ACLJ to International Criminal Court: Jewish Settlements in Judea and Samaria Are Not “War Crimes”

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By Skip Ash

American Center for Law and Justice

<https://aclj.org/israel/aclj-to-international-criminal-court-jewish-settlements-in-judea-and-samaria-are-not-war-crimes>

Israel’s government is the only stable democracy in the Middle East. And Israel has never been (and likely never will be) a member of the International Criminal Court (ICC).

Yet, the ICC is focusing laser-like on Israel. It’s considering looking into whether Israel has committed war crimes in its dealings with Palestinians. Now, the ICC is even considering initiating an investigation into the legality of Jewish settlements in the so-called “West Bank” (i.e. the area of Israel made up of east Jerusalem, Judea, and Samaria), suggesting that such settlements constitute a war crime against Palestinians. The fact is, but for political motives, the ICC would not even be considering these issues.

To counter the ICC’s efforts, we (through our European affiliate, the European Centre for Law & Justice (ECLJ)) sent a [detailed letter](http://media.aclj.org/pdf/LTR-H.E.Bensouda-ICC-08.07.2019_Redacted.pdf) to the current ICC Prosecutor emphasizing why the ICC has no legal basis to get involved in an internal, non-ICC Member State matter.

In [our letter](http://media.aclj.org/pdf/LTR-H.E.Bensouda-ICC-08.07.2019_Redacted.pdf), we made three main arguments: that an international legal principle establishes that this land is in fact Israel’s, that in the alternative this land is in dispute and thus it cannot be determined that it is unlawful for the Jewish people to settle this land, and that there is no State of Palestine for Israel to supposedly be “occupying.”

First, the customary international law principle known as uti possidetis juris controls in this context and, as such,

applying the customary international law principle uti possidetis juris to the Mandate for Palestine means that Israel, as the sole State to emerge from the Mandate for Palestine upon the departure of the British Mandatory, attained sovereignty over the entirety of the territory of the Mandate within the borders as they existed on 15 May 1948 (to wit, over the entire territory between the Mediterranean Sea and the Jordan Rift Valley, including the so-called “West Bank” (with east Jerusalem) and the Gaza Strip).

Second, under an alternative legal theory, absent a final determination of borders, there is no basis to deem Jewish settlements illegal. In fact, at best, the “West Bank” is territory in dispute. In this regard, we [explained](http://media.aclj.org/pdf/LTR-H.E.Bensouda-ICC-08.07.2019_Redacted.pdf):

Even if, for the sake of argument, one disregards the applicability of the well-established uti possidetis juris principle, then, at best, one might argue that the “West Bank” belongs to those who inhabited the territory of the Mandate for Palestine prior to its dissolution. Yet, that would merely establish that ownership of the territory is disputed since the prior inhabitants of Palestine—collectively called “Palestinians”—included both Jewish Palestinians (who call themselves “Israelis” today) and Arab Palestinians (who call themselves “Palestinians” today). Accordingly, both Jews and Arabs would have colourable claims to the territory, thereby establishing the dispute referred to above. This being the case, one cannot claim that Jewish settlements are unlawfully situated since there has been no valid determination as to which territory of the “West Bank” belongs to Israel and which belongs to a future Arab Palestinian State.

Third, we explained that since the “West Bank” has never belonged to another State, the Israeli presence there does not and cannot constitute “Occupation” in the sense of the Fourth Geneva Convention. As we [stated](http://media.aclj.org/pdf/LTR-H.E.Bensouda-ICC-08.07.2019_Redacted.pdf):

The argument repeatedly raised against Jewish “settlements” is that they supposedly violate Article 49(6) of the Fourth Geneva Convention of 1949. . . . [Article 49(6)](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf) reads: “The occupying power shall not deport or transfer parts of its own civilian population into territories it occupies”. This claim as applied to Jewish settlements has several fatal flaws. The most fundamental of these is that [Article 49(6)](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf) presupposes the existence of an occupation of the territory of a High Contracting Party (a State Party to the Convention) since, except for Common Article 3, the Convention applies solely to High Contracting Parties, i.e., States. Yet, the territory in question (i.e., the so-called “West Bank”) belongs to the State of Israel pursuant to uti possidetis juris and, therefore, cannot be considered “occupied”.

We also noted that no Palestinian “state” exists today nor has one ever existed. This is true despite the fact that, in November 2012, the [U.N. General Assembly agreed](https://www.un.org/press/en/2012/ga11317.doc.htm) to change the Palestinian Authority’s designation at the U.N. from an “Entity” enjoying Observer status to that of a “Non-member State” with Observer status.

Importantly, “under the UN Charter, the General Assembly has no lawful authority to create or recognise a ‘State’. The UN does not officially recognise states or declare statehood; such actions are the responsibility of individual governments.” Moreover, “the General Assembly has no lawful authority to determine the borders, the territorial extent, or the capital city of any State, much less those of an entity whose very existence as a ‘State’ has no basis in international law.” The General Assembly also “has no authority to set aside or supersede the terms of existing treaties, other international agreements and documents, or Security Council resolutions.”

We concluded our [letter](http://media.aclj.org/pdf/LTR-H.E.Bensouda-ICC-08.07.2019_Redacted.pdf) by urging the ICC Prosecutor to halt all action concerning Israel’s settlements:

The OTP is entrusted with a mandate from the States Parties to the Rome Statute to investigate and prosecute genuine war crimes and crimes against humanity. This mandate does not include the adjudication of territorial disputes. A finding by the OTP concerning the legality of Jewish settlements would unavoidably require taking sides in a longstanding territorial dispute. Needless to say, this would be an unacceptable overreach on the Prosecutor’s part. The OTP is neither authorised nor equipped for such an undertaking. We submit therefore that the Prosecutor has no alternative but to halt any and all actions by her office concerning Jewish settlements in the “West Bank” (including in east Jerusalem).

The ICC is supposed to be a court, wholly objective and divorced from politics. Yet, that is not the case in fact. Threatening to investigate the legality of Jewish settlements in the “West Bank” is yet another example of the ICC’s political meddling. In our letter, we remind the ICC Prosecutor of her responsibilities as a lawyer, to avoid political matters and follow the law, and we strongly encourage her to do so in this matter.

We’ve [won at the ICC before](https://aclj.org/israel/icc-gets-right-finally) in defence of Israel’s interests, and we will continue to work through our office in Jerusalem, Israel, on Capitol Hill, and at the U.N. to protect and defend our ally.