



I. INTRODUCTION

The European Centre for Law and Justice (ECLJ) submits this information to contribute to the Commission of Inquiry's (CoI) work pursuant to its mandate under Resolution A/HRC/RES/S-30/1. The ECLJ is a non-governmental organization dedicated to the defense 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 U.N. 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 CoI has published under its mandate. The ECLJ respectfully submits the following observations on the CoI's reports.

II. SELECTIVE AND INEQUITABLE APPLICATION OF THE LAW OF ARMED CONFLICT AND INTERNATIONAL HUMAN RIGHTS LAW IN THE COI REPORTS

The CoI has released two reports to date under its mandate "to investigate, in the Occupied Palestinian Territory, including East Jerusalem, and in Israel all alleged violations of international humanitarian law and all alleged violations and abuses of international human rights law leading up to and since 13 April 2021."¹ Both reports are premised on false assumptions that are relied on without providing any basis in law or fact. For example, both reports presume that a state of Palestine exists, while it is clear under international law that

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 (May 9, 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 (Sept. 14, 2022) [hereinafter CoI Rep. II].

there is not currently, nor has there ever been, a true state of Palestine. Both reports presume that the so-called West Bank, the Gaza Strip, and East Jerusalem are Palestinian territories, which means that, aside from assuming statehood, the CoI has arrogated to itself the authority to determine *borders* for the notional state of Palestine, even though the relevant parties to the disputed territories have agreed that borders would be decided as part of permanent status negotiations *between the parties*—which has yet to occur.² Both reports further presume, without any legal support, that Israel is unlawfully occupying the so-called “occupied Palestinian territories” (oPt), completely disregarding the fact that Israel was given legal title to the land by the League of Nations through the Mandate for Palestine³ before the West Bank and the Gaza Strip fell under illegal occupation by Jordan and Egypt, respectively. Hence, in 1967, Israel recaptured its own land in response to an Arab-initiated war.

Further, while the CoI’s title states that its mandate is to investigate “all” alleged violations of the Law of Armed Conflict (LOAC) and human rights law in the oPt and in Israel, the CoI’s reports focus only on the alleged violations by Israel, disregarding serious violations of the LOAC and human rights law by groups like Hamas and Palestinian Islamic Jihad (PIJ), which violations necessitate an Israeli response in self-defense. And both reports ignore Israel’s many attempts to negotiate as well as one-sided overtures of peace that the Israelis have consistently offered, and the Palestinians have rejected.⁴

In Section V of the second report published on September 14, 2022, discussing Israel’s “intent underlying the occupation regime,” the CoI stated Israel’s position and the

² Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, Sept. 28, 1995, U.N. Doc. A/51/889, Art. XVII(1)(a).

³ *Mandate for Palestine*, League of Nations, Doc. C.P.M.466-C.529.M.314.1922.VI.-C.667.M.396.1922.VI. (1922).

⁴ See, e.g., Mark Lavie, Opinion, *Israel Did Everything It Could for Peace and Was Rejected*, JERUSALEM POST (May 31, 2021), <https://www.jpost.com/opinion/israel-has-done-everything-it-can-for-peace-and-was-rejected-opinion-669687>; Walid Mahmoud & Muhammad Shehada, *Palestinians Unanimously Reject UAE-Israel Deal*, AL JAZEERA (Aug. 14, 2020), <https://www.aljazeera.com/news/2020/8/14/palestinians-unanimously-reject-uae-israel-deal>.

Palestinians' position. For Israel's position, the CoI stated that "Israel notes the Jewish presence in the territory for thousands of years and the recognition in the Mandate for Palestine, adopted by the League of Nations in 1922."⁵ For the Palestinians' position, the CoI stated that "Palestinians have vehemently opposed Israeli settlements, noting that they 'have no legal validity'" and violate "the Fourth Geneva Convention."⁶ Instead of determining the legality of these positions under international law or providing any legal analysis whatsoever, the CoI presumed the Palestinians' position to be correct. No legal analysis was provided as to the Israeli position under the League of Nations' Mandate, a binding international legal document, which encouraged close Jewish settlement by Jews on the land.⁷ Nor was there any discussion of Israel's defensive war that led to the disputed territories' recapture after the illegal and offensive occupation by Jordan and Egypt.

The CoI did not provide any reference as to how it came to presume that a state of Palestine exists or that the so-called West Bank, the Gaza Strip, and East Jerusalem are within that presumed state's territorial boundaries under international law. Are such boundaries based on the U.N. Partition Plan under General Assembly Resolution 181, which the Arabs refused and thus was never implemented? Are they based on the Armistice Agreements (aka the Green Line) which explicitly included a caveat, at the Arab states' insistence, that those lines should *not* be considered borders? Or, are such boundaries based on Security Council Resolution 242, which didn't even consider Arab residents of the West Bank and the Gaza Strip (aka "Palestinians") as a separate entity, let alone indicate any territorial boundaries? The CoI's reports have no answers for these questions.

⁵ CoI Rep. II, *supra* note 1, ¶ 48.

⁶ *Id.*

⁷ *Mandate for Palestine*, League of Nations, *supra* note 3, Art. 6.

The CoI also disregarded customary international law on statehood.⁸ “Palestine” does not satisfy the Montevideo criteria for statehood.⁹ Even Palestinian leaders continue to insist that they are moving *toward* statehood, which remains aspirational.¹⁰ The CoI, however, not only assumed the existence of a state, but also defined its exact borders. For instance, when discussing East Jerusalem, the second report calls it “Palestinian land.”¹¹ Notably, even General Assembly Resolution 181 never designated Jerusalem to be included in the future state of Palestine.¹² It intended Jerusalem to be *corpus separatum*.¹³ Denying history and law by simply calling East Jerusalem “Palestinian land” in light of such facts and without any legal basis belies the antisemitic undercurrent on display in the reports.

Further, the CoI disregarded the Oslo Accords, the terms of which were mutually agreed upon by Israeli and Palestinian leaders that final borders would be decided by negotiations between Palestinian and Israeli leaders.¹⁴ Palestinian leaders continue to reject every Israeli effort toward negotiations and a peaceful resolution.¹⁵ Thus, the borders are not decided, and the so-called West Bank and the Gaza Strip are, at best, disputed territories.

⁸ Observations with respect to the Situation in the State of Palestine on behalf of the European Centre for Law and Justice, ICC-01/18-70, 16-03-202, ¶ 20, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01009.PDF.

⁹ *Id.* ¶¶ 16-21.

¹⁰ *Id.* ¶ 26.

¹¹ CoI Rep. II, *supra* note 1, ¶ 14.

¹² GA Res. 181 (II), Future Government of Palestine, U.N. Doc. A/RES/181 (Nov. 29, 1947).

¹³ *Id.* at 146.

¹⁴ Isr.-PLO, *supra* note 2, Art. XVII(1)(a).

¹⁵ Mahmoud & Shehada, *supra* note 4 (“Palestinian leaders who spoke to Al Jazeera called [the UAE-Israeli deal] a ‘stab in the back’. . . . [A member of the PA Parliament] emphasized the deal ‘doesn’t introduce any change or progress, it’s far from being genuine peace. . . . “This is an attempt to force the ‘deal of the century’ that aims to liquidate Palestinian national rights, it represents a denial of Palestinian, Arab and Islamic rights.””); Mohammed Daraghme & Fares Akram, *Palestinians Angrily Reject Trump Mideast Peace Plan*, AP NEWS (Jan. 28, 2020), <https://apnews.com/article/israel-united-nations-donald-trump-ap-top-news-ramallah-0dcb0179faf41e1870f35838058f4d18> (“Palestinian President Mahmoud Abbas said ‘a thousand no’s’ to the Mideast peace plan.”); Dr. Edy Cohen, *A Short History of Palestinian Rejectionism*, BEGIN-SADAT CENTER FOR STRATEGIC STUDIES (Feb. 16, 2020), <https://besacenter.org/palestinian-rejectionism/> (“In 2008, . . . Abbas rejected [‘a sweeping peace proposal’ from Israeli PM Ehud Olmert] outright . . . claim[ing] that ‘the gaps are too wide,’ countering that ‘I will wait until all the Israeli settlements have been frozen.’”); Reuters Staff, *Palestinians Reject Proposal by Israeli PM*, REUTERS (Aug. 12, 2008), <https://www.reuters.com/article/us-palestinians-israel/palestinians-reject-proposal-by-israeli-pm-idUSLC6231820080812> (According to Abbas’s spokesman, “[t]he Palestinian side will only accept a Palestinian state with territorial continuity, with holy Jerusalem as its capital, without settlements, and on the June 4, 1967 boundaries,” and the 2008 Israeli proposal was a “waste of time” and demonstrated a “lack of seriousness.”).

The CoI reports are also internally and inherently contradictory. On the one hand, the reports state that the West Bank, East Jerusalem, and the Gaza Strip are “occupied” territories and, as such, the LOAC applies therein. At the same time, however, they allege that Israeli security measures—which are lawful under the same law of armed conflict—are somehow still unlawful. These are inherently inconsistent positions. For example, measures such as security barriers,¹⁶ naval blockades,¹⁷ military tribunals,¹⁸ etc. are all lawful under the LOAC. Because the security measures are lawful under the LOAC, they cannot be unlawful under general human rights law. In other words, measures (such as restrictions on freedom of movement, security barriers, blockades, etc.) that are not allowed in peacetime are lawful during an armed conflict. The CoI demands that the Geneva Conventions apply to Israeli actions; and when Israel takes measures that are lawful under the Geneva Conventions, the CoI condemns those actions as illegal. An action cannot be both lawful and unlawful at the same time.

Further, by calling Israeli presence and the Jewish settlements in the so-called West Bank unlawful occupation,¹⁹ the CoI disregarded the Mandate for Palestine, an international legal instrument that called for the establishment of a Jewish national home in the entire territory of the Mandate for Palestine. Article 6 of the Mandate explicitly encouraged “close settlement by Jews on the land.”²⁰ That Mandate was adopted by the United Nations and has never been repealed. Again, the CoI reports contain erroneous conclusions without providing any legal analysis on these matters.

¹⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S 287, art. 27 [hereinafter Geneva Convention IV].

¹⁷ *Id.* art. 18; ICRC, *Commentary on the Fourth Geneva Convention: Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1958* [hereinafter *Commentary of 1958*].

¹⁸ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 75 U.N.T.S 135, art. 84 [hereinafter Geneva Convention III].

¹⁹ CoI Rep. II, *supra* note 1, ¶¶ 26, 75; *Contra* DR. JAY ALAN SEKULOW & ROBERT WESTON ASH, WHY JEWISH SETTLEMENTS IN THE SO-CALLED “WEST BANK” ARE LAWFUL UNDER INTERNATIONAL LAW 2 (Apr. 19, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4087694.

²⁰ *Mandate for Palestine*, *supra* note 3, Art. 6.

Moreover, the CoI apparently placed the entire responsibility for Palestinian deaths and the destruction of infrastructure in the so-called occupied territories on Israel,²¹ while minimizing the fact that Hamas, PIJ, and other terrorist groups in the disputed territories commit flagrant war crimes when they indiscriminately fire thousands of rockets into Israel;²² use civilians as human shields;²³ use civilian infrastructure,²⁴ such as hospitals,²⁵ schools,²⁶ and residential buildings for military purposes;²⁷ and pay salaries and commissions to those who murder innocent Israelis and Americans.²⁸ In response to such attacks, Israeli security measures are completely lawful acts of self-defense allowed under the Geneva Conventions and the UN Charter.²⁹ In taking such measures to defend its civilian population from indiscriminate attacks (including its Arab citizens), Israel also takes every precaution, above and beyond what is required of it legally, to avoid civilian casualties in the disputed territories.³⁰

The CoI reports also discuss the alleged discriminatory treatment of Israel's Arab citizens by Israel,³¹ apparently in a thinly veiled attempt to work up to a charge of apartheid.³²

²¹ CoI Rep. I, *supra* note 1, ¶ 73.

²² *Palestinian Rockets in May Killed Civilians in Israel, Gaza*, HUM. RTS. WATCH (Aug. 12, 2021), <https://www.hrw.org/news/2021/08/12/palestinian-rockets-may-killed-civilians-israel-gaza>.

²³ European Parliament Resolution of April 19, 2018, on the Situation in the Gaza Strip, 2018/2663(RSP), 2019 O.J. (C 390) 3; Orde F. Kittrie & Matthew Zweig, *How Congress Can Fight Hamas's Use of Human Shields*, THE HILL (June 11, 2021), <https://thehill.com/opinion/international/557939-how-congress-can-fight-hamas-use-of-human-shields/>.

²⁴ Kittrie & Zweig, *supra* note 23.

²⁵ Terrence McCoy, *Why Hamas Stores Its Weapons Inside Hospitals, Mosques and Schools*, THE WASH. POST (July 31, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/07/31/why-hamas-stores-its-weapons-inside-hospitals-mosques-and-schools/>.

²⁶ *Id.*

²⁷ Julia Marnin, *Owner of Gaza Apartment Building Was Warned by Israeli Military to Evacuate Before Airstrike*, NEWSWEEK (May 13, 2021), <https://www.newsweek.com/owner-gaza-apartment-building-was-warned-israeli-military-evacuate-before-airstrike-1591185>.

²⁸ Sean Durns, *The Palestinian Authority Is Still Paying Terrorists*, NEWSWEEK (Jan. 21, 2021), <https://www.newsweek.com/palestinian-authority-still-paying-terrorists-opinion-1563138>; Sander Gerber & Michael Koplow, *No More 'Pay to Slay'*, WALL. ST. J. (July 12, 2022), <https://www.wsj.com/articles/no-more-cash-for-terrorists-payments-west-bank-abbas-biden-visit-martyrs-washington-11657656402>.

²⁹ U.N. Charter art. 51.

³⁰ See, e.g., *Taking Every Measure to Avoid Civilian Casualties*, EMBASSY OF ISR. TO THE U.S. (Nov. 19, 2012), <https://embassies.gov.il/washington/NewsAndEvents/Pages/IDF-minimizes-civilian-casualties.aspx>.

³¹ CoI Rpt. I, *supra* note 1, ¶ 44.

³² Tovah Lazaroff, *UN Commission Will Probe Question of Israeli Apartheid – Pillay Tells 'Post'*, JERUSALEM POST, <https://www.jpost.com/arab-israeli-conflict/article-709511> (June 16, 2022).

Instead of using the accurate legal terminology, the CoI uses politically charged, inaccurate terminology when it calls Israel's Arab citizens "Palestinian citizens of Israel,"³³ "treatment of Palestinians by Israel inside Israel," or "Palestinians residing in other areas of Israel."³⁴ While Arab citizens of Israel share the same ethnicity with Arabs residing in the so-called West Bank and the Gaza Strip, they are citizens of Israel, i.e., they are "Israelis," and would still be considered Israelis, not "Palestinians," even if a state of Palestine were to come into existence at some future date. This complete disregard for the application of simple principles of law, including the difference between citizens and non-citizens, is shocking.

As to the merits of the alleged discrimination, Israel treats all of its citizens, Arabs, Jews, and others, alike. Israeli law protects the rights of all citizens.³⁵ Arab citizens of Israel have full and equal voting rights.³⁶ 64.7% of Arab citizens of Israel voted in the 2020 election.³⁷ As a result, Arab politicians held 15 out of 120 seats in the Knesset, making them the third most powerful coalition in the legislative branch.³⁸ In addition, Arabs have served in senior cabinet positions,³⁹ and several Arabs have sat on Israel's Supreme Court.⁴⁰ The facts on the ground show that Israel is a model of equality and justice that other countries in the Middle East would do well to imitate and emulate, rather than attack.

³³ CoI Rpt. II, *supra* note 1, ¶ 21.

³⁴ *Id.* ¶ 23.

³⁵ Kali Robinson, *What to Know About the Arab Citizens of Israel*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/background/what-know-about-arab-citizens-israel> (Oct. 28, 2022).

³⁶ Shuli Dichter & Asad Ghanem, *Promoting Civic Society Between Arab and Jewish Israelis: An NGO's Perspective*, WILSON CTR. (June 21, 2002), <https://www.wilsoncenter.org/event/promoting-civil-society-between-arab-and-jewish-israelis-ngos-perspective>.

³⁷ Oliver Holmes, *Israel's Arab Parties Make Historic Gains as Election Support Surges*, GUARDIAN (Mar. 4, 2020), <https://www.theguardian.com/world/2020/mar/04/israel-arab-parties-make-historic-gains-election-support-surges>.

³⁸ *Id.*

³⁹ *Who's Who in Israel's New Patchwork Government*, AL JAZEERA (June 14, 2021), <https://www.aljazeera.com/news/2021/6/14/whos-who-in-israels-new-patchwork-coalition-government>.

⁴⁰ Deborah Brand, *Israel Appoints Arab Muslim As Supreme Court Judge*, BREITBART (Feb. 21, 2022), <https://www.breitbart.com/middle-east/2022/02/21/israel-appoints-arab-muslim-as-supreme-court-judge/>.

III. CONCLUSION

In concluding the second report, the CoI stated that “there are reasonable grounds to conclude that the Israeli occupation of Palestinian territory is now unlawful under international law.”⁴¹ This statement implies that the so-called “occupation” was at some point lawful, but the CoI reports do not explain when or how that analysis might have changed. Regardless, the CoI reports once again self-contradict when they also allege the occupation’s illegality since 1967.⁴² Further, the CoI presumed illegality of the occupation from its alleged “permanence.”⁴³ Yet, when determining “permanence” of the “occupation,” the CoI disregarded the legal principle of necessity of self-defense on Israel’s part in the face of thousands of indiscriminate rocket attacks (which clearly constitute war crimes) by groups like Hamas and the PIJ. Moreover, excluding Palestinian attacks from the analysis when determining the legality of Israeli security measures, such as checkpoints, naval blockades, restrictions on freedom of movement, military tribunals, administrative detentions, etc. (all lawful measures under the Geneva Conventions) is not intellectually honest, let alone a valid legal analysis. We respectfully submit to the CoI to abide by its own stated principle: “International law cannot be selectively applied; it must be implemented in its entirety.”⁴⁴

Respectfully submitted,



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⁴¹ CoI Rpt. II, *supra* note 1, ¶ 75 (emphasis added).

⁴² *Id.* ¶¶ 14, 16, 21-22.

⁴³ *Id.* ¶ 75.

⁴⁴ *Id.* ¶ 50.