



ECLJ'S OBSERVATIONS ON THE COMMISSION OF INQUIRY'S REPORT, A/HRC/53/22, AND THE COMPLEMENTARY INFORMATION, A/HRC/53/CRP.1

I. INTRODUCTION

The European Centre for Law and Justice (ECLJ) submits this information to contribute to the Commission of Inquiry's ("Commission") work pursuant to its mandate under Resolution A/HRC/RES/S-30/1. The ECLJ is a non-governmental organisation dedicated to the defence of human rights around the world. The ECLJ has Special Consultative status with the United Nations' ECOSOC and has contributed to the United Nations' work through numerous submissions before different UN bodies, as well as the International Criminal Court. The ECLJ has a longstanding interest in the peaceful resolution of the Israeli-Palestinian conflict and, as such, is concerned with the one-sided investigation and reports the Commission has published under its mandate. The ECLJ respectfully submits the following observations on the Commission's most recent report, A/HRC/53/22, published on 9 May 2023 ("COI Report III"), and information complementary to that report in A/HRC/53/CRP.1, published on 2 June 2023 ("Complementary Information to COI Report III").

II. PRELIMINARY OBSERVATIONS

A. The Commission has provided no legal or factual basis for its assumptions that a "State of Palestine" exists and that the Gaza Strip, West Bank, and East Jerusalem constitute that state.

Like its two previous reports,¹ the Commission continues to call the Gaza Strip, the so-called "West Bank", and East Jerusalem, Palestinian territories without any legal or factual

¹ Rep. of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, ¶ 1, U.N. Doc. A/HRC/50/21 (9 May 2022) [hereinafter COI Rep. I]; Rep. of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, ¶ 1, U.N. Doc. A/77/328 (14 Sept. 2022) [hereinafter COI Rep. II].

basis for such labeling. Without explicitly stating so, however, the Commission seemingly relies on the Partition Plan recommended by the General Assembly in Resolution 181(II) and/or the armistice lines drawn as a result of the Armistice Agreements of 1949 between Israel and its neighbouring States (none of which was a State of Palestine) to claim that the Gaza Strip, the West Bank, and East Jerusalem, constitute the “State of Palestine”. Such a conclusion has no legal or factual basis because neither the Partition Plan nor the armistice agreements resulted in the creation of a “State of Palestine”.

First, because the Partition Plan arose from the General Assembly, which only has authority to make recommendations, it lacked any enforcement mechanism.²

Second, even though the Partition Plan was only a recommendation without any binding legal effect, it could have become a binding agreement if both the Jews and the Arabs had agreed to it. That did not happen. The Jews were willing to accept the plan’s terms, whereas the Arabs and their allies rejected them. Absent a meeting of the minds between the Jews and the Arabs *vis-à-vis* the plan, it was dead—and remains dead to this day, despite periodic attempts to resurrect portions of it.³

² The U.N. Charter limits General Assembly responsibilities to discussing issues and making recommendations; the Charter grants no authority to the General Assembly to make legal decisions with respect to issues of global concern or compel compliance with its resolutions: U.N. Charter art. 10 (“The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and . . . *may make recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters”). (emphasis added); U.N. Charter art. 11, ¶ 1 (“The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security . . . and *may make recommendations* with regard to such principles to the Members or to the Security Council or to both”). (emphasis added); U.N. Charter art. 12, ¶ 1 (“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”); U.N. Charter art. 13, ¶ 1 (“The General Assembly shall initiate studies and *make recommendations* for the purpose of: 1. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; 2. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights . . .”). (emphasis added); U.N. Charter art. 14 (“Subject to the provisions of Article 12, the General Assembly *may recommend* measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations . . .”). (emphasis added); U.N. Charter art. 96, ¶ 1 (“The General Assembly or the Security Council may request the International Court of Justice *to give an advisory opinion* on any legal question.”) (emphasis added)).

³ Proponents of Palestinian statehood periodically cite Resolution 181(II)’s language calling for an Arab State as evidence that the international community recognises the right of an Arab State to exist in Palestine. *See, e.g.,*

Third, when Israel declared independence upon Britain's departure from Mandatory Palestine in May 1948, pursuant to the customary international law principle, *uti possidetis juris*, Israel became a sovereign state over the entire territory of the Mandate with the borders as they existed on 15 May 1948 (to wit, over the entire territory between the Mediterranean Sea and the Jordan rift valley, which included the Gaza Strip, the West Bank, and East Jerusalem). The day following Israel's declaring its independence, the nascent State of Israel was attacked by its Arab neighbours, thereby triggering the 1948-49 Arab-Israeli war. The war continued into 1949, when armistice agreements were signed to end hostilities.⁴ At war's end,

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 251 (July 9) (separate opinion of Judge Elaraby) ("On 14 May 1948, the independence of the Jewish State was declared. The Israeli declaration was 'by virtue of [Israel's] natural and historic right' and based 'on the strength of the resolution of the United Nations General Assembly'. *The independence of the Palestinian Arab State has not yet materialized*") (emphasis added). Yet, even as they rely on UNGA Resolution 181(II)'s language referring to an Arab State, many of those same persons reject explicit language in the resolution calling for a "Jewish" State. Further, Arab Palestinians claim that Jerusalem is the capital of the Arab State, despite Resolution 181(II)'s clear language placing Jerusalem and its environs under international control. G.A. Res. 181(II), at 146 (29 Nov. 1947). Accordingly, any argument for an Arab State predicated on Resolution 181(II) is built on wishful thinking—especially since Arabs rejected the Plan at the time.

⁴ Armistice lines are not concrete boundaries. In fact, armistice lines simply reflect the relative position of opposing forces when an armistice agreement is concluded. The specific language in these armistice agreements is significant because the language illustrates that border and territorial issues were to be determined at some future date. In fact, *it was at Arab insistence* that the lines be simply armistice lines, not internationally recognised borders. See Howard L. Bressler, *Wrong Conclusion, No Resolution: United Nations Security Council Resolution 2334's Erroneous Conclusions on the Legality of Israeli Settlements in Judea, Samaria and Jerusalem*, 2 INT'L COMP. POL'Y & ETHICS L. REV. 37 (2018). The Egyptian-Israeli General Armistice Agreement of 24 February 1949, for example, stated the following:

It is further recognized that rights, claims or interests of a non-military character in the area of Palestine covered by this Agreement may be asserted by either Party, and that these, by mutual agreement being excluded from the Armistice negotiations, shall be, at the discretion of the Parties, the subject of later settlement. It is emphasized that it is not the purpose of this Agreement to establish, to recognize, to strengthen, or to weaken or nullify, in any way, any territorial, custodial or other rights, claims or interests which may be asserted by either Party in the area of Palestine or any part or locality thereof covered by this Agreement *The provisions of this Agreement are dictated exclusively by military considerations and are valid only for the period of the Armistice.*

Isr.-Egypt Armistice Agreement, Egypt-Isr., art. IV, ¶ 3, Feb. 24, 1949, 42 U.N.T.S. 251. The agreement further stated: "The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question". *Id.* art. V, ¶ 2. And the purpose of the lines was to "delineate the line beyond which the armed forces of the respective Parties shall not move". *Id.* art V, ¶ 3. Similar language was used in the following armistice agreements.

The Israel-Jordan Armistice Agreement of 3 April 1949, for example, stated the following: "It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations". Isr.-Jordan Armistice Agreement, Isr.-Jordan, art. II, ¶ 2, Apr. 3, 1949, 42 U.N.T.S. 303. Similar to the 1949 Egyptian-Israeli General Armistice Agreement, the purpose of the Israel-Jordan armistice lines was to "delineate the lines beyond which the armed forces of the respective Parties shall not move". *Id.* art. IV, ¶ 2. The agreement further explained that the armistice lines were "agreed

portions of the territory of the Mandate for Palestine (i.e., the Gaza Strip and the West Bank (which included East Jerusalem)) were under unlawful military occupation by the military forces of Egypt and Jordan. The Israeli and Arab military forces were separated by an armistice line, and each armistice agreement—at Arab insistence—specifically ruled out identifying the armistice line as an international border.⁵ As such, no State of Palestine was created as a result of the Armistice Agreements of 1949. Further, during the eighteen-year unlawful occupation of the Gaza Strip and the West Bank by Egypt and Jordan, respectively, those areas did not become part of Egypt and Jordan. They remained Israeli territory under the Mandate for Palestine and *uti possidetis juris*.

When Israel regained control of those areas from Egypt and Jordan in the Six-Day War in 1967, it simply recaptured its own territory from unlawful occupiers.⁶ No “State of Palestine” came into existence during the eighteen years (1949–67) of Egyptian and Jordanian unlawful military occupation of the respective areas. As such, claiming that Israel has occupied “Palestinian territory” since 1967 is an oxymoron.

upon by the Parties *without prejudice to future territorial settlements or boundary lines* or to claims of either Party relating thereto”. *Id.* art. VI, ¶ 9 (emphasis added). Clearly, these armistice agreements were not intended to (and did not) establish national borders. The Israel-Syria Armistice Agreement to follow further illustrates this.

The Israel–Syria Armistice Agreement of 20 July 1949 set forth the following: “[N]o provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military, and not by political, considerations”. *Isr.-Syria Armistice Agreement*, *Isr.-Syria*, art. II, ¶ 2, July 20, 1949, 42 U.N.T.S. 327. It further set forth that “the following arrangements for the Armistice Demarcation Line between the Israeli and Syrian armed forces and for the Demilitarized Zone *are not to be interpreted as having any relation whatsoever to ultimate territorial arrangements affecting the two Parties* to this Agreement”. *Id.* art. V, ¶ 1 (emphasis added).

Based on the language in these armistice agreements, border and territorial issues were separate and distinct from the temporary armistice lines established in 1949. Moreover, *it was at Arab insistence that the 1949 lines be designated as mere armistice lines*, not international boundaries, because the Arab world did not want to confer any form of international legitimacy on the newly proclaimed Jewish State of Israel.

⁵ *Id.*

⁶ To quote Professor Stephen Schwebel, former judge at the International Court of Justice in the Hague: “Where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title”. Ricki Hollander, *The Debate About Israeli Settlements*, CAMERA, (13 June 2007), <https://www.camera.org/article/the-debate-about-israeli-settlements/>.

Moreover, no State of Palestine came into existence after 1967 as is evident from Palestinian leaders, the ICC, and the UN actions. In June 2009, Palestinian Prime Minister Salam Fayyad “called for the *establishment of a Palestinian state within two years*”.⁷ In the same speech, he called on all Palestinians to “help create the institutions that will ‘embody’ *the future state*”.⁸ It is obvious that one does not call for establishing a state “within two years” (or any other time limit) when such a state already exists. Further, in April 2012, the then Prosecutor of the International Criminal Court (“ICC”) refused to allow “Palestine” to accede to jurisdiction of the ICC because it was not a state.⁹ In November 2012, the UN General Assembly changed the designation of Palestine *at the UN* from entity with observer status to non-party “state” with observer status. Nothing, however, changed on the ground following that simple change in moniker used at the UN. More recently, a Palestinian negotiator spoke of the desire “[t]o achieve statehood . . .”.¹⁰

Simply put, labels such as “pre-1967 borders” and “State of Palestine’s territories occupied since 1967” not only lack legal or factual basis, they are patently contradictory to the facts. No “State of Palestine” came into existence as a result of the General Assembly Resolution 181(II), or as a result of the Armistice Agreements of 1949, or any time during the unlawful occupation of the disputed territories by Egypt and Jordan between 1949 to 1967, or any time thereafter. As such, Israel could not have “occupied” “Palestinian territory” since 1967 as the term “occupation” is understood in the Geneva Conventions, and the Commission has provided no evidence even suggesting, let alone proving, otherwise.

⁷ Howard Schneider, *Palestinian Premier Sets Timeline for Establishing State, Asks Constituents to A ‘Roll Up Their Sleeves’*, WASH. POST (23 June 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/22/AR2009062202962.html> (emphasis added).

⁸ *Id.* (emphasis added).

⁹ Situation in Palestine, The Office of the Prosecutor, International Criminal Court, 3 April 2012, <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>.

¹⁰ AP, *Israeli and Palestinian Figures Propose a Plan for an Independent State of Palestine*, NPR (7 Feb. 2022), <https://www.npr.org/2022/02/07/1078258023/independent-state-palestine-proposal-two-state-confederation-israel>.

Instead of providing any evidence supporting its claims, the Commission simply disregards the fact that the Jews were given legal title to the land in question by the League of Nations through the Mandate for Palestine, an internationally binding legal document.¹¹ The Commission also disregards the fact that Israel gained sovereignty over the territory of the Mandate for Palestine as its borders existed at Great Britain's departure under the customary international law principle of *uti possidetis juris*, which the International Court of Justice (ICJ) deems to be superior to any self-determination claims.¹² The Commission further disregards that the areas in question were under *unlawful* belligerent occupation by Egyptian and Jordanian armies for eighteen years. The Commission also disregards that, in 1967, Israel recaptured its own land in response to an Arab-initiated war and, at no point, did the areas Israel recaptured morph into a State of Palestine. And finally, the Commission disregards the fact that, under any of the accepted international tests for statehood, "Palestine" lacks the relevant criteria.¹³ The Commission has consistently ignored these facts.

B. The Commission claims that Israel's occupation of Palestinian territory has *now* become unlawful without considering thousands of indiscriminate attacks directed toward Israeli civilian population centres.

Like the Commission's first two reports, the third report also assumes not only that Israel is occupying "Palestinian territory" since 1967, but that the occupation has *now* become unlawful.¹⁴ By claiming that the occupation has *now* become unlawful, the Commission admits that it was lawful up to some point. The Commission, however, omits significant facts surrounding the lawfulness of the occupation. The same security reasons that existed when Israel recaptured the areas from the occupying powers (i.e., Egypt and Jordan), who had

¹¹ *Mandate for Palestine*, League of Nations, Doc. C.529.M.314.1922.VI. (1922).

¹² Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, 567, ¶¶ 25-26 (Dec. 22).

¹³ Situation in the State of Palestine, ICC-01/18-12 22-01-2020, Prosecution Request Pursuant to Art. 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, Situation in the State of Palestine, ¶¶ 9, 41 (22 Jan. 2020), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00161.PDF.

¹⁴ Detailed Findings on Attacks and Restrictions on and Harassment of Civil Society Actors, by all Duty Bearers, ¶ 3, U.N. Doc. A/HRC/53/CRP.1 (2 June 2023) [hereinafter Complementary Information to COI Rpt. III].

unlawfully occupied the territories for eighteen years, continue to exist now. The Commission simply fails to discuss Israel's security needs in the face of thousands of indiscriminate attacks directed at Israel's civilian population centres, and fails to analyse each attack against Israel and Israel's response to each attack under the LOAC principles of self-defence, distinction, proportionality, which is required before a conclusion that Israel violated its obligations under international law can be legitimately made.

C. The Commission claims that Israel is violating Palestinians' civil rights without applying international humanitarian law (aka the Law of Armed Conflict)—the very law it expects Israel to follow.

The Commission alleges Israel is violating the civil and political rights of Palestinians in the disputed territories and Arab Israelis (whom the Commission calls "Palestinian citizens of Israel"¹⁵) within Israel, while wholly disregarding applicable law. Contrarily, the Commission claims that the Gaza Strip, the West Bank, and East Jerusalem are "occupied Palestinian territory" where the LOAC applies. From this, it follows that Arab inhabitants (aka Palestinians) in the so-called "occupied" areas who are not citizens of Israel cannot be expected to have civil rights under Israeli law. Their rights can only be analysed under international law. Here, as per the Commission, both the LOAC (*lex specialis*) and international human rights law (*lex generalis*) apply. Notably, the LOAC—*lex specialis* in this situation—permits limiting civil and political rights as well as the use of security measures such as naval blockades, security check points, military tribunals, necessary and proportionate defensive military responses, etc. in an "occupied" territory. Under the Commission's own logic, the State of Israel may limit certain aspects of the "occupied" population, especially due to legitimate and well known security reasons. It is no secret that Israel must constantly defend itself against

¹⁵ This phrase itself defies logic. If the Commission claims that a State of Palestine exists and the inhabitants of that State are called Palestinians, then Israeli citizens (whether Jews or Arabs) would be Israelis, not Palestinians. Under the Commission's logic, it could legitimately call Hindu citizens of Pakistan "Indians".

thousands of indiscriminate attacks launched from the so-called “occupied” territories by armed groups that clearly violate the LOAC.

One cannot presuppose Israeli security measures—which are necessitated by numerous indiscriminate armed attacks by groups like Hamas and the Palestinian Islamic Jihad (PIJ)—to be unlawful, without analysing each Israeli response and security measure under the rules of self-defence, military necessity, distinction, and proportionality. Furthermore, lawful measures permitted under the *lex specialis* during an armed conflict cannot at the same time be unlawful even though they may not be permitted in peace time under *lex generalis*. The Commission’s reports provide no such analysis and yet conclude that Israel is violating international law.

The Commission can neither legally nor logically claim that the disputed territories constitute the State of Palestine and are occupied by Israel under the meaning of Article 49 of the Geneva Convention IV if it wants to claim that Israel’s (the so-called occupying power) security measures are unlawful. These are inherently contradictory positions. Regardless of the erroneous nature of such a contradiction, the claim that Israel is in fact limiting the Palestinians’ civil and political rights has no basis. The analysis of several sections of the Commission’s third report and complementary information provided below shows the one-sided and biased nature of the Commission’s investigation.

III. COMMISSION’S BIASED AND ONE-SIDED CLAIMS

The Commission alleges that several Israeli laws violate civil and political rights of the Palestinians in the disputed territories and/or Arab citizens of Israel within Israel. The Commission portrays those laws in a bad light without providing reasons as to how those laws are bad. However, a closer look at each law shows that such laws exist in almost every country.

A. The Commission criticises several laws without providing any reason for such criticism or how those laws are unjust or discriminatory towards Palestinians.

1. Laws that protect Jewish businesses from discrimination

The Commission condemns actions taken by Israel against antisemitism, accuses Israel of wrongfully labeling certain “civil society” groups that advocate for boycotting Israeli companies and products as antisemitic, and condemns Israel for revoking visas of people who advocate for a boycott of Israel as part of the Boycott, Divestment, and Sanctions (BDS) movement.¹⁶ The Commission calls such measures “attacks” by Israeli government officials¹⁷ to silence human rights defenders in violation of their freedom of expression.¹⁸ The Commission also condemns anti-BDS laws in thirty-five states of the United States and claims that such actions have a chilling effect on voices critical of Israeli policies and actions.¹⁹

In condemning such actions, the Commission disregards that a state of ongoing armed conflict exists between Palestinian armed groups and Israel. The BDS movement operates as a coordinated, sophisticated effort to disrupt the economy of the State of Israel, with the ultimate goal of destroying the sovereign nation altogether. It uses the threat of withdrawing financial support in an effort to coerce companies or other entities to cease or refuse to engage in business relations with Israel, its nationals, and its residents. Moreover, it often intentionally advocates for discrimination of people who are Jewish or who do business with the Jews. In its objectives, activities, and effects, including its overt use of blatant double standards, the BDS movement is definitionally antisemitic. In both intent and practice, BDS is being used in the United States as a justification not only to discriminate against, but also physical assault, American Jews. Although Jews comprise less than 2% of the American population, they are the victims of

¹⁶ See Complementary Information to COI Rpt. III, *supra* note 14, ¶¶ 27–42.

¹⁷ *Id.* ¶ 29.

¹⁸ *Id.* ¶ 40.

¹⁹ *Id.* ¶¶ 39–40.

51.6% of hate crimes nationally against all faith groups.²⁰ BDS provocations are regularly associated with such anti-Jewish discrimination, abuse, and hate crimes.

In the last few years, the movement has also gained momentum in the United States. In an effort to counter this discrimination, several states in the United States have enacted laws. For instance, in 2017, the State of Texas passed a law which “prohibits the State from contracting with companies that discriminatorily boycott Israel”.²¹ The law “was amended in 2019 to exclude individual contractors and narrowed to apply only to state contracts with companies that have more than 10 full-time employees and when the contract is worth more than \$100,000”.²²

Contrary to the claim that such laws violate the right to freedom of speech, anti-BDS laws are a clear example of *constitutional government speech* intended to prevent discrimination and attacks against a religious and ethnic minority occurring in the context of governmental spending programs (*i.e.*, commercial contracting for goods and services). Many such laws exist in order to protect other minorities and it is astonishing that the Commission would single out anti-BDS laws and criticise such protections for a religious or ethnic minority. In any event, just as the Commission, Palestinians, and even proudly unabashed antisemitic provocateurs have the right to advocate in favour of the BDS movement, states also have the right to refuse to support commercial operators which could use funds derived from the government to further the BDS movement. The government is not required to remain viewpoint-neutral in such circumstances. Instead, it is permitted to take or not take a position of its own. With respect to the BDS movement, the states that have enacted anti-BDS laws

²⁰ *AJC Deeply Troubled by FBI Hate Crimes Data Showing Overall Increase, Jews Most-Targeted Religious Group*, AJC (31 Aug. 2021), <https://www.ajc.org/news/ajc-deeply-troubled-by-fbi-hate-crimes-data-showing-overall-increase-jews-most-targeted>; *FBI Releases Supplement to the 2021 Hate Crimes Statistics*, THE U.S. DEP'T OF JUST., <https://www.justice.gov/crs/highlights/2021-hate-crime-statistics> (28 Mar. 2023).

²¹ H.B. No. 793 (2019) (with amendment markup), available at <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/11B00793F.pdf#navpanes=0>.

²² *Id.*

have merely chosen not to fund, through commercial contracts, companies that participate in activity at odds with the states' own commercial policies and interests—the boycott of Israel, its businesses, and its people.

To the extent that private speech is even implicated, the statutes have no unconstitutional chilling effect, nor do they unconstitutionally compel private speech. Any private individual (or a group of individuals), acting in a personal capacity and according to a personal choice, may boycott the State of Israel and may engage in related speech of his choosing. He may not, however, require his customer—the State of Texas (and other states)—to limit their speech and interests by doing business with him.

The anti-BDS statutes only regulate government speech (*i.e.*, in the form of spending and business transactions) and relay the governments' decision concerning those companies with which they wish to conduct business. “As a matter of law, there is a fundamental difference between a state suppressing free speech and a state simply choosing how to spend its dollars. To argue otherwise would be to suggest that [the state] is constitutionally obligated to support the BDS movement, which is not only irrational but also has no basis in law”.²³

2. Budgeted Foundations Law

The Commission criticises Israel's Budgeted Foundations Law as violative of Palestinian rights.²⁴ The law, however, is neither discriminatory nor unreasonable. First, it does not apply to Palestinians (*i.e.*, Arabs who reside in the Gaza Strip and the West Bank and are not Israeli citizens); it only applies to Israeli citizens. Second, it applies to all citizens of Israel, whether Jews or Arabs, and thus does not discriminate against anyone. Third, it allows the

²³ Andrew Cuomo, *Gov. Andrew Cuomo: If You Boycott Israel, New York State Will Boycott You*, THE WASHINGTON POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-new-york-state-will-boycott-you/2016/06/10/1d6d3acc-2c62-11e6-9b37-42985f6a265c_story.html.

²⁴ Rep. of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, ¶ 11, U.N. Doc. A/HRC/53/22 (9 May 2023) [hereinafter COI Rep. III]; Complementary Information to COI Rpt. III, *supra* note 14, ¶ 44.

Minister of Finance to reduce *state* funding to an entity that rejects the “existence of the State of Israel as a Jewish and democratic state”; incites racism, violence, or terrorism; supports an “armed struggle or act of terror by an enemy state or a terrorist organization against the State of Israel”; commemorates the Independence Day as a day of mourning; or destroys or dishonours the state flag.²⁵ Even accepting as accurate the unofficial translation of this law provided by an anti-Israel organisation, there is nothing in the law that would suggest any discriminatory or unreasonable effect on any group, including Arab citizens of Israel. Almost every civilised nation has similar laws.

For instance, France not only has a similar but a more restrictive law. French *Law no. 2021-1109* allows the government to “monitor and dissolve religious organizations and groups [it] determine[s] to be promoting ideas contrary to French values”.²⁶ Article 12 of the law allows the government to fund only those organisations that sign a “contract of republican commitment”.²⁷ Under the contract, organisations are required to commit that they will not “call into question the secular character of the Republic”.²⁸ The French law is much more restrictive than the Israeli law criticised by the Commission.

Despite the fact that the Commission has not pointed to any international human rights law that would contradict the Israeli law in question (because no such international law exists), to expect a state to fund groups that engage in anti-state activities is simply absurd. To espouse that such a requirement exists is moronic.

²⁵ Budget Foundations law (Amendment No. 4) 5771 – 2011, (*unofficial translation by Adalah*), available at <https://www.adalah.org/uploads/oldfiles/Public/files/Discriminatory-Laws-Database/English/33-Budget-Foundations-Law-Amendment40-Nakba-Law.pdf>.

²⁶ U.S. DEPT. OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2022: FRANCE 1 (2022), <https://www.state.gov/wp-content/uploads/2023/05/441219-FRANCE-2022-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf>.

²⁷ Press Release, Amnesty Int’l, France: ‘Republican values’ law risks discrimination (29 Mar. 2021), <https://www.amnesty.org/en/latest/press-release/2021/03/france-republican-values-law-risks-discrimination/>.

²⁸ LOI n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République (1) [Law 2021-1109 of 24 August 2021 confirming respect for the principles of the Republic (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 24 Aug. 2021, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043964778/> (unofficial translation).

3. Duty to disclose foreign funding

The Commission also criticises Israel's law that requires Israeli NGOs to disclose if they receive support from a foreign political entity.²⁹ Many countries, in both Europe and the Middle East, require the disclosure of foreign funding, require approval for foreign funding, or prohibit foreign funding altogether. Again, the Commission fails to provide any justification for its criticism or any information as to how such a law is oppressive or unique only to Israel. Just as a state has the right to decline funding activities that directly contradict the state's interests, a state also has an interest in determining whether another state or foreign entity is funding domestic organisations to interfere with the state's internal affairs. In fact, most states do monitor such foreign funding.

For example, United States law requires organisations that receive funding from a foreign source to file disclosures with the government.³⁰ French law "requires audits of associations, including those that are religious in nature, that receive foreign funding".³¹ The law in Saudi Arabia prohibits civil society organisations "from receiving foreign funding from outside Saudi Arabia unless they seek and obtain approval from the Ministry of Labor and Social Development".³² Algeria's penal code provides the government with the authority "to prosecute civil society activists who receive foreign funding if [the government] consider[s] that [civil society activists'] activities undermine the 'normal functioning of institutions' or

²⁹ Complementary Information to COI Rpt. III, *supra* note 14, ¶ 46.

³⁰ U.S. DEPT. OF STATE, *Non-Governmental Organizations (NGOs) in the United States Fact Sheet*, (20 Jan. 2021), <https://www.state.gov/non-governmental-organizations-ngos-in-the-united-states/>; 20 U.S.C.S. § 1011f, <https://www.govinfo.gov/content/pkg/USCODE-2011-title20/html/USCODE-2011-title20.htm>.

³¹ U.S. DEPT. OF STATE, *supra* note 26, at 7; LOI n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République (1) [Law 2021-1109 of 24 Aug. 2021 confirming respect for the principles of the Republic (1)], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 24 Aug. 2021, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043964778/> (unofficial translation).

³² *Saudi Arabia*, INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW, <https://www.icnl.org/resources/civic-freedom-monitor/saudi-arabia> (last updated 7Jan. 2019).

‘national unity’”.³³ Egypt’s law provides, *inter alia*, that the government maintain a database of all civil society organisations and their sources of funding.³⁴ Yemen also requires NGOs to disclose foreign funding in order to renew their licenses.³⁵ Jordan requires NGOs to obtain prior government approval to receive foreign funding.³⁶ The Commission has not shown how Israeli law is oppressive or even discriminatory toward “Palestinians”. Claiming that the Israeli law in question is unique is preposterous.

4. Laws related to counterterrorism, citizenship, and entry into Israel

The Commission’s criticisms of Israel’s counterterrorism, citizenship, and entry laws are also unjustified. Israel is not the only country to have counterterrorism, citizenship, and entry laws. Most countries have such laws. To say that Israel may not stop a terrorist from entering its borders, or revoke citizenship of a person who engages in terrorism or breaches allegiance to the state, has no legal, moral, or logical basis. All sovereign states not only have the right, but a duty, to protect their borders and citizens from such actors. That is a hallmark of sovereignty, which is recognised in the United Nations Charter.

Regarding the revocation of citizenship for breach of allegiance to the State of Israel, it is incredible that the Commission is aware that the Supreme Court of Israel upheld the constitutionality of the law, “provided that the Minister of the Interior grants the person [whose citizenship is revoked] a permanent residence permit in Israel”,³⁷ and yet criticises the law. The fact that the Supreme Court of Israel required that the person must be given a permanent residence permit even when his citizenship is revoked for breaching allegiance to the state

³³ *Algeria*, INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW, <https://www.icnl.org/resources/civic-freedom-monitor/algeria> (last updated 9 May 2023).

³⁴ Law No. 149 of 2019 (Law on Regulating the Exercise of Civil Work), *al-Jarīdah al-Rasmīyah* (Jumhūrīyat Miṣr al-‘Arabīyah, Riyāsat al-Jumhūrīyah [Arab Republic of Egypt, the Presidency of the Republic]), vol. 33, 19 Aug. 2019, <https://www.icnl.org/wp-content/uploads/law149eng.pdf> (unofficial translation).

³⁵ *The Middle East NGO Laws in Selected Arab States*, 7 INT’L J. OF NOT-FOR-PROFIT L. 3, 25 (2005), <https://www.icnl.org/resources/research/ijnl/ngo-laws-in-selected-arab-states>; Law No. 1 for the Year 2001 Concerning Associations and Foundations, https://www.icnl.org/wp-content/uploads/Yemen_1-2001-En.pdf.

³⁶ *Jordan*, INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW, <https://www.icnl.org/resources/civic-freedom-monitor/jordan>, (last updated 8 Mar. 2023).

³⁷ Complementary Information to COI Rpt. III, *supra* note 14, ¶ 50.

shows that Israel is a country of laws where due process is the norm. Additionally, other countries have similar laws. For example, United States law requires that no person be allowed to obtain citizenship who, *inter alia*, advocates opposition to the organised government.³⁸ U.S. law also allows for revocation of citizenship of a person who declares allegiance to a foreign state.³⁹ The UK,⁴⁰ France,⁴¹ Pakistan,⁴² Syria,⁴³ are just a few of the countries with similar laws. The Commission has provided no legal basis that prohibits a state from revoking citizenship of persons who breach their allegiance to the state. Likewise, it has provided no justification why Israel alone is prohibited to do what other states may, and routinely, do.

5. Filming on duty soldiers or waving the flag of an enemy country or a terror organisation

The Commission further criticizes Israel for a proposed bill that prohibits filming of soldiers on duty.⁴⁴ In the Commission's view, such a law is oppressive and discriminatory of Palestinians. Interestingly, both the United States⁴⁵ and United Arab Emirates⁴⁶ have similar laws that prohibit taking pictures of government and military installations. Further, the United Kingdom⁴⁷ and Pakistan⁴⁸ have laws that range from prohibiting wearing insignia of a terrorist organisation to defiling the state's flag. The Commission has not stated how such laws violate international human rights law. Under the Commission's logic, the U.S. may not be able to prohibit waving Al-Qaeda or ISIS flag in the United States or Pakistan may not be able to

³⁸ U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL Vol. 12 Part L Ch. 2 (2023), <https://www.uscis.gov/policy-manual/volume-12-part-l-chapter-2>.

³⁹ 8 U.S.C. § 1481, <https://www.law.cornell.edu/uscode/text/8/1481>.

⁴⁰ British Nationality Act, (1981) c. 61 § 40, <https://www.legislation.gov.uk/ukpga/1981/61/section/40>.

⁴¹ *Cancellation, Withdrawal or Revocation of French Nat'y*, RÉPUBLIQUE FRANÇAISE (Feb. 24, 2023), <https://www.service-public.fr/particuliers/vosdroits/F32827?lang=en#:~:text=of%20French%20nationality%3F,Reasons,constituting%20a%20act%20of%20terrorism>.

⁴² The Pakistan Citizenship Act, No. 2 of 1951 (Pak.), <https://www.refworld.org/pdfid/3ac6b4ffa.pdf>.

⁴³ Legislative Decree 276 – Nationality Law, 1969 (Syria), <https://www.refworld.org/pdfid/4d81c7b12.pdf>.

⁴⁴ Complementary Information to COI Rpt. III, *supra* note 14, ¶ 53.

⁴⁵ 18 U.S.C. § 795, <https://uscode.house.gov/view.xhtml?req=granulocid:USC-prelim-title18-section795&num=0&edition=prelim>.

⁴⁶ *Foreign Travel Advice United Arab Emirates*, Gov.UK, <https://www.gov.uk/foreign-travel-advice/ united-arab-emirates/local-laws-and-customs> (last visited 20 June 2023).

⁴⁷ Terrorism Act, (2000) c. 11 § 13, <https://www.legislation.gov.uk/ukpga/2000/11/section/13>.

⁴⁸ Pakistan Penal Code, No. 45 of 1860, PAK. PENAL CODE, sec. 123-B, <https://www.pakistani.org/pakistan/legislation/1860/actXL.Vof1860.html>.

prohibit waving of the Indian flag in Pakistan. The Commission's analysis, yet again, reveals its anti-Israel bias. It also reveals the length to which the Commission goes to grasp at straws to single out Israel for condemnation. Yet, Israel, as a sovereign state, may do everything every other sovereign state may do.

B. The Commission accuses Israel of abusing its laws to oppress civil society organisations and personnel.

The Commission alleges that Israel has maliciously used its counterterrorism laws to designate six Palestinian civil society organisations as terrorist organisations.⁴⁹ The Commission claims that it “received information *suggesting* that some six months prior to the designations, the Israel Ministry of Intelligence had advised the Government to incriminate individuals and organizations receiving foreign funding, tarnish their reputation, and expose their connections to ‘terrorist’ elements, mentioning by name at least one of the designated organizations”.⁵⁰ In making its claim of maliciously using counterterrorism laws to wrongly designate Palestinian organisations as terrorist organisations, not only did the Commission rely on shadowy information that only “suggests” (as opposed to prove) wrongdoing by Israel but, contrary to the Commission’s claim, that information does not even “suggest” any wrongdoing by Israel. Note the language from the Commission’s report quoted above. It does not state that the Ministry of Intelligence advised the government to *manufacture false evidence* against Palestinian organisations. It states, the Ministry of Intelligence advised the government to *expose the organisations’ terrorist connections*. In order to expose any connections, such connections must exist in the first place. As such, the Commission’s presumptions about Israel’s designation of terrorist organisations are misplaced and misleading.

⁴⁹ Complementary Information to COI Rpt. III, *supra* note 14, ¶ 57.

⁵⁰ *Id.* ¶ 66 (emphasis added).

C. The Commission accuses Israeli security forces and settlers of attacking and prosecuting Palestinians but omits Palestinian attacks against Israelis.

The Commission gives multiple examples of alleged attacks, harassment, arrests, and prosecution of Palestinians by Israeli forces or attacks and harassment of Palestinians by Israeli settlers.⁵¹ It is unbelievable that the State of Israel, which provides equal rights to its Arab citizens (who are ethnically identical to Palestinians in the West Bank and the Gaza Strip), would attack or prosecute Palestinians without just cause. Nonetheless, while the Commission discussed examples of alleged violation by Israel, it simply ignored Palestinian attacks on Israeli soldiers or settlers. The Commission's examples also presented only one side of the facts. There is always a cause-and-effect relationship in such relations. There are always at least two sides to an issue. Until the Commission looks at both sides of an issue, it cannot render a legitimate evaluation. As long as the Commission accepts all charges made by Palestinians as true on their face without considering Israel's situation, concerns, and response, the Commission will be an "objective factfinder" only in its own imagination. It will also do more harm than good and delay the day when the Arab-Israeli conflict can be resolved.

D. For the first time the Commission mentions violations of rights by the Palestinian Authority and the so-called "de facto authorities" in Gaza.

For the first time, the Commission discussed the violations of rights by the Palestinian Authority (PA) and by, what the Commission calls, "the de facto authorities" (i.e., Hamas) in Gaza. The two prior reports, which deal with much more important issues, neglect discussing the numerous war crimes committed by Palestinian armed groups, such as Hamas and the PIJ. The fact that the Commission discussed examples of violations of law by the PA and Hamas only in the third report that deals with less significant issues shows that the Commission's prior reports were incomplete, whether by design or default.

⁵¹ *Id.* ¶¶ 67–91.

Further noteworthy is the drastic difference in treatment of Palestinians by Israel as opposed to their treatment by the PA or Hamas. While, according to the Commission's own report, Israel has investigated or arrested Palestinians for alleged violations of counterterrorism laws, denied visas to people who have advocated boycotting Israel, or designated "civil society" organisations for alleged connections with terrorist organisations, the PA and Hamas have investigated, arrested, or tortured Palestinians (their own people) for merely criticising the PA or Hamas. There is no moral equivalency between how Israel treats Palestinians and the level of care it takes in providing due process to people who deny Israel's right to exist and how the PA and Hamas abuse Palestinians for simply exercising their right to speak and protest against their leaders.

Moreover, there is no justification for continuously maligning Israel for exercising its right to self-defence while giving a pass to Palestinian groups who commit a war crime every time they indiscriminately fire a rocket toward Israel's civilian population centres. Despite clear examples of Israel's fidelity to the rule of law as opposed to frequent violations of both human rights law and the LOAC by Palestinian groups, the Commission primarily—and *inexplicably, save only for deep-seated antisemitism and animus towards Israel*—holds Israel responsible for any and every situation negatively affecting Palestinians. It seems to come down to this for the Commission: if Palestinians indiscriminately fire rockets at Israeli civilian communities and Israel responds with force in defence and Palestinians are injured, Israel is *ipso facto* at fault. That reasoning is absurd.

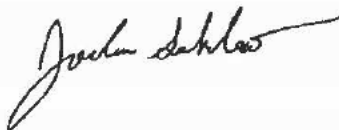
IV. CONCLUSION

The Commission purports to examine violations of international human rights law and the LOAC without actually providing any legal analysis. In all three reports, the Commission simply parrots accusations made by Palestinians while virtually ignoring the Israeli side altogether. Moreover, even with the one-sided allegations, the Commission fails to analyse

each accusation under the applicable law, i.e., primarily the LOAC and secondarily international human rights law. The Commission also criticises Israeli laws without providing any rationale to show how those laws are unreasonable, let alone how they may conflict with applicable international law.

In light of the legally flawed conclusions reached by the Commission, the Commission's third report is also simply one more in the long list of anti-Israel reports and resolutions at the UN. Unfortunately, the Commissioners have also made anti-Israel remarks before and after being appointed to the Commission, including pre-judging Israel guilty without doing any research or legal analysis.⁵² The word "independent" in the Commission's mandate means free from any outside pressure, influence, or bias. In order to be truly called an "independent" Commission, it should uphold the standards it states in its reports: "International law cannot be selectively applied; it must be implemented in its entirety".⁵³ The Commission currently assumes each Palestinian claim to be true without further examination *and* makes no serious effort to evaluate Israel's circumstances to draw objective conclusions. The Commission's very actions delegitimise it as an objective, trustworthy factfinder.

Respectfully submitted,



Jordan Sekulow
Senior Counsel



Shaheryar Gill
Senior Counsel

⁵² Request for Navi Pillay to Recuse Herself for Bias or the Appearance Thereof, 14 Feb. 2022, United Nations Watch, *available at* <https://unwatch.org/wp-content/uploads/2022/02/Request-for-Navi-Pillay-to-Recuse-Herself-on-Grounds-of-Bias.pdf>. UN "Inquiry Greenlights Palestinian Terror", THE TIMES OF ISRAEL, (22 June 2023), <https://blogs.timesofisrael.com/un-inquiry-greenlights-palestinian-terror/>.

⁵³ COI Rep. II, *supra* note 1, ¶ 50.