



MEMORANDUM

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The Importance of Defending the State of Israel, Our Closest Ally

Since Israel declared independence on May 14, 1948, the Jewish state has faced continuous existential threats from a slew of different opponents. After decades of fighting on the battlefield, however, Israel’s enemies have realized that they simply cannot overpower the tiny country with its outsized military prowess, and so over the last several years they have increasingly shifted their focus elsewhere – abusive lawfare¹ and the use of outright lies in the court of public opinion.² The ACLJ has been actively engaged for years in helping defend our closest ally in both of these arenas, and exposing the lies that are at the center of anti-Israel advocacy. What follows is a brief legal history of the underlying conflict, and the answers to some of the most often-raised legal arguments in these arenas.

A Brief Legal History of the Conflict

In 1922 the League of Nations Mandate for Palestine established an area (which included what is now the West Bank) to be a national home for the Jewish people.³ Article 6 of the mandate explicitly encouraged “close settlement by Jews on the land.”⁴ This was not a “gift” to the Jews, nor was it established at anyone else’s expense. Jews have lived in these areas continuously for over 4000 years. As Winston Churchill, then secretary of state for the colonies, explained, “When it is asked what is meant by the development of the Jewish National Home in Palestine, it may be answered that it is not the imposition of a Jewish nationality upon the inhabitants of Palestine... but the further development of the existing Jewish community [I]n order that this community

¹ See, Orde F. Kittrie, *LAWFARE: LAW AS A WEAPON OF WAR* 197-238 (2016).

² See generally NACHMAN SHAI, *HEARTS AND MINDS: ISRAEL AND THE BATTLE FOR PUBLIC OPINION* (2018).

³ *Mandate for Palestine*, League of Nations Doc. C.529M.314 1922 VI 3 (1922), https://www.un.org/unispal/wp-content/uploads/2017/05/C-529-M-314-1922-VI_BI.pdf.

⁴ *Id.* at 4.

should have the best prospect of free development . . . it is essential that it should know that it is in Palestine as of right and not on the sufferance.”⁵

When the United Nations was formed, it re-affirmed the existing arrangements. After Britain announced that it would leave the area, the U.N. proposed a partition plan⁶ that was accepted by the Jewish community, but was not accepted by the Arab world. This left the extant Mandate lines intact. Under the international legal principle of *Uti possidetis juris*, emerging states presumptively inherit their pre-independence administrative boundaries, and thus international law dictates that Israel, which to this day remains the only state to ever have emerged from that Mandate, inherited the boundaries of the Mandate of Palestine as they existed in May, 1948.⁷

Of course, when Israel declared independence, it was immediately attacked by five Arab nations. The United Nations blamed the Arabs for the violence and aggression meant to undermine the Resolution and forcefully take land, and the Spokesman for the Arab Higher Committee readily agreed.⁸ Two of the invading Arab armies, Jordan (West Bank) and Egypt (Gaza Strip) occupied territory that they had taken through aggressive action – the kind of aggressive action that is forbidden under international law. The famous “Green Line” was drawn for no other reason than to mark off on a map how far those two invading armies had gotten; the armistice agreements themselves state that these were never meant to be actual borders.⁹ To give meaning under international law to these “pre-67 lines,” as anti-Israel agitators often do, is, ironically, to retroactively ratify aggression against the mandate and support occupation.

In 1967, Israel regained those territories in what was undisputedly a defensive war.¹⁰ While the U.N. charter forbids aggression, U.N. Charter Article 51 clearly recognizes “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations. . . .”¹¹ To summarize: “Israel was given land under a Mandate that was never repealed, two other countries attacked Israel and squatted on the land for a while, and then, when they attacked Israel again and lost, Israel regained the land she had originally been given.”¹² This leads to the first myth which underlies much of the current anti-Israel activism: the myth of the occupation.

⁵ *British White Paper of June 1922*, YALE L. SCH., https://avalon.law.yale.edu/20th_century/brwh1922.asp (last visited Sept. 15, 2023).

⁶ *UN Partition Plan - Resolution 181 (1947)*, ISRAELI MISSIONS AROUND THE WORLD, <https://embassies.gov.il/MFA/AboutIsrael/Maps/Pages/1947%20UN%20Partition%20Plan.aspx> (last visited Sept. 15, 2023).

⁷ See Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 ARIZ. L. REV. 633, 681-83 (2016).

⁸ *Israeli War of Independence: Background & Overview (1947 - 1949)*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/background-and-overview-israel-war-of-independence> (last visited Sept. 18, 2023).

⁹ Israel and Jordan: General Armistice Agreement (with annexes). Signed at Rhodes, on 3 April 1949, art. 6, Isr.-Jordan, Apr. 3, 1949, 42 U.N.T.S. 656, <https://treaties.un.org/doc/Publication/UNTS/Volume%2042/v42.pdf>.

¹⁰ *The Six Day War: Forty Years On*, HONESTREPORTING (June 4, 2007), <http://honestreporting.com/the-six-day-war-forty-years-on-2>.

¹¹ U.N. Charter art. 51, <https://www.un.org/en/about-us/un-charter/full-text>.

¹² Mark Goldfeder, *Obama Administration Was Hypocritical on UN's Israeli Settlements Vote*, CNN (Dec. 26, 2016, 10:03 PM), <https://www.cnn.com/2016/12/26/opinions/us-role-in-israel-un-vote-was-hypocritical-goldfeder/index.html>.

The Myth of Occupation

Under international law, occupation occurs when a country takes over the sovereign territory of another country. But a country cannot occupy territory to which it has sovereign title, and Israel has the strongest claim to the land. To quote former State Department Legal Advisor and Professor, Stephen Schwebel, who later sat on 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.”¹³ One cannot occupy one’s own land, and being that Israel has both rights and sovereignty in the West Bank there is, as a matter of law, no occupation present. In the most generous light, the territories in question can be considered disputed, but disputed territory still cannot be considered occupied if there was no clear sovereign beforehand – and even in the most generous retelling of the conflict, neither Jordan, nor Egypt, nor the non-existent state of Palestine, was *ever* in legal possession of the land.

How then does the pernicious occupation myth continue? Those spreading the lie rely on the fact that the U.N. has continually condemned the Israeli ‘occupation,’ and that many laypeople mistakenly believe that the U.N.’s resolutions are internationally binding. The truth, however, is that according to Article 10 of the U.N.’s own Charter, General Assembly Resolutions are generally *not* binding, and do not create international law.¹⁴ U.N. Security Council Resolutions *are* theoretically binding in limited circumstances, when the Council is using its U.N. Charter Chapter VII powers,¹⁵ which deal with threats to the peace, breaches of the peace, or acts of aggression, but the Security Council has never made such a declaration regarding Israel. All of the U.N. statements about the occupation are nothing more than political slander by an international group that displays a consistent anti-Israel bias.¹⁶ A large focus of that bias is spreading the false accusation that Israel, and not the Palestinians, are the ones who are holding up the peace process.

¹³ Stephen M. Schwebel, *What Weight to Conquest?*, 64(2) AM. J. OF INT’L L. 344, 346 (Apr., 1970), <https://www.jstor.org/stable/pdf/2198669>.

¹⁴ U.N. Charter art. 10.

¹⁵ U.N. Charter chapter 6.

¹⁶ It is legitimate for the United Nations to criticize any nation, including Israel, which should be held accountable like every other country. But it is also clear that Israel faces systemic bias at the U.N.: Not one but two U.N. Secretary Generals have admitted it. May Bulman, *Ban Ki-moon Says UN Has 'Disproportionate' Focus on Israel*, INDEPENDENT (Dec. 16, 2018, 12:52 AM), <https://www.independent.co.uk/news/world/middle-east/ban-kimoon-united-nations-disproportionate-israel-focus-resolutions-palestinians-human-rights-danny-danon-a7481961.html>; *UN Chief Vows to Stand Up Against Anti-Israel Bias, Anti-Semitism*, TIMES OF ISR. (Apr. 24, 2017, 3:56 AM) <https://www.timesofisrael.com/un-chief-vows-to-stand-up-against-anti-israel-bias-anti-semitism>. And frankly, the numbers don’t lie. At the U.N. Human Rights Council alone, roughly one third of *all* resolutions for the *entire globe* condemn the State of Israel. *Human Rights Actions: Resolutions & Decisions (2003-2016)*, HUMAN RIGHTS VOICES (Mar. 11, 2017, 10:53 PM), http://www.humanrightsvoices.org/EYEontheUN/priorities/actions/body/?ya=1&sa=1&u=344&un_s=0&ul=1&tp=1&tpn=Resolution [https://web.archive.org/web/20170311225358/http://www.humanrightsvoices.org/EYEontheUN/priorities/actions/body/?ya=1&sa=1&u=344&un_s=0&ul=1&tp=1&tpn=Resolution]. Israel has been the subject of more commissions of inquiry than any other country; more special sessions than any other country; and it is the *only* country in the

The Myth of Israeli Intransigence

Anti-Israel activists often claim that they would be happy with a two-state solution, but that Israel is not allowing that to happen. This is a lie. In fact, Israel has repeatedly (over 30 times) offered plans for peace that would resolve the conflict over the territories.¹⁷ Some of those plans were incredibly generous, and some, including the Clinton Parameters, were even supported by much of the Arab world.¹⁸

To put it squarely in facts and numbers: “Israel (legitimately) gained a total of 26,178 square miles of territory in the defensive war of 1967. To date, it has ceded sovereignty over approximately 23,871 square miles or 87% of that territory. At various times in recent history (including deals proposed in 2000, 2008 and 2014), Israel has offered up to 99.3% of the remaining disputed territory in exchange for peace. Each time the Palestinians refused.”¹⁹ Real solidarity with the Palestinian cause would include being honest about history of failed Palestinian leadership. It would also involve acknowledging the real-world consequences of decisions made that still affect the Middle East today. Instead, they turn to wild fabrications about what happened and what is currently happening in Israel. Which leads to the next myth: The myth of Israeli apartheid.

The Myth of Israeli Apartheid

Another legal term that is often abused when it comes to slandering Israel is the international-law crime of apartheid. There are a couple of accepted definitions of apartheid, both of which mean basically the same thing. The International Convention on the Suppression and Punishment of the Crime of Apartheid states that “‘the crime of apartheid’ . . . shall apply to the following inhuman

world that has a permanent agenda item dedicated to focus on its alleged wrongdoings. *7 Problems with the Human Rights Council*, UN WATCH, <https://unwatch.org/database/problems/unhrc> (Aug. 15, 2023). This is so glaringly apparent that, in 2018, the previous U.S. Administration voluntarily terminated its membership in protest. Gardiner Harris, *Trump Administration Withdraws U.S. From U.N. Human Rights Council*, N.Y. TIMES (June 19, 2023), <https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html>. Even when the Biden Administration rejoined last year, Ambassador Linda Thomas-Greenfield promised that the U.S. “‘will oppose the Council’s disproportionate attention on Israel. . . .” Richard Roth & Meagan Vazquez, *US officially rejoins controversial UN Human Rights Council*, CNN: POLITICS, <https://www.cnn.com/2021/10/14/politics/us-united-nations-human-rights-council/index.html> (Oct. 14, 2021, 8:03 PM).

¹⁷ See David Meir-Levi, *31 Opportunities for Statehood Squandered in Favor of Genocide: Exposing the Palestinians’ bid for statehood at the United Nations*, FRONT PAGE MAG. (July 14, 2011), <https://www.frontpagemag.com/31-opportunities-statehood-squandered-favor-david-meir-levi>.

¹⁸ Dennis Ross, *Bandar Speaks Out: The Changing Landscape in the Mideast*, HILL (Oct. 19, 2020, 11:00 AM) <https://thehill.com/opinion/international/521597-bandar-speaks-out-the-changing-landscape-in-the-mid-east>.

¹⁹ Mark Goldfeder & Gabriel Groisman, *Israel is Not a Racist State, in Theory or in Practice: U.S. Representative Pramilla Jayapal’s Recent Statement That Israel Is a “Racist State” Is Both False and Dangerous*, JEWISH JOURNAL (July 18, 2023), <https://jewishjournal.com/commentary/opinion/360836/israel-is-not-a-racist-state-in-theory-or-in-practice>.

acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”²¹

In 1998, the Rome Statute, which defines crimes under the jurisdiction of the International Criminal Court, codified something similar: Apartheid consists of “inhumane acts . . . committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”

There are any number of reasons why Israel is not an apartheid state; for example, Israeli Arab citizens have full and equal rights, and have enjoyed positions in the highest levels of every branch of government, including the legislative branch (the Knesset), the executive branch (the Israeli cabinet), and the judicial branch (the High Court). But even ignoring those facts, remember that by definition, apartheid involves inhumane acts committed with the intention of maintaining a particular regime. As already noted, Israel has repeatedly and consistently offered plans for peace. By definition, there cannot be apartheid when one group keeps trying to negotiate a lasting peace in order to end the status quo, not maintain it.

Still, the allegation of apartheid gets repeated until it becomes a de facto justification for the launch of violence against innocents. And then, when Israel responds, you will inevitably be confronted by the next myth:

The Enduring Myth of Israel’s Disproportionate Response

Lawfare operatives (assisted by ill-informed “pundits”) love to make the argument that in any given situation, even if Israel is defending itself against terrorist attacks, Israel is still in the wrong because Israel’s response was “disproportionate.” They especially love to point to the fact that there are often times more casualties on the Palestinian side than on the Israeli side. But that surface level comparison is deeply flawed and terribly dangerous.²²

First, it is undisputed that U.S.-designated terrorist organizations like Hamas and Palestinian Islamic Jihad²³ continue to shoot thousands of rockets into densely populated Israeli cities. The express, unwavering goal of these terrorists is to kill every Jewish man, woman, and child. Israel’s defense system knocks down most of the missiles, but some get through and kill or injure innocents – including innocent Arab Israelis. If Israel had not invested in research and development to protect its people and instead focused on digging terror tunnels like Hamas, there would be hundreds more dead Israelis. Would that make these pundits feel better? Israel is not at fault for being able to

²¹ G.A. Res. 3068 (XXVIII), art. 2 (July 18, 1976), https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.10_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf.

²² See Kenneth Anderson, *Laurie Blank on Proportionality in the International Law of Targeting*, WASH. POST (July 31, 2014, 9:41 PM) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/31/laurie-blank-on-proportionality-in-the-international-law-of-targeting>.

²³ *Foreign Terrorist Organizations*, U.S. DEPT. OF STATE: BUREAU OF COUNTERTERRORISM, <https://www.state.gov/foreign-terrorist-organizations> (last visited Sept. 18, 2023).

defend herself and has every right to respond to aggression. Hamas and its allies should not be rewarded or excused by the media for its poor aim and misplaced priorities.

Second, these critics either purposefully, or at the very least negligently, confuse and conflate the ideas of proportionality and symmetry. Proportionality in wartime is a prospective legal analysis that falls under Article 8(2)(b)(iv) of the Rome Statute.²⁴ Per the statute, the principle of proportionality forbids attacks in which expected civilian casualties will be excessive in relation to the anticipated military advantage gained. It has nothing to do with the relative number of people killed on both sides, and the reason for that is clear: When you judge the appropriateness of an attack based on the number of people who died, you do not protect civilians, you incentivize human shields. That is precisely why Hamas operatives continuously surround themselves with civilians, just to let them die. That is why they store weapons in schools and hospitals, and why they deploy them from civilian structures in populated areas.²⁵

Under the kind of effects-based, non-legal analysis offered by those who wish to harm Israel's reputation, Hamas's use of human shields to build up the number of casualties is actually rewarded. To paraphrase a quote often attributed to Israeli Prime Minister Golda Meir, if they only loved their children as much as they hated ours, this war would be over.²⁶

Unlike their enemies, Israel only aims at military targets, and does everything it can to limit casualties, including warning civilians in advance to leave the targeted areas. In fact, as these same critics often ironically note in an attempt to display the power imbalance, Israel has the ability to completely destroy the other side – but they have shown great restraint in not doing so. For the record, the conflict often does result in casualties that are asymmetrical – not disproportionate – and that is because Israel cares about and invests in protecting its citizens, while its enemies do not. Asymmetry and disproportionality are not the same thing, no matter how many celebrities and influencers confuse them. One is a statement of numerical fact, and the other is a war crime.

But even these allegations do not go far enough in the eyes of Israel's critics, and so a newer popular pastime is to accuse Israel of committing genocide against the Palestinians.

The Myth of Israel Committing Genocide

This uninspired update on the classic blood libel²⁷ “is so deranged that it would be laughable if it were not so incredibly dangerous.”²⁸ Fortunately, it is also perhaps the easiest to refute. The Convention on the Prevention and Punishment of the Crime of Genocide says that genocidal acts are “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious

²⁴ Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), 2187 U.N.T.S. 38544 (July 17, 1998), <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

²⁵ *Hamas' Use of Human Shields in Gaza*, 149 https://stratcomcoe.org/cuploads/pfiles/hamas_human_shields.pdf (last visited Sept. 18, 2023).

²⁶ Golda Meir Quotes on Israel & Judaism, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/golda-meir-quotes-on-israel-and-judaism> (last visited Sept. 18, 2023).

²⁷ *Blood Libel*, AM. JEWISH COMM., <https://www.ajc.org/translatehate/blood-libel> (last visited Sept. 18, 2023).

²⁸ Moshe Goldfeder, *A Postwar Debriefing*, MISHPACHA (June 1, 2021), <https://mishpacha.com/a-postwar-debriefing>.

group, as such.”²⁹ Even setting aside the complete lack of evidence for such a heinous charge the irrefutable math here tells a very different story. Since 1967, the Palestinian Arab population has actually increased by 387 percent. If Israel is perpetrating a genocide against a defenseless people, then it is historically, awfully bad at it.

If you are curious as to what a call for genocide does look like, Hamas’s founding charter contains the following paragraph: “The Day of Judgement will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him.”³⁰

Why We Support the State of Israel

America’s enduring partnership with Israel is, of course, based on our deeply held shared values, including the commitment to democracy, economic prosperity, and regional security.³¹ That partnership includes educational and cultural ties; economic ties; and, of course, security assistance and cooperation.

Recently, some on the far Left have been calling for America to add restrictions to its military aid to Israel.³² Aside from the fact that we stand by our allies and our commitments, it is important to remind them that “American military aid to Israel is generous to be sure, but it is an investment and not a charity. Supporting Israel in combating Middle East terrorist groups and expansionist potentates is crucial for America’s own national security. Israel is our closest ally in the Middle East and our only reliable source of intelligence and cyber-defense in that region.”³³ As President Biden once said at an Israeli Day Celebration, “[W]ere there no Israel, America would have to invent one. We’d have to invent one because . . . you protect our interests like we protect yours.”³⁴ Our shared security interests include but are not limited to preventing nuclear proliferation,

²⁹ G.A. Res. 260 A (III), art. 2 (Dec. 9, 1948), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

³⁰ *Hamas Covenant 1988: The Covenant of the Islamic Resistance Movement*, YALE L. SCH., art. 7 (Aug. 18, 1988), https://avalon.law.yale.edu/20th_century/hamas.asp (quoting Muhammad). This call to kill Jews around the world accompanies a vow to destroy the State of Israel. *Id.* preamble. While Israel has the ability to destroy opposition, it demonstrably does not use it. While Israel’s enemies do not have the inverse power, they openly proclaim they would, if they could. *Id.*

³¹ *U.S. Relations with Israel*, U.S. DEPT. OF STATE: OFF. OF THE SPOKESPERSON (Jan. 30, 2023), <https://www.state.gov/u-s-relations-with-israel-2>.

³² *US Congresswoman Introduces Bill to Restrict Aid to Israel*, AL JAZEERA (May 5, 2023), <https://www.aljazeera.com/news/2023/5/5/us-congresswoman-introduces-bill-to-restrict-aid-to-israel>.

³³ Mark Goldfeder, *Kamala Harris Should Apologize for Leaving Lies About Israel Unrefuted*, DAILY NEWS (Oct. 1, 2021, 4:41 PM), <https://www.nydailynews.com/2021/10/01/kamala-harris-should-apologize-for-leaving-lies-about-israel-unrefuted>.

³⁴ Joe Biden, Vice President, U.S. Remarks by Vice President Joe Biden the 67th Annual Israeli Independence Day Celebration, ¶12 (Apr. 23, 2015, 7:29 PM), <https://obamawhitehouse.archives.gov/the-press-office/2015/04/23/remarks-vice-president-joe-biden-67th-annual-israeli-independence-day-ce>.

combating terrorism, containing Iranian, Turkish, and Russian expansionism, and promoting the rule of democracy. In addition, all of the money spent on American military aid to Israel is actually spent domestically, in the United States, providing jobs and economic growth that benefit our own economy and defense industry.

At the ACLJ, we have been proud to stand in the breach and fight for our ally Israel. We have done so in the halls of the United Nations, on the airwaves and in academia, and in courtrooms across the country and as far as the International Criminal Court in the Hague. And we will continue to do so forever, because that is how long our friendship will endure.

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