

January 2, 2017

**Submission of the Institute for NGO Research
Position Paper Regarding the Preparation of a Discriminatory Blacklist Pursuant to
UNHRC Resolution 31/36**

The Institute for NGO Research,¹ an NGO in Special Consultative with ECOSOC, submits the following information to the Office of the High Commissioner for Human Rights (OHCHR) in advance of its preparation of a discriminatory blacklist aimed at entities doing business over the 1949 Armistice Lines, pursuant to UN Human Rights Council Resolution 31/36.

Summary

- Pursuant to UN Human Rights Council Resolution 31/36, the Office of the High Commissioner for Human Rights, in conjunction with BDS activists, is currently preparing a discriminatory blacklist intended to defame and economically destroy companies doing business with Israel. The ultimate goal is to isolate, demonize, and harm the Jewish State.
- The UNHRC's discriminatory blacklist operates from the premise that business in occupied territory is "illegal settlement activity" and is barred by international law. In fact, there is no such prohibition and almost every country engages in and/or facilitates business activities in settlements in situations of occupation throughout the globe.
- The discriminatory blacklist also targets companies providing security services to the State of Israel, by labeling legitimate security measures (undertaken everywhere in the world) as "illegal settlement activity". The purpose is to disrupt efforts to protect civilians from Palestinian terrorism and is part of a decades-long UN campaign to minimize and justify Palestinian violence.

¹ Formerly the Amuta for NGO Responsibility. Members of the Institute's Advisory Board include Harvard Professor Alan Dershowitz; Colonel Richard Kemp, former commander of British forces in Iraq and Afghanistan; Hon. Alexander Downer AC, former Foreign Minister of Australia, UN Special Advisor to the Secretary General on Cyprus, and currently Australian High Commissioner to the UK; Hon. Michael Danby MP, senior member of the Australian Labor Party; R. James Woolsey, former US Director of Central Intelligence; former Member of Italian Parliament, Fiamma Nirenstein; US Jurist and former Legal Advisor to the State Department, Abraham Sofaer; UCLA Professor and President of the Daniel Pearl Foundation, Judea Pearl; Harvard Professor Ruth Wisse, former US government official, Elliot Abrams; Einat Wilf, former member of Knesset with the Israel Labor Party and advisor to Shimon Peres; Douglas Murray, Director of the Centre for Social Cohesion, best-selling author and commentator; and British journalist and international affairs commentator, Tom Gross.

- The discriminatory blacklist promotes the violation of the documents known as the Oslo Accords (1993-5), mutually agreed to by the PLO and Israel, and guaranteed by the UN and the international community. It seeks to punish activity necessary to carry out Israeli security and infrastructure obligations mandated by the agreements.
- In contrast to actual international law, the interpretation of “settlement activity” used in Resolution 31/36 is so absurdly broad that the UNHRC may blacklist entities with *any* presence and *for whatever purpose* over the 1949 Armistice lines. Under the UNHRC’s inexplicable logic of Resolution 31/36, being the “wrong” person (as secretly defined by anonymous OHCHR bureaucrats) who is cleaning one’s hands in a sink over the line could be enough for inclusion on the blacklist.
- The discriminatory UNHRC blacklist is meant as a “backdoor” means to impose sanctions. The UNHRC, however, does not have this power. Under Chapter VII, Article 41 of the UN Charter, the power to levy sanctions and implement enforcement mechanisms is solely vested in the UN Security Council. The creation of the blacklist is therefore an illegal usurpation of the Security Council by both the UNHRC and the OHCHR in violation of the UN Charter.
- The discriminatory UNHRC blacklist violates due process rules and norms by placing individuals and entities on an illegal sanctions list aimed at causing reputational harm and economic damage. The blacklist is being created by anonymous UN bureaucrats in conjunction with BDS activists utilizing vague and secret criteria. There is no oversight of their work, no notice of inclusion, and no right to challenge these arbitrary determinations. Anne Herzberg, legal advisor of NGO Monitor (a project of the Institute for NGO Research), wrote to OHCHR seeking basic information about the procedural aspects of the blacklist, but OHCHR was either unwilling or unable to answer these simple questions.
- The UNHRC blacklist violates international human rights law and UNHRC guidelines by promoting religious and national origin discrimination, and supporting antisemitic BDS. There are more than a dozen situations of military occupation and settlement activity currently in place around the globe. Yet, as part of the UNHRC’s ongoing anti-Israel obsession and immoral double standards, Israel alone is singled out. Neither UNHRC nor OHCHR has taken any steps to blacklist economic activities in any other settlements despite their being far greater in scale and scope, as well as in demographic impact, than Israeli settlements located in Jerusalem or over the 1949 Armistice lines. Moreover, boycotts and blacklists have been used to target and discriminate against Jews throughout history. Many of these efforts have been aided and abetted by the UN. The discriminatory UNHRC blacklist is the latest iteration of that shameful legacy.

Introduction

On March 24, 2016, the Human Rights Council (UNHRC) adopted resolution 31/36, “Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan.” The resolution calls on the Office of the High Commissioner for Human Rights (OHCHR) in consultation with the UN’s Working Group on Business and Human Rights to create a discriminatory blacklist of entities allegedly conducting activities in areas over the 1949 Armistice Lines.

This blacklist, aimed at promoting discriminatory anti-Israel boycott, divestment and sanctions (BDS), violates international law in the following manner: 1) it operates from the premise that it is illegal to conduct business with an occupying power in occupied territory even though there is no such prohibition whatsoever in international law and almost every country in the world engages in this activity; 2) it promotes the violation of the documents known as the Oslo Accords (1993-5), seeking to punish activity necessary to carry out Israeli security and infrastructure obligations mandated by the agreements; 3) it violates the UN Charter by usurping the exclusive power of the UN Security Council to levy sanctions; 4) it violates due process rules and norms by placing individuals and entities on a sanctions list created by anonymous UN bureaucrats based on secret criteria, with no oversight, no notice, and no right to challenge; 5) the illegal blacklist is predicated on religious and national origin discrimination in violation of the UN Charter, international human rights law, and rules and guidelines of the UNHRC and OHCHR.

Paragraph 17 of Resolution 31/36 explicitly calls for the establishment of the discriminatory blacklist:

[r]equests the United Nations High Commissioner for Human Rights, in close consultation with the Working Group on the issue of human rights and transnational corporations and other business enterprises, in follow-up to the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem [[A/HRC/22/63](#)] and ***as a necessary step for the implementation of the recommendation contained in paragraph 117 thereof, to produce a database of all business enterprises involved in the activities detailed in paragraph 96 of the afore-mentioned report, to be updated annually and to transmit the data therein in the form of a report to the Council at its thirty-fourth session. (emphasis added)***

The resolution purports to be a “necessary step” of Paragraph 117 of the UNHRC’s fact-finding mission on settlements² even though there is no mention in this paragraph of establishing a blacklist, boycott, or sanctions:

Private companies must assess the human rights impact of their activities and take all necessary steps –including by terminating their business interests in the settlements –to ensure that they do not have an adverse impact on the human rights of the Palestinian people, in conformity with international law as well as the Guiding Principles on Business and Human Rights. The mission calls upon all Member States to take appropriate measures to ensure that business enterprises domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, that conduct activities in or related to the settlements respect human rights throughout their operations. The mission recommends that the Working Group on Business and Human Rights be seized of this matter.

Moreover, this paragraph merely asks that private businesses and Member States assess and respect the human rights impact of their activities. Again, it says nothing about creating a blacklist, promoting a boycott, or placing sanctions on those that do not conform to the vague standards advocated by the UNHRC.

Resolution 31/36 also says that OHCHR should create a blacklist based on an absurdly broad range of activities that the UNHRC mission claimed “raise particular human rights violations.”³ Many of these proscribed activities merely reflect the UNHRC’s economic and political ideology:

- The supply of equipment and materials facilitating the construction and the expansion of settlements and the wall, and associated infrastructures
- The supply of surveillance and identification equipment for settlements, the wall and checkpoints directly linked with settlements

² See NGO Monitor’s submission to the Fact-finding mission, available at http://www.ngo-monitor.org.il/data/images/File/NGO_Monitor-Submission_to_the_Settlements_Fact-Finding_Committee.pdf

³ Contrary to the implications of the blacklist, Israelis, even those living in settlements, are also entitled to human rights such as the right to life, right to water, etc... As in most activities conducted by the UNHRC, these rights are erased. In other words, according to UNHRC 31/36, it is illegal for Israel to take any measures, such as examining ids, utilizing cameras, or erecting checkpoints or other barriers, to prevent a Palestinian suicide bomber to freely enter a settlement or travel inside the 1949 Armistice lines to kill people. And according to the UNHRC, any companies that are contracted by Israel to implement these measures should be singled out for reputational harm and economic ruin, subject to the whim of anonymous individuals at OHCHR under secret criteria.

- The supply of equipment for the demolition of housing and property, the destruction of agricultural farms, greenhouses, olives groves and crops
- The supply of security services, equipment and materials to enterprises operating in settlements
- The provision of services and utilities supporting the maintenance and existence of settlements, including transport
- Banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses
- The use of natural resources, in particular water and land, for business purposes
- Pollution, and the dumping of waste in or its transfer to Palestinian villages
- Captivity of the Palestinian financial and economic markets, as well as practices that disadvantage Palestinian enterprises, including through restrictions on movement, administrative and legal constraints
- Use of benefits and reinvestments of enterprises owned totally or partially by settlers for developing, expanding and maintaining the settlements

It is notable that most of the activity the UNHRC seeks to prohibit involves measures aimed at preventing Palestinian terror attacks on civilians on both sides of the 1949 Armistice lines, weapons smuggling, unsafe and unsanitary building, and crime.

I. International Law Does Not Bar Business Activities in Occupied Territory

The UNHRC's discriminatory blacklist operates from the premise that doing business in occupied territory is a form of "settlement activity" and is barred by international law. There is no such prohibition whatsoever.

Resolution 31/36 claims that East Jerusalem and the West Bank are occupied by Israel; that the law of occupation, as laid out in the 1907 Hague Conventions, the 1949 Geneva Conventions, and the Additional Protocols apply to the territory; and Israel as the "Occupying Power" is bound by the legal duties contained therein.⁴ In particular, it points to Article 49 of the Fourth Geneva Convention. Article 49(6) states that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." The UNHRC interprets this provision as prohibiting "settlement activity."

⁴ Israel is not a party to the Additional Protocols of the Geneva Conventions. Many NGOs and organizations like the International Committee for the Red Cross (ICRC) claim that most of the provisions in these treaties have reached the status of customary law. This is a highly disputed position. See, e.g., Letter from John Bellinger III, Legal Adviser, U.S. Dept. of State, and William J. Haynes, General Counsel, U.S. Dept. of Defense, to Dr. Jakob Kellenberger, President, Intl. Comm. of the Red Cross, Regarding Customary International Law Study, 46 I.L.M. 514 (2007).

The UNHRC seeks to reduce the entire body of occupation law to the supposed prohibition against “settlement activity.”⁵ The framework of international humanitarian law, however, is simply not limited to whether there is state compliance with Article 49(6). Moreover, its applicability to private actors is even more attenuated, if at all even relevant.

Instead, the law aims to “regulate the relationship between a State’s military forces and the population and property in enemy territory, which as a result of an international armed conflict, have come under the control of those forces.”⁶ Under this paradigm, the occupier is required to “restore and maintain public order, and provide for the needs of the population.”⁷

Article 43 of the 1907 Hague Convention sets out this obligation:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.⁸

It is important to mention that the 1907 Hague Convention was originally published in French and the French text is the authoritative version.⁹ The widely disseminated English translation changed the meaning of the French text. Notably, the French text refers to “*l’ordre et la vie publics*” (i.e., public order and life), which is considerably broader than the English phrase “public order and safety.”¹⁰

Yoram Dinstein, the leading expert on the law of occupation, explains that under Article 43, the Occupying Power must “restore and ensure, as far as possible, public order and life in the occupied territory” and “respect the laws in force in the occupied territory unless an

⁵ It is beyond the scope of this submission to analyze whether Israeli settlements are prohibited by Article 49(6). For discussion on this issue, see YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 240-47 (2009). See also, Eugene Kontorovich, finding no rule or state practice prohibiting or facilitating settlement activity given its ubiquity in every situation of occupation across the globe. “Unsettled: A Global Study of Settlements in Occupied Territories,” *Northwestern Public Law Research Paper* 16-20 (2016). This submission also does not analyze whether territory across the 1949 Armistice Lines is indeed occupied.

⁶ GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 356 (Vicki Been et al. eds., 2012).

⁷ *Id.* at 371.

⁸ *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, art. 43, Oct. 18, 1907, 187 CTS 227, available at <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument> [hereinafter *Hague Convention*].

⁹ See Yoram Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, HPCR OCCASIONAL PAPER SERIES 2 (2004), <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf> [hereinafter *HPCR PAPER*]. The original French text reads: L’*autorité du pouvoir légal ayant passé de fait entre les mains de l’occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d’assurer, autant qu’il est possible, l’ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.*

¹⁰ *Id.*

‘*empêchement absolu*’ exists.”¹¹ The provision also makes clear that “[w]hen a necessity arises, the Occupying Power is allowed to enact new legislation, repealing, suspending, or modifying the preexisting legal system.”¹² Thirdly, Article 43 recognizes the need to ensure the “orderly government” of the occupied territory. Orderly government laws can encompass security, the environment, public health, and sanitation. There is no doubt that Israel, under the paradigm of occupation, is able to build roads, enact security measures, engage in environmental protection, or other provisions relating to infrastructure. To conclude otherwise could lead to “grievous social woes.”¹³

A March 2013 French appellate court decision elaborates on the scope of Article 43 and points to the legality of a range of infrastructure. The decision dismissed a lawsuit brought by the Palestine Liberation Organization (PLO) and the Palestinian activist group Association France-Palestine Solidarité (AFPS) against three French companies.¹⁴ The PLO and the AFPS accused the French companies of aiding and abetting a violation of Article 49(6) by participating in contracts to build the Jerusalem light rail, a portion of which travels through North Jerusalem, deemed by these organizations to be occupied territory.¹⁵

The PLO and AFPS claimed that Israel was occupying “Palestinian territory illegally” and that the rail was illegal because “of the access that its route provides for Israeli settlers.”¹⁶ They argued that the companies’ participation in the contracts was, therefore, “illegal on account of the violation by the State of Israel of its obligations under international occupation law.”¹⁷

Among other demands, the claimants sought an order annulling the contracts, thereby prohibiting continued performance and barring the companies from entering into any subsequent agreements. Ultimately, the PLO and the AFPS were seeking a judicial declaration that the Jerusalem light rail itself was illegal and that Israel was violating international law by building it.

The French appellate court rejected these demands, basing a significant part of its decision on the failure to allege a cause of action. In particular, the court considered whether an unlawful act had even been claimed. Relying on Article 43 of the Hague Convention, the court noted that building the Jerusalem light rail was not illegal because occupation law allows for the governance of occupied territory which includes the building of transportation

¹¹ *Id.* at 3.

¹² *Id.* at 4.

¹³ DINSTEIN, *supra* note 5, at 120.

¹⁴ Cour d’appel [CA] [regional court of appeal] Versailles, 3 ch., March 22, 2013, 11/05331 (Fr.), available at <http://fr.slideshare.net/yohanntaieb3/decision-de-lacourdappel> [hereinafter Cour d’appel], translated at <http://blog.eur.nl/iss/hr/files/2012/02/Decision-Versailles-Appeal-Court-22-March-2013.pdf>.

¹⁵ *Id.* The three companies were not signatories on the contract but had formed an Israeli company that subsequently won the government tender to build the light rail. The companies were also involved in its construction and maintenance. *Id.* at 2.

¹⁶ Cour d’appel, *supra* note 14.

¹⁷ *Id.*

infrastructure.¹⁸ Citing a decision of the 1947 Control Commission Court of Criminal Appeal, the French court said that on the basis of Article 43 “the occupying power could and in fact should restore normal public activity in the occupied country and accepted that administrative measures could address all activities generally carried out by the state authorities (social, economic and commercial activities).”¹⁹

More importantly, the court discounted the claims that the light rail was illegal because settlers would have access to it. It emphasized that the determination of the purpose of a contract and its legality cannot hinge on “the individual assessment of a social or political situation by a third party.”²⁰ In other words, just because the Palestinians said the rail was designed solely to entrench the settlements, does not mean that this indeed was the purpose of the contract. Moreover, the court found that the alleged “political motive attributed to the State of Israel by the appellant as the purpose underlying its commitment cannot be applied by ‘contamination’ to the purpose of the contracts.”²¹

National courts in the UK and Canada, and the advertising standards board in the Netherlands have arrived at similar determinations to the French court.²² And as pointed out by Professor Eugene Kontorovich, who examined business activities in occupied territories, state practice overwhelmingly demonstrates that there is no prohibition. In fact, most of the countries that voted for Resolution 31/36 engage in or facilitate extensive “settlement activity” throughout the world.²³

In contrast to the actual international law briefly outlined above, the interpretation of “settlement activity” used in Resolution 31/36 is so absurdly broad that the UNHRC seeks to blacklist entities with *any* presence²⁴ and *for whatever purpose* over the 1949 Armistice lines. Under the UNHRC’s inexplicable logic of Resolution 31/36, being a “wrong” person (as secretly defined by anonymous OHCHR bureaucrats) who cleans one’s hands in a sink over that line could be enough for inclusion on the blacklist.²⁵

¹⁸ See *id.* at 20; see also Raphael Ahern, *French Court’s Light Rail Ruling Breaks No Legal Ground*, *Scholars Say*, THE TIMES OF ISRAEL (Apr. 29, 2013), <http://www.timesofisrael.com/french-ruling-on-jeruselems-light-rail-adds-nothing-new-scholars-say>.

¹⁹ Cour d’appel, *supra* note 14, at 15.

²⁰ *Id.* at 21.

²¹ *Id.* at 15.

²² See, e.g. Anne Herzberg, “NGO ‘Lawfare’: Exploitation of Courts in the Arab-Israeli Conflict,” *NGO Monitor Monograph Series*, (2d ed. 2010), ; Anne Herzberg, “When International Law Blocks the Flow: The Strange Case of the Kidron Valley Sewage Plant,” 10 *Regent J. of Int’l Law* 71 (2014); Eugene Kontorovich, “Economic Dealings in Occupied Territories,” 53 *Columbia J. of Transnt’l Law* 584 (2015)

²³ See Kontorovich, “Economic Dealings,” *id.* and “Unsettled”, *supra* note 5.

²⁴ DINSTEN, *supra* note 5, at 240-47.

²⁵ One of the criteria mentioned in Resolution 31/36 is “the use of natural resources, in particular water and land, for business purposes.”

II. The UNHRC Does Not Have Power to Alter or Cancel the Oslo Accords

In addition to distorting the applicable international law, the discriminatory UNHRC blacklist also promotes the violation of international treaties (itself a violation of international law). In particular, by creating the blacklist, the UNHRC seeks to punish activity necessary to carry out Israeli security and infrastructure obligations mandated by the series of agreements known as the Oslo Accords (1993-5), mutually agreed to by the PLO and Israel, and guaranteed by the UN and the international community.

The provisions in the accords specifically govern relations between Israel and the PA, and as the *lex specialis*, trump more general obligations delineated in other legal documents. Under the treaty, Israel is granted full security and civil control in Area C of the West Bank (the location of settlements). The borders of Israel and the future Palestinian state, the status of Jerusalem, refugees, and settlements are to be “negotiated in the permanent status negotiations.”²⁶

Nothing in the Oslo Accords, again mutually agreed to by the Israelis and the Palestinians, restricts Israel’s exercise of sovereignty over any part of Jerusalem, including East Jerusalem.

Second, the agreement does not proscribe settlement activity. In fact, under Article XII the treaty Israel shall have “the responsibility for **overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary** to meet this responsibility” (emphasis added). Under Article XIII, “Israel shall have the overriding responsibility for **security for the purpose of protecting Israelis and confronting the threat of terrorism**” (emphasis added).²⁷

The Oslo agreements, therefore, are clear that security and public order in Jerusalem, including East Jerusalem, and the settlements are obligations placed solely on Israel. In contrast, the UNHRC discriminatory blacklist seeks to disrupt this binding legal instrument by creating a sanctions list of entities contracted to carry out the functions mandated by the treaty. The UNHRC does not have the power to alter or cancel the Oslo Accords.

III. The UNHRC Blacklist is a Violation of the UN Charter

As discussed above, it is well-established in international law that there is no prohibition against conducting business in occupied territory, and almost every country in the world engages in this activity. In addition, the activity declared illegal by the UNHRC is in violation of the obligations and duties laid out in the Oslo Accords. Nevertheless, the UNHRC has ordered the creation of a blacklist of entities engaged in this legal activity. Yet,

²⁶ Interim Agreement.

²⁷ *Oslo I, Articles XII, XIII, and Annexes.*

the UNHRC does not have the legal authority to order such a list, nor does OHCHR have the authority to create it.

The intention of the UNHRC discriminatory blacklist is to cause reputational harm and economic damage to entities conducting business over the 1949 armistice lines. Richard Falk, the creator of an earlier form of this illegal blacklist while acting as UN Special Rapporteur, has explicitly stated that the purpose is to establish a boycott and impose civil and criminal liability on the listed entities.²⁸

Similarly, during a General Assembly meeting to approve the budget to create the blacklist, Palestinian representative, Abdullah Abushawesh, clearly stated the purpose:

We should block the source of financing for settlements on occupied Palestinian territory, in particular by drawing up a list of companies that operate on this territory, whether these companies are Israeli or from other countries . . . As soon as this list is drawn up we encourage all to disseminate it, and to help these transactions with these companies to be stopped . . . Because I am sure that you would all agree that these settlements are illegitimate . . . as a consequence, any products there are also illegitimate and should not be sold on your markets.²⁹

In other words, the UNHRC blacklist is intended as a form of sanctions.

The UNHRC, however, does not have the power to impose sanctions. Under Chapter VII, Article 41 of the UN Charter, the power to levy sanctions and implement enforcement mechanisms is solely vested in the UN Security Council. The creation of the blacklist is therefore an illegal usurpation of the Security Council by both the UNHRC and the OHCHR in violation of the UN Charter.

IV. The UNHRC Discriminatory Blacklist Violates Due Process Rules and Norms

Resolution 31/36 charges OHCHR with preparing the blacklist. On December 23, 2016, the UN General Assembly approved \$138,700 to cover the costs. \$102,400 was allocated as salary for the OHCHR employee hired to compile the list over a period of eight months, and \$36,300 for “documentation.”³⁰

Like all OHCHR projects related to Israel, the blacklist is being conducted without the requisite transparency and in violation of due process rules and ethical norms.

²⁸ http://www.un.org/apps/news/story.asp?NewsID=43376#.WGNu6bZ94_V

²⁹ <http://www.cnsnews.com/news/article/patrick-goodenough/un-approves-funding-first-anti-israeli-settlement-blacklist>

³⁰ <http://www.cnsnews.com/news/article/patrick-goodenough/un-approves-funding-first-anti-israeli-settlement-blacklist>

The purpose of the discriminatory blacklist is to inflict significant reputational harm and economic damage, if not financial ruin, on the listed entities. Not only does it damage the entities but their shareholders, employees, and families. Yet, OHCHR has published no information on its process for compiling the list.

On December 13, 2016, Anne Herzberg, Legal Advisor of NGO Monitor (a project of the Institute for NGO Research), wrote to OHCHR officials asking for specific information regarding the process behind compiling the blacklist:

1. What specific process takes place when OHCHR receives information to place an individual/business on the list?
2. How is the received information verified?
3. What are the criteria used to determine whether an individual/business is included on the list?
4. Where are these criteria published?
5. Will businesses owned/operated by Palestinian citizens of Israel be excluded from the list?
6. Who is making the determinations as to whether the criteria are met?
7. What outside individuals/organizations are assisting in this process?
8. Will individuals/businesses be contacted prior to their inclusion on the list?
9. What process is in place to challenge the determination? Where is this process published?
10. If an individual or business is falsely/erroneously placed on this list, what remedies are available? Will OHCHR provide compensation for lost business and other economic and reputational damage caused by its error?

In subsequent discussions with OHCHR officials, OHCHR was unable or unwilling to provide substantive answers to these questions.

Per Resolution 31/36, the discriminatory blacklist was established in March 2016 and submissions from NGOs about which entities are to be included on the list were collected

until December 31, 2016. OHCHR's secretly selected targets are to be presented to the Council in March 2017. It is beyond credulity that responses to these basic questions about the process would not be readily available to officials at OHCHR. And it is unclear what is more disturbing: that OHCHR officials were refusing to provide this information or that they did not have the answers.

V. The UNHRC Blacklist is Discriminatory & Promotes Antisemitic BDS

The UNHRC blacklist violates international human rights law and UNHRC guidelines by promoting religious and national origin discrimination.

The Human Rights Council was created after decades of serious failings on the part of its predecessor entity, the Commission on Human Rights. In 2005, former UN Secretary General Kofi Annan remarked that "the Commission's ability to perform its tasks has been . . . undermined by the politicization of its sessions and the selectivity of its work."³¹ In order to ostensibly remedy the problems of politicization and selectivity, the General Assembly passed Resolution, 60/251 on April 3, 2006, establishing the new Human Rights Council and mandating that

the work of the Council shall be guided by the principles of universality, impartiality, objectivity and nonselectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.³²

The HRC's Institution-building package further elaborated on the principles set forth by the General Assembly, including "transparency, accountability, [and] balance . . ." as additional values guiding its work.³³

Yet, in the creation of its discriminatory blacklist, the UNHRC, and OHCHR by extension, have chosen to flout these laws and principles in order to deliberately target and harm Israel and Jews and those doing business with them.

The origins of the discriminatory blacklist lie in a coordinated effort between the Arab League, the Organization of Islamic Cooperation, and the antisemitic BDS movement that repeatedly exploits UN frameworks to operationalize a discriminatory political agenda that is

³¹ Office of the Spokesperson (U.N.), Secretary-General's Address to the Commission on Human Rights, Apr. 7, 2005, available at <http://www.un.org/apps/sg/sgstats.asp?nid=1388>.

³² GA Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006)

³³ HRC Res. 5/1, UN Doc. A/HRC/RES/5/1, June 18, 2007.

aimed at erasing the self-determination of the Jewish people and destroying their nation state, Israel.

As former UN Secretary General Ban Ki-Moon remarked in his last address to the Security Council, “Decades of political maneuverings have created a disproportionate volume of resolutions, reports and conferences criticizing Israel. In many cases, rather than helping the Palestinian cause, this reality has hampered the ability of the UN to fulfill its role effectively.”

For centuries, the use of boycotts, exclusion, and other form of economic warfare have been employed to discriminate against Jews.³⁴ During the Middle Ages, business with Jews was legally regulated and Jews were denied the ability to join trade associations and merchant guilds. The late 19th and early 20th centuries saw the rise of the “Don’t buy from Jews” slogan and widespread boycotts. These campaigns intensified in the Nazi boycotts, attacks on Jewish businesses, and the expropriation of Jewish property, ultimately leading to the Holocaust.

Boycotts were also employed by the Arab population in mandatory Palestine with a full boycott adopted in 1945. The Arab boycott also called for secondary and tertiary boycotts aimed at blocking trade of non-Arab countries with Israel and the creation of blacklists of companies doing business with Israel.³⁵ Arab countries co-opted UN frameworks to carry out these campaigns recognizing in 1945, that “the UN era would be one that would see the proliferation of international organizations and specialized agencies, and regional arrangements” ripe for exploitation.³⁶

At the 2001 UN Durban Conference, so-called “civil society” organizations joined the Arab boycott by forming the discriminatory BDS campaign. The declaration of the NGO Forum at the conference revived the antisemitic canard that “Zionsim is racism” and called for “the international community to impose a policy of complete and total isolation of Israel . . . the imposition of mandatory and comprehensive sanctions and embargoes, the full cessation of all links (diplomatic, economic, social, aid, military cooperation and training) between all states and Israel.”

The goal of BDS, is not to promote human rights, but rather, as stated by many leaders of the movement to erase the Jewish state.³⁷ It is no surprise that many leaders of BDS, including

³⁴ <http://www.jewishvirtuallibrary.org/jsource/anti-semitism/boycotts.html>

³⁵ http://www.jewishvirtuallibrary.org/jsource/History/Arab_boycott.html

³⁶ Robert P. Barnidge, *SELF-DETERMINATION, STATEHOOD, AND THE LAW OF NEGOTIATION: THE CASE OF PALESTINE*, Bloomsbury 2016) at 62, 65, 113; Laquer 1969; PLO Charter 1964, Arts. 17-19)

³⁷ Statements of antisemitism and hate by BDS leaders include: “Ending the occupation doesn’t mean anything if it doesn’t mean upending the Jewish state itself. . . BDS does mean the end of the Jewish state”; “The real aim of BDS is to bring down the state of Israel. . . That should be stated as an unambiguous goal. There should not be any equivocation on the subject. Justice and freedom for the Palestinians are incompatible with the existence of the state of Israel.”; “There’s no Israel. That’s what it’s really about.” See http://www.stopbds.com/?page_id=48 for many more.

some that have provided submissions to OHCHR and/or lobbied the UNHRC to establish the blacklist, have been caught disseminating videos of white supremacist and antisemite David Duke, posting virulently antisemitic cartoons, and promoting classical antisemitic themes in their activities such as blood libels, supersessionism, and charges of Jewish conspiracy and control. As a result, officials around the world have denounced BDS and enacted legislation to combat it.

The current UNHRC blacklist effort is a continuation of this shameful antisemitic history as is evident by the role of BDS organizations in lobbying for the creation of the blacklist and their role with OHCHR in compiling it.³⁸ Due to the extreme secrecy at OHCHR, the full extent of this cooperation is unknown.

The UNHRC blacklist is not only rooted in the antisemitic Arab boycott and BDS, but it is predicated on the promotion of severe double standards and extreme disproportionate focus on Israel in contrast to other conflicts or states – itself a form of antisemitism. Natan Sharnasky explains that such double standards become a form of antisemitism, as opposed to legitimate criticism of Israel, when “criticism of Israel is applied selectively” and “when Israel is singled out [] for human rights abuses while the behavior of known and major abusers is ignored” (Sharansky 2004). Ultimately, this form of antisemitism is based on the “master trope” of “Jewish abuse of power” (Julius 2010, 476).

As documented by Professor Eugene Kontorovich, the existence of settlement activity is ubiquitous in every case of occupation. And in all of those cases, third states engage in and facilitate business activities related to those settlements. The scale, scope, and demographic impact of these cases far exceeds that of settlement activity by Israel. Yet, the UNHRC has never taken a single action against any of these other situations, nor has it called for a blacklist to restrict the settlement activity. There is only one country the UNHRC has ever condemned on this issue and only one country where the UNHRC has sought to impose blacklists and boycotts – Israel.

³⁸ See, e.g., Human Rights Watch, “[Human Rights Watch Recommendations on the Implementation of Human Rights Council Resolution 31/36 Business Activities in Israeli Settlements](#),” November 21, 2016; Al-Haq, Al Mezan, Badil, Addameer, Jerusalem CAC, “[Statement on behalf of Al-Haq, Al- Mezan Center for Human Rights, Badil, Jerusalem CAC, Addameer](#),” March 21, 2016; American Muslims for Palestine, “[Global Day of Action - Protest Airbnb and Fidelity](#),” June 1, 2016; Ingrid Jaradat, “[New UN database of companies complicit in Israel's occupation](#),” April 30, 2016

Conclusion

As discussed in this submission, the UNHRC blacklist violates the rights of the individuals, entities, and states targeted; violates the Oslo Accords and the UN Charter; and promotes antisemitism and the elimination of a UN member state. As a result, it is both illegal and discriminatory. It is yet another shameful stain on the UN, the UNHRC, and the OHCHR.

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