court of law, will continue to do its work undeterred, in accordance with those principles and the overarching idea of the rule of law.[21](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_edn21)

### Conclusion

In light of the questionable legal status of the Palestinians vis-à-vis the Court, as well as the clear lack of jurisdiction of the Court in territories that are acknowledged internationally to be in dispute and pending settlement, it might be expected that the Court, acting in accordance with the principles of objectivity, would not permit itself to be abused. This expectation is all the more pertinent given the inherent lack of gravity of the crimes complained-of.

But the question remains whether the ICC, in light of its inbuilt, constitutional linkage to and dependence upon political determinations by the various the UN bodies, has the capability to overcome such limitations and act in a truly judicial manner.

If it cannot, then there is a need to go back to the international drawing board and to think again as to how to have a genuinely independent juridical body. This body must be devoid of any linkage to political entities so that there would not be any political considerations in electing judges and staff or in its general judicial functioning.

Time will tell.

\* \* \*

Notes

[1](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref1) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>

[2](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref2) <http://legal.un.org/avl/ha/ictr/ictr.html>

[3](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref3) <http://www.rscsl.org/>

[4](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref4) <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/>

[5](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref5) <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>

[6](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref6) Id. ICC Statute, 9th preambular paragraph

[7](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref7) Id. 7th preambular paragraph

[8](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref8) Press Release GA/L/3044 dated 21 Oct. 1997 <https://www.un.org/press/en/1997/19971021.GAL3044.html>

[9](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref9) Id. Article 115(b)

[10](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref10) Id. article 112

[11](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref11) “Challenges to the Independence of the International Criminal Court from the Assembly of States Parties” by Hannah Woolaver, Emma Palmer, Journal of International Criminal Justice, Volume 15, Issue 4, September 2017, Pages 641–665 <https://doi.org/10.1093/jicj/mqx022>

[12](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref12) “The International Criminal Court Needs Fixing” Atlantic Council April 24, 2019, by Prince Zeid Raad al Hussain, Bruno Stagno Ugarte, C WENAWESER, AND TIINA INTELMAN

<https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing>

[13](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref13) UN General Assembly Plenary 73rd Session, 27th and 28th meetings, 29 Oct. 2018, GA/12084 <https://www.un.org/press/en/2018/ga12084.doc.htm>. See also Dore Gold “America and the International Criminal Court” April 18, 2019 <http://jcpa.org/video/america-and-the-international-criminal-court/>

[14](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref14) Theodor Meron “Judicial Independence and Impartiality in International Criminal Tribunals” The American Journal of International Law Vol. 99, No. 2 (Apr., 2005), pp. 359-369

[15](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref15)<https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>

[16](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref16) <https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/19862d03c564fa2c85257acb004ee69b?OpenDocument>

[17](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref17) Ibid para. 5

[18](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref18) Article 12 of the Statute determines that only States party to the Statute and having accepted the court’s jurisdiction, may invoke the court’s jurisdiction. Similarly, all three subparagraphs of article 125 of the ICC Statute, dealing with signature, ratification, acceptance, approval or accession to the statute, specifically refer only to states

[19](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref19) Israeli-Palestinian Interim Agreement 1995, Article XXXI(7) <https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>

[20](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref20)See in this context Alan Baker “Palestinian Manipulation of the International Criminal Court”, January 21, 2018 <http://jcpa.org/will-the-international-criminal-court-disregard-international-law/> and “The International Criminal Court’s Decision on Alleged U.S. Crimes in Afghanistan: Implications for Israel” April 30, 2019 <http://jcpa.org/the-international-criminal-courts-decision-on-alleged-u-s-crimes-in-afghanistan-implications-for-israel/>

[21](http://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/%22%20%5Cl%20%22_ednref21) “The ICC will continue its independent and impartial work, undeterred” <https://www.icc-cpi.int/Pages/item.aspx?name=pr1406>