Travesty of Justice at the International Criminal Court?

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<https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice>

The International Criminal Court (ICC) Prosecutor's Response to observations of more than 50 *amici curiae*, legal representatives of victims and States, is 60 pages long.[[1]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn1" \t "_blank) It makes an abstraction of history; misleadingly refers to Judea and Samaria as the "West Bank" of the Jordan River (which includes Israel), and falsely called "Occupied Palestinian Territories" that were liberated in 1967 from the Jordanian occupation.

The Prosecutor's Response adopts the Muslim-Arab and pro-Arab-Muslim vision of the conflict.

The Prosecutor's Response seems to create new international law where non-binding resolutions can change legally binding agreements in order to prosecute Israeli leaders and Israeli Jews for war crimes under article 8-2b-viii of the Rome Statute for settling the land, and to deprive the Jews of their rights as the indigenous people or native people of this land. The Prosecutor's Response endorses the legal/political agenda of the Muslim/Arab and the so-called human rights NGOs.

According to the Prosecutor, the West Bank-Gaza is the land of the "Palestinian state", although this lands is in legally binding agreements (the Oslo Accords) considered to be a disputed territory under Israeli control;[[2]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn2" \t "_blank) nothing in the Oslo Accords bars "Palestine" from accepting the jurisdiction of the ICC, or the exercise of the jurisdiction by the Court although the same Accords prohibit the Palestinian Authority from engaging in foreign relations[[3]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn3" \t "_blank) and limit its jurisdiction.[[4]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn4" \t "_blank)

Apparently, since 138 member states of the United Nations knowingly violated the Israel-Palestinian agreements by engaging in foreign relations with the Palestinian Authority, the ICC, a court of justice, has decided that it can violate them too.

The same political movement[[5]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn5" \t "_blank) that has poisoned the international organizations [UNESCO, the World Health Organization, the International Court of Justice, the International Criminal Court, the United Nations Human Rights Council (UNHRC) who replaced the United Nations Commission on Human Rights (UNCHR), the United Nations General Assembly and Security Council] has now reached the ICC. As it is not possible in this context to analyze every paragraph of the Prosecutor's Response, we selected five of them.

1. Several Resolutions of the UN General Assembly (UNGA) consider that Palestine is a state and that Jewish settlements are illegal (par. 39, 43, 47, 80). Other resolutions of the UN Security Council (UNSC) also consider them illegal (par. 47, 80, 89)

The resolutions of the UN General Assembly are no more than recommendations. They were imposed by 57 Muslim and Arab States and their friends in common interest. These resolutions are not binding under international law.[[6]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn6" \t "_blank) The UN Security Council resolutions, not adopted under Chapter VII of the Charter, are also not binding under international law.

The Jewish cities and villages of Judea and Samaria are not illegal and "Palestine" is not a state according to the International Court of Justice.[[7]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn7" \t "_blank)

"The [French] Coué Method or method of self-persuasion[[8]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn8" \t "_blank) does not apply and cannot change International Law. In other words, it is not by repeating and constantly voting on non-binding resolutions stating that the Jewish settlements in Judea and Samaria (West Bank) are illegal or violating international law, that these settlements are illegal or violating international law. Repeating false statements does not make them true" (Law Prof. David Ruzié).[[9]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn9" \t "_blank)

2. The Prosecutor stated that the International Court of Justice has deemed Israel's settlement policy and the construction of the [security] barrier and its associated regime to be in violation of international law (par. 49, 77, 84)

Israel's security barrier was in conformity with international law. Regulation 43 of the Hague Regulations (public order and security) authorizes the military commander to take all necessary action to preserve security.[[10]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn10" \t "_blank) The ICJ did not refer to this regulation that authorizes a security barrier. Even though we can give a presumption of honesty to the honorable members of the ICJ honorable court, error is human and international law cannot be based on an advisory opinion. The ICJ advisory opinion is an opinion that has no legal force, as mentioned in the decision itself.[[11]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn11" \t "_blank)

3. The Occupying Power and the occupied population were not in the same factual position, or could not be seen as "equals" (par. 76, 78) and consequently any limitations to the PA's jurisdiction agreed upon in the Oslo Accords cannot and should not bar the exercise of the Court's jurisdiction in Palestine (par. 76, note 266 – Prosecution request)

The Prosecutor interferes and disregards the existence of a basic principle of international law: "*Pacta sunt servanda*", meaning "agreements must be kept" and applied in good faith by the parties. The PLO had very skilled negotiators and the peace plan was "directly, concretely and in detail elaborated by Arafat himself".[[12]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn12" \t "_blank) The limitations of the Palestinian Authority's jurisdiction in the Oslo Accords do not permit to transfer jurisdiction to the ICC. Those limitations cannot be changed or disregarded.

4. The "Occupied Palestinian Territory" is not *terra nullius* ["nobody's land"] nor can they be considered as sovereign territory of another State (par. 53-55)

The Jewish residents settled in Judea and Samaria voluntarily. None of them was "deported" or "transferred" "directly or indirectly" or forcibly by any Israeli government (the "Occupying Power") into the territory it "occupies" (Palestine/Judea and Samaria). Art. 8-2-b-viii of the Rome Statute cannot apply,[[13]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn13" \t "_blank) as there is no crime and no case for the Prosecutor to investigate those who returned to their ancestral land, and who are the indigenous people.[[14]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn14" \t "_blank) Judea and Samaria are not occupied territories.

The "Dictionary of Public International Law" (under the direction of Jean Salmon - Bruylant, 2001) reads: "Occupation aims at the de facto presence of military forces of one state on the territory of another state." There is no occupation by Israel of the territory of another state. There was no "Palestinian" state before 1967. Israel liberated Judea and Samaria from Jordan after a war of aggression, in which Jordan attacked Israel in 1967 – for the second time (the first time being in 1948). Jordan finally abandoned all claims to the territory in 1988. In 2004, the ICJ stated that there is no ("Palestinian") state.[[15]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn15" \t "_blank)

Jews lived in the land that the ancient Romans -- and in the 20th century, the British -- called Palestine before 1948, even in the East Bank of the Jordan. Jews also lived in East Jerusalem, but "only Jews were called "Palestinians". The other inhabitants were called Arabs. Jews were expelled or killed during Jordan's 1948 aggression and their houses (including in East Jerusalem) were taken by Arabs. "Palestine" is the Jewish Home as codified in international law. It is not a *terra nullius* ["nobody's land"]. It belongs to the Jewish people. The "Arabs" of Judea Samaria are the colonizers, who colonized the land.

The Jews hold the right to that land from the Bible, the Qur'an, and from several international instruments: the Balfour Declaration (1917), the Treaty of Lausanne (1923), the British Mandate (1922), the San Remo Resolution (1920), and the Treaty of Sèvres (1920) created International law, recognized and re-established the historical indigenous rights of the Jews to their land. Britain, France, Turkey, Japan, Italy, etc. are bound by these instruments. Moreover, the Jewish people are entitled to their land under the [United Nations Declaration on the Rights of Indigenous Peoples](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/61/295&Lang=E) (UNDRIP or DOTROIP), stressing "especially their rights to their lands, territories and resources", adopted by the United Nations General Assembly on September 13, 2007. With domestic state practice, the legal status and rights of indigenous people have evolved and crystallized into customary law.[[16]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn16" \t "_blank)

5. The right of peoples to self-determination is a right (par. 46, 47).

The right to self-determination entails the right freely to choose the candidate, "government" or "Authority" by which a people wants to be governed. It does not automatically constitute a right to a state. The right to a State for the "Palestinians" seems to be given precedence over the right to life and security of the Jews. To exercise the right to self-determination there must be a "people" (not a "population"). Contrary to the Jewish people being the indigenous people, the "Palestinian people" has been [invented](https://www.gatestoneinstitute.org/11401/palestinian-people) to oppose the Jewish people. In the context of self-determination of an ethnic group, the definition of a people requires the existence of subjective and objective criteria. Subjectively, the Muslim Arabs declared the Jews/Israel as their enemies, and claim to be a "people" as opposed to the Jews. Objectively, a people has to possess common characteristics, such as history, language, religion or a culture that distinguishes this group from other groups or people. The objective criterion is missing. The "Arabs" of Judea and Samaria are the settlers, colonizers, who invaded the land.[[17]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn17" \t "_blank)

The 1911 edition of the *Encyclopedia Britannica* reports that at the beginning of the 20th century, the various nationalities in Palestine spoke about 50 different languages. In May 1947, Henry Cattan, the representative of the Higher Palestinian Arab Committee, declared that the Arabs of Palestine do not form a separate political entity.[[18]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn18" \t "_blank) In 1974, Yasser Arafat declared "What you call Jordan is actually Palestine."[[19]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn19" \t "_blank) In 1981, King Hussein of Jordan stated that "Palestine is Jordan and Jordan is Palestine". On March 22, 2012, "Hamas Minister" Fathi Hammad confirmed that "half of the Palestinians are Egyptians and the other half are Saudis*...* from Yemen, or anywhere...Who are the Palestinians? We are Egyptians."[[20]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn20" \t "_blank) In 2013, Ali Salim: "There were never "Palestinians" in the Holy Land, nor is there one word of them in the Noble Qur'an,...but the Children of Israel are mentioned countless times and they are mentioned as the Chosen People in the Qur'an."[[21]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn21" \t "_blank) In 2015, Abbas, a Jordanian national, stated that "Jordanians and Palestinians are one people..."[[22]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn22" \t "_blank)

CONCLUSION

The ICC cannot be a forum for the diversion of international law and for a travesty of justice. The ICC may well not survive. The Response of the Prosecutor follows a political agenda and is based on law created by the Prosecutor to enable the prosecution of Israeli Jews/leaders for crimes they never committed. Ms. Fatou Bensouda's impartiality can reasonably be doubted and she should be disqualified pursuant to article 42-7 of the Rome Statute and Rule 34 (d) of the Rules of Procedure and Evidence.

In addition, in an interview with Bensouda in 2011 entitled "ICC's new prosecutor on Arab conflicts, how Islam plays a role in guiding her and her vision for the international court", Al-Arabiya reported:

On whether her religion plays any role in helping her do the job that she has been elected to do, she said: "Absolutely, definitely. Islam, as you know, is a religion of peace, and it gives you this inner strength, this inner ability and a sense of justice. Together with my experience, this will help a lot."[[23]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn23" \t "_blank)

It is clear that Ms. Bensouda, like any person in civilized countries, is free to follow any religion she chooses. That is not the point.

The expression of her religious opinion on Al-Arabiya, adversely affects her required impartiality and is an additional ground for disqualification.

It should be recalled that for Islam, once a given land is under Islamic rule, it belongs to Islam (*Dar al Islam*). It is an Islamic land (*Waqf*) for all generations of Muslims until the last day judgment[[24]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftn24" \t "_blank); in this view Jews do not have any legitimate right to the land.

The Qur'an orders all Muslims to fight the Jews, until they pay a tribute and have been humbled:

"Fight those who do not believe in Allah or in the Last Day and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth from those who were given the Scripture - [fight] until they give the jizyah willingly while they are humbled." (Surah IX: 29. Sahih International translation).

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[[1]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref1" \t "_blank) Pursuant to [Rule 103](https://www.icc-cpi.int/CourtRecords/CR2020_01746.PDF) (1 of the ICC Rules of Procedure and Evidence – Amicus Curie and other form of submission, ICC Court Chambers "can invite states, organizations or persons to submit any observation on any issue that the Chamber deems appropriate". "The Prosecutor and the defense have the opportunity to respond to the observations submitted".

[[2]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref2" \t "_blank) The Declaration of Principles does not prejudge the Permanent Status. The outcome of the permanent status talks should not be prejudged or preempted by the interim arrangements.

[[3]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref3" \t "_blank) Under the Declaration of Principles the Israeli government retains sole responsibility for foreign affairs. In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions. [The Israeli-Palestinian Interim Agreement](https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT.aspx) on the West Bank and the Gaza Strip, ARTICLE IX, Powers and Responsibilities of the Council, 5.a

[[4]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref4" \t "_blank) 1. In accordance with the DOP, the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for: a. issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis; 2...the authority of the Council encompasses all matters that fall within its territorial, functional and personal jurisdiction, as follows: a. The territorial jurisdiction of the Council shall encompass Gaza Strip territory, except for the Settlements and the Military Installation Area... and West Bank territory, except for Area C..; [The Israeli-Palestinian Interim Agreement](https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT.aspx) On The West Bank And The Gaza Strip, Chapter 3 - Legal Affairs, Article XVII, Jurisdiction.

[[5]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref5" \t "_blank) This movement includes the Palestinian Authority, the Arab League, the Muslim /Arab so called "human rights" groups, the European pro-Palestinian organizations funded by the Arab Countries, financed by the European Union, the European states, some Christian and Catholic Churches groups, the BDS movement and anti-apartheid groups, the Palestinian Campaign for academic and cultural Boycott of Israel (in Ramallah), the Palestinian civil society organizations, the 50 state members of the Organization of Islamic Conference (OIC) (1.8 billion people), the 120 states members of the Non-Aligned Movement (4.31 billion people) who hijacked the UNGA and the UN Specialized Agencies.

[[6]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref6" \t "_blank) See the Amicus Curiae (Friend of the Court) brief of Professors Robert Badinter, Irwin Cotler, David Crane, Jean-François Gaudreault-DesBiens, Guglielmo Verdirame QC and Lord David Pannick QC (par. 14, 15) [confirming this legal point](https://www.icc-cpi.int/CourtRecords/CR2020_00488.PDF). Moreover the UN has no power to create states.

[[7]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref7" \t "_blank) In 2004, the ICJ in its Advisory Opinion denied Israel its inherent right to self-defense against the Palestinian terror since there is no "Palestinian" state. According to the ICJ, "*article 51 of the UN Charter recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State*". ICJ Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I. C. J. Reports 2004, p.132, paragraph 139.

[[8]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref8" \t "_blank) Emile Coué, [Wikipedia](https://en.wikipedia.org/wiki/%C3%89mile_Cou%C3%A9).

[[9]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref9" \t "_blank) Retired Professor of International Law, Former Dean of the Faculty of Law – Professor Emeritus of the University Renée Descarte – Paris 5.

[[10]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref10" \t "_blank) Although Jordan was not "the legitimate power" of Judea Samaria and Israel not being an "occupant", Israel has accepted to apply International Humanitarian Law. Regulation 43 of The Hague Regulations reads: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." [Convention (IV)](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4D47F92DF3966A7EC12563CD002D6788) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[[11]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref11" \t "_blank) The ICJ recognized in its opinion that it has no binding force: "The Court's reply is only of an advisory character: as such, it has no binding force". Construction of a Wall – Advisory Opinion, p.25, paragraph 47.

[[12]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref12" \t "_blank) Hans Willem Longwa in Hilde Henriksen Waage, "Norwegians? Who Needs Norwegians? Explaining the Oslo Back Channel: of Norway's Political Past in The Middle East", PRIO, International Peace Research Institute, Olso-Institutt for Fredforskning, Evaluation Report 9 /2000, Nov. 2000, p. 63, 64, 65.

[[13]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref13" \t "_blank) War Crimes, Article 8 8-2-b-viii of the Rome Statute reads: "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilians population into the territory it occupies, or the deportation or transfer of all of the population of the occupied territory within or outside this territory".

[[14]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref14" \t "_blank) "..Israel has asserted valid legal and historical claims [on the territory] ... which are part of the ancestral homeland of the Jewish people". Peace to Prosperity (Deal of the Century), p. 12.

[[15]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref15" \t "_blank) See Supra note 7.

[[16]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref16" \t "_blank) "[Israel: The Settlements are not Illegal](https://www.gatestoneinstitute.org/16032/israel-settlements-not-illegal)." Michel Calvo, May 19, 2020, *Gatestone Institute.*

[[17]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref17" \t "_blank) "[Who are the Palestinians?](https://jcpa.org/article/who-are-the-palestinians/)", Pinhas Inbari, Augusr 7, 2017, *JCPA*.

[[18]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref18" \t "_blank) United Nations, [Official Records](https://unispal.un.org/UNISPAL.NSF/0/1343338D30D39DCF85256E5C00578E01) of the First Special Session of the General Assembly, Volume III, 7 May 1947, 52 meeting, UNGA, A/C.1/PV.48.

[[19]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref19" \t "_blank) Joan Peters, From Time Immemorial, p. 240.

[[20]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref20" \t "_blank) [MEMRI](https://www.memri.org/tv/hamas-minister-interior-and-national-security-fathi-hammad-slams-egypt-over-fuel-shortage-gaza), Hamas Minister of the Interior and of National Security Fathi Hammad Slams Egypt over Fuel Shortage in Gaza Strip, and Says: "Half of the Palestinians Are Egyptians and the Other Half Are Saudis", 23 March 2012, #3389 | 03:09 Source: Al-Hekma TV (Egypt).

[[21]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref21" \t "_blank) Ali Salim, "[Hatred of Jews](https://www.gatestoneinstitute.org/3897/hatred-of-jews)," *Gatestone Institute*, September 16, 2013.

[[22]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref22" \t "_blank) "Jordan said threatening to renounce citizenship of senior PA officials," by Khaled Abu Toameh, [*The Jerusalem Post*](http://www.jpost.com/landedpages/printarticle.aspx?id=405206)*,* June 6, 2015.

[[23]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref23" \t "_blank) [Al-Arabiya](https://www.alarabiya.net/articles/2011/12/15/182694.html), 15 December 2011 - 15 December 2011 KSA 09:57 - GMT 06

[[24]](https://www.gatestoneinstitute.org/16120/icc-travesty-of-justice" \l "_ftnref24" \t "_blank) "There is a consensus among Muslims, in the past and present, that if an Islamic land is occupied, then its inhabitants must declare jihad until it is liberated from the occupiers." -- from "[The 'Anti-Normalization' Campaign and Israel's Right to Exist](https://www.gatestoneinstitute.org/8656/anti-normalization-israel)," by Khaled Abu Toameh, August 8, 2016, *Gatestone Institute*.