



AGPI STATEMENT ON UN-HRC COMMISSION REPORT ON ISRAEL

Prepared by: Henry Kopel is a retired U.S. Federal Prosecutor, and the author of *War on Hate: How to Stop Genocide, Fight Terrorism, and Defend Freedom* (Lexington Books, 2021). He serves on the AGPI Global Advisory Board.

Last week, on October 20, 2022, the UN Human Rights Council's "Independent International Commission of Inquiry on the Occupied Palestinian Territory" released a report that – not surprisingly – declared Israel guilty of violating international law for its alleged "permanent occupation" of Palestinian territory. Among other recommendations, the Commission urged all UN member nations to arrest and prosecute Israeli officials if/when they happen to pass through any such country.

This damning Commission report is wrong – deeply wrong, on four separate counts. As explained below, the report is: (1) factually false; (2) legally flawed; (3) tainted by bias; and (4) fundamentally corrupted by the illegitimacy of the HRC's membership criteria. Legally and morally, this report deserves only one response, namely, to be summarily rejected by the global community.

1. The report is factually false. At bottom, the report rests on two conclusions: (1) that Israel occupies Palestinian territory; and (2) that Israel has made that occupation permanent – and therefore, that Israeli actions to enforce the so-called occupation consist of war crimes. Neither conclusion is accurate.

First, as a formal legal matter, the territory in question is not "Palestinian," but rather is "disputed." There never has existed a Palestinian nation – which several Palestinian leaders acknowledged during 1947 hearings before the UN Commission responsible for those lands (those same leaders insisted that "Palestine" was actually a district within south Syria). Although the UN in 1948 sought for the first time ever to create a Palestinian state in the West Bank and Gaza (along with a separate Jewish state alongside it), the Palestinian Arab leadership rejected that proposal and launched a war specifically to negate it – which war they lost.

In that same war, Jordan and Egypt illegally seized and then occupied the territories until 1967, when Israel – in defending against another Arab-launched war seeking its annihilation – took control of the territories. Five times since then, Israel has endorsed and sought to resurrect the two-state concept, that is, finally to give the territories to the Palestinian people under guarantees of peace – and yet again, the Palestinian leadership rejected every such initiative, namely: (1) after the 1967 war, the famous “three no’s” of the Khartoum conference; (2) the 1993 Oslo Accords, sabotaged by Palestinian terrorism; (3) the 2000 Camp David Accords, rejected by Arafat; (4) the 2001 revised Accords, again rejected by Arafat; and (5) the 2007 Olmert proposals, deliberately ignored by Mahmoud Abbas. Hence the territories’ status as “disputed.”

Second, the territories are not even legally “occupied” by Israel. Under the 1993 Oslo Accords and related agreements, day-to-day governance over substantial parts of the West Bank and all of Gaza was transferred to the Palestinian Authority, pending a final status resolution. In practice, this means that “more than 95% of the Palestinians in the West Bank and all Palestinians in Gaza live under Palestinian rule.”¹

Subsequently in Gaza, the Hamas terror group took control in a murderous coup; the PA still governs the West Bank. The present lack of full Palestinian national sovereignty is no fault of Israel, but rather results from the PA’s (and Hama’s) repeated *rejection* of statehood-and-peace offers.

Third, Israel’s falsely alleged occupation – which in fact consists of its unwanted, unavoidable role in countering the constant Palestinian terror threats from the territories – is by no means “permanent.” The fact that Israel has offered and endorsed repeated proposals for Palestinian statehood demonstrates the craven falsity of this UN accusation. Consider: If I keep offering a hungry man a meal, and he keeps tossing it away – who is responsible for his persistent – or seemingly “permanent” – hunger?

The Commission buttresses its claim of “permanent occupation” by focusing on so-called “settlements,” that is, homes of Israelis outside the interim 1949 armistice lines, often referred to as the 1967 lines (which never had legal standing as actual borders, owing to the still-disputed status of the West Bank and Gaza). But on this issue, the report omits the most important factual context, namely: (1) the vast majority of Israelis residing outside the 1967 lines – 75 per cent – are in areas closely contiguous to the 1967 lines, mostly around Jerusalem²; and (2) the Clinton administration’s two-state proposals in 2000 – which were arguably the closest the parties ever came to a final, two-state resolution – envisioned Israel’s retaining those contiguous residential blocks, while still granting the

Palestinian state nearly 100% of the West Bank.³ In other words, the demographics on the ground present challenging but by no means insurmountable issues for a two-state peace – and further refute the Commission’s false claim of a permanent occupation/annexation by Israel.

It further bears mentioning that even if not a single Israeli citizen resided over the 1967 lines, Israel still would be wholly unable to disengage itself from interventions in that land area. The reason for this – and the broader reason for the stalemate over the West Bank’s status – is the Palestinian leadership’s relentless incitement of their people in genocidal hatred of both the Jewish people and the Israeli nation.

Consider this contrast: Since its birth in 1948, Israel has educated all its citizens – Jewish, Christian, Muslim, and others – in the law and spirit of equal respect and dignity. Over that same period, without respite, the Palestinian leadership has indoctrinated their people in hatred of Israel and Jews; supported and armed those seeking to act on that indoctrination; lionized murderers of Jews as the greatest heroes of their society; and rewarded such terrorists and their families with cash prizes and life pensions. *This* is the sole cause of the West Bank security measures that the UN denounces and falsely characterizes as a “permanent occupation” and war crimes.

And in Hamas-controlled Gaza, this reality is only more salient. Contrary to the Commission’s claim of an Israeli “blockade,” Israel allows tons of supplies through to Gaza every day. What Israel does do – and only because the explicit genocidal aims of Hamas force it to do – is carefully screen the contents of those tons of deliveries, both to prevent more terror attacks, and to reduce the otherwise vital need for Israel to send soldiers into Gaza to disrupt and disarm terrorists. Despite these efforts, Hamas has managed to divert thousands of tons of imported concrete and other building materials to build a vast network of underground terror tunnels, for terrorists sent to commit mass murders in Israel.

In fact, one of the world’s most experienced battlefield commanders – Col. Richard Kemp, former Commander of British Forces in Afghanistan – has characterized Israel’s military conduct against Hamas and other Palestinian terrorists as follows: “no one has been able to tell me which other army in history has ever done more to safeguard the rights of civilians in a combat zone.”⁴

The Commission Report’s complete neglect of these critical determinative realities wholly undermines and negates its factual credibility.

2. The report is legally flawed. For all the above reasons, the report’s legal conclusion that Israel is guilty of an illegal permanent occupation of, and war

crimes in, the West Bank and Gaza is fundamentally false. In addition, the report's directive that member nations arrest and prosecute Israeli officials who pass through their territories is likewise wholly without foundation – for at least two reasons.

First, it is without foundation because, as noted, the factual premises of illegal occupation and war crimes are false. No crime, no prosecution.

Second, even if the alleged occupation were deemed to raise substantive questions about the lawfulness of Israel's necessary security actions, the assertion of "universal jurisdiction" for other countries to arrest and prosecute Israeli officials is without foundation. The customary practice of international law is that countries refrain from asserting universal jurisdiction "if the country that is most closely connected to the incident investigates it and, when needed, prosecutes those responsible."⁵

In fact, Israel has established thorough and detailed procedures for investigating allegations of misconduct and crimes committed in the course of its national defense activities.⁶ Hence the necessary predicate for other countries asserting universal jurisdiction to prosecute Israeli officials is lacking,

For similar reasons, the jurisdiction of the International Criminal Court is not implicated. First, the lack of a valid basis to find criminal conduct precludes ICC prosecution. Second, the ICC's investigation of Israeli actions is barred because Israel is not a signatory to the Rome Statute establishing the ICC.⁷

However, the ICC has chosen to recognize the Palestinian territories as a state for purposes of the Rome statute,⁸ hence creating a rationale – however questionable – that the ICC might assert in support of jurisdiction to address acts committed in the West Bank and Gaza. But even here:

Before even initiating an investigation, the ICC prosecutor must satisfy the requirement of complementarity.

According to the principle of complementarity, the ICC will not approve the opening of an investigation in cases in which the suspected defendant has already been investigated or prosecuted in the country that has the closest connection to the incident, as long as it can ascertain that the investigation/prosecution was genuine.⁹

Accordingly, Israel's robust internal investigation procedures should preclude complementarity, and hence also preclude ICC jurisdiction.

In sum, the Commission's call for arrest and prosecution of Israeli officials worldwide is, again, a summons to action that lacks factual and legal foundation.

3. The Commission is Fatally Tainted by Explicit Bias. On December 10, 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights. Article 10 of that Declaration provides that:

Everyone is entitled in full equality to a fair and public hearing by an independent and *impartial* tribunal, in the determination of his rights and obligations and of any criminal charge against him.¹⁰

Article 30 of the Declaration makes clear that no exceptions to this or any other enumerated rights are to be allowed, namely: "Nothing in this Declaration may be interpreted as implying . . . any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."¹¹

And yet, the Commission that prepared this damning report is acting in blatant violation of Article 10's guarantee of an impartial tribunal. All three of the appointed commissioners – Ms. Navanethem Pillay, Mr. Miloon Kothari, and Mr. Chris Sidoti¹² – have publicly and clearly displayed explicit bias against Israel and Jews.

Commissioner Kothari has publicly accused "a Jewish lobby" of obstructing the body's work, adding that the Commission "is disheartened by the social media that is controlled largely by – whether it is the Jewish lobby or specific NGOs." Kothari also gratuitously commented, "I would go as far as to raise the question of why are they [Israel] even a member of the UN."¹³

Commissioner Pillay had prejudged and condemned Israel as guilty of apartheid long before her appointment to the Commission. In 2017 Pillay declared in an interview that the term apartheid "means the enforced segregation of people on racial lines, and that is happening in Israel."¹⁴ She also dismissed critiques of Kothari's biased comments as having been "taken out of context," defending them as "necessary to clarify certain issues given the seriousness of the accusations."¹⁵

And Commissioner Sidoti recently declared that "Jews throw around accusations of anti-Semitism like a rice like at a wedding."¹⁶

The world would rightly object to the appointment of three racists to an investigative Commission on alleged war crimes committed by an African country. The world would also rightly object to the appointment of three anti-Muslim bigots to a Commission investigating religious discrimination against non-Muslims in an Arab country.

The United States and the European Union did lodge objections to Koothari's bigoted comments. But world leaders remained silent about Pillay's and Sidoti's bigoted utterances, and the UN retained all three Commissioners despite the clear evidence of their complete unsuitability for such judicial service.¹⁷

This is not at all a close call: The reality here is that a Commission led by Israelophobes and anti-Semites completely negates its solemn duty of impartiality, guaranteed by Article 10 of the Universal Declaration of Human Rights. Or is the UDHR suddenly suspended in the case of the world's only Jewish state?

4. The Commission is Corrupted by the Illegitimate Bases of HRC Membership. The manifest bias of the three appointed Commissioners is, in fact, both a result and a reflection of a much deeper malady, namely, the illegitimate bases of Human Rights Council Membership.

The online home page of the United Nations Human Rights Council defines its mission as follows:

The Human Rights Council is an inter-governmental body within the United Nations system made up of 47 States *responsible for the promotion and protection of all human rights around the globe.*¹⁸

And yet, among the UNHRC's voting members are these exemplars of egregious human rights malpractice: Communist Cuba, which tortures dissidents in its gulag; China, which continues to wage a brutal genocide against the Muslim Uygher people; Pakistan, where the courts condemn female rape victims to be stoned to death for "adultery"; Venezuela, for which the UN's own investigators found "serious human rights violations" committed by its security forces, "including arbitrary killings and the systematic use of torture . . . amount[ing] to crimes against humanity"¹⁹; and the Russian Federation, which regularly poisons and murders regime opponents, and which now wantonly commits war crimes in its unprovoked invasion of Ukraine, including intentionally bombing hospitals.

Having the world's worst violators of human rights stand at the apex of the world community's enforcement of human rights jurisprudence is a form of dysfunction and mission corruption that cries out – in fact screams – for wholesale reform. As noted above, no sane person would place racists in judgment of an African nation, or Islamophobes in judgment over an Arab country. Yet in effect, this is *exactly* what the UN does in its human rights work. For the sake of all those actually suffering from human rights abuse and deprivations, this great stain upon the global community of nations must stop.

Conclusions. The egregiousness of the above-enumerated failures of the UNHRC and its Commission should trigger a high-decibel alarm among all those committed to actual human rights. By producing and releasing this false, flawed, biased, and illegitimate report, the United Nations has brought disgrace upon itself. Two conclusions follow from this: The Commission report should be summarily and loudly rejected by the global community; and the UN's Human Rights apparatus needs wholesale, top-to-bottom reform.

Henry Kopel is a retired U.S. Federal Prosecutor, and the author of *War on Hate: How to Stop Genocide, Fight Terrorism, and Defend Freedom* (Lexington Books, 2021). He serves on the AGPI Global Advisory Board.

¹ Efraim Inbar, "The Oslo process – 25 years on," *Jerusalem Post*, September 2, 2018, at <https://www.jpost.com/Opinion/The-Oslo-process-25-years-on-566343>.

² "Borders and Territory," *Progress is Possible*, at <https://progressispossible.org/issues/borders-territory/>.

³ Esther Pan, "Peace Plans Background," *Council on Foreign Relations*, February 7, 2005, at <https://www.cfr.org/background/middle-east-peace-plans-background>.

⁴ Richard Kemp, "A Salute to the IDF," June 15, 2011, at <https://www.jpost.com/Opinion/Op-Ed-Contributors/A-salute-to-the-IDF>.

⁵ Amichai Cohen, "Are Israeli soldiers at risk of prosecution abroad?" *The Israel Democracy Institute*, February 11, 2016, at <https://en.idi.org.il/articles/3724>.

⁶ See, e.g., IDF, "Israel's Investigation of Alleged Violations of the Law of Armed Conflict," June 22, 2015, at <https://www.idf.il/en/mini-sites/wars-and-operations/israel-s-investigation-of-alleged-violations-of-the-law-of-armed-conflict/>.

⁷ Amichai Cohen, "Are Israeli soldiers at risk of prosecution abroad?" *The Israel Democracy Institute*, February 11, 2016, at <https://en.idi.org.il/articles/3724>.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ "Universal Declaration of Human Rights," *United Nations*, at <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (emphasis added).

¹¹ *Ibid.*

¹² "The United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and in Israel," *United Nations Human Rights Council*, at <https://www.ohchr.org/en/hr-bodies/hrc/co-israel/index>.

¹³ William Daroff, "Disband this biased UN commission on Israel," *New York Daily News*, August 30, 2022, at <https://www.nydailynews.com/opinion/ny-oped-disband-this-biased-un-commission-on-israel-20220830-zkm7pwjzdzanvcdeizffelcnzq-story.html>.

¹⁴ Janey Keaten and Josef Federman, "Israel, citing 'bias,' won't cooperate with UN rights team," *Associated Press*, February 17, 2022, at

<https://apnews.com/article/europe-middle-east-israel-geneva-race-and-ethnicity-d71a6a9692959a73806c8356cd7bf2dd>.

¹⁵ Daroff, “Disband this biased UN commission.”

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *United Nations Human Rights Council*, at <https://www.ohchr.org/en/hrbodies/hrc/home>(emphasis added).

¹⁹ “Venezuela: UN investigators accuse authorities of crimes against humanity,” *British Broadcasting Service*, September 16, 2020, at <https://www.bbc.com/news/world-latin-america-54176927>.

