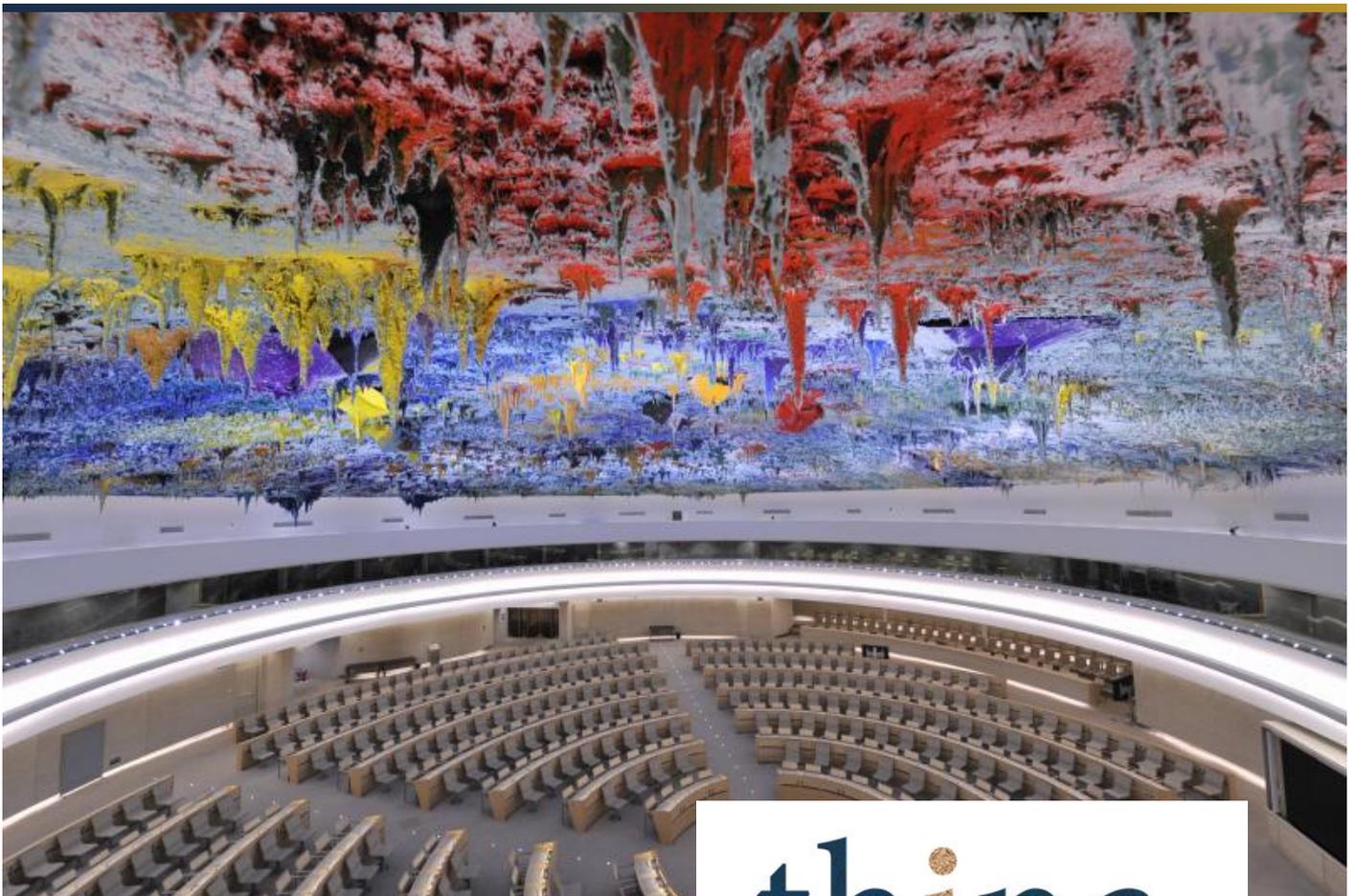


The UNHRC ongoing Commission of Inquiry into Israel and the Occupied Palestinian Territories (Res. S-30/1)

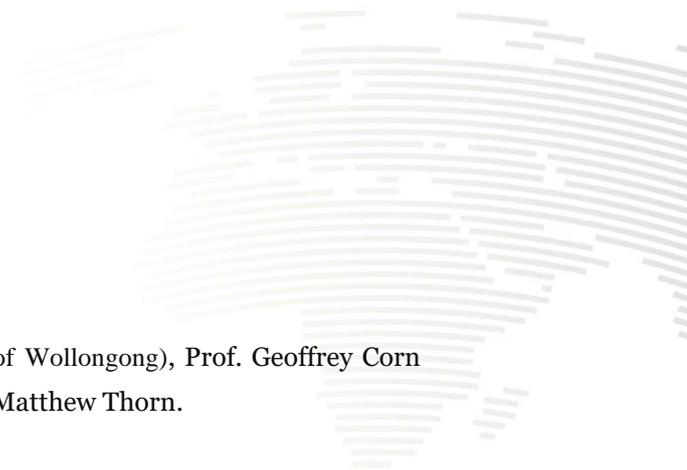
- A fundamentally flawed institution

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ISRAEL *and* INTERNATIONAL LAW



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The UNHRC Commission of Inquiry (Res. S-30/1) - a fundamentally flawed institution



Executive Summary

In May 2021, following another round of violence in the ongoing conflict between Israel and Hamas, the UN Human Rights Council (UNHRC) established an ongoing Commission of Inquiry into the Occupied Palestinian Territory, including East Jerusalem, and Israel (COI). The budget for the COI for 2021-2023 was approved by the General Assembly's Fifth Committee in December 2021.

The creation of the COI has attracted much criticism. After considering the concerns expressed by numerous United Nations member states (as set out in Annex 1 of this Briefing Paper), we have analyzed the principle instruments on which the COI is founded – namely Res 60/251, establishing the UNHRC itself (Annex 2); Res S-30/1, in which the UNHRC establishes the COI (Annex 3); and the COI's Terms of Reference (TOR) (Annex 4) –, and considered the inquiry's implications under international law.

Our analysis leads to the following conclusions and recommendations.

CONCLUSIONS

1. **The COI is highly contentious.** Political support for the Commission is weak. In fact, only 24 of the UNHRC's 47 members voted in favor of its creation (Annex 1, sub-part 1). Over recent months, a significant number of UN Member states have formally criticised the COI (Annex 1, sub-parts 2 and 3). While it is not necessary for a UNHRC Commission of Inquiry to enjoy universal support, it is highly undesirable to launch a massive, ongoing inquiry in the face of significant international criticism, disagreement related to the underlying issues and opposition to the inquiry.
2. **The COI is wasteful.** The devotion of so many resources to the Israel-Palestinian conflict is totally out of proportion to the seriousness of the alleged international law violations, compared with other territories and conflicts where serious human rights violations have been alleged.
3. **The COI's mandate is imbalanced.** In particular, its mandate does not sufficiently reflect Hamas' deliberate attacks against civilians and civilian property, indiscriminate attacks, and deliberate use of civilians in an effort to shield lawful military objectives from attack and to compel the infliction of civilian casualties in triggering the 2021 conflict. The sole reference to the State of Israel in association with "alleged violations and abuses" and "Occupied Palestinian Territories" give little confidence that actions of Hamas and other Palestinian entities such as the PLO, Fatah, Palestinian Islamic Jihad or the Popular Front for the Liberation of

Palestine (PLFP) will be credibly scrutinized in a serious fashion: certainly not to the same extent as Israel. This is despite the fact that Israeli armed forces routinely and consistently acted in good-faith compliance with the legal obligation to implement feasible precautionary measures to mitigate the risk of casualties, and despite Hamas deliberately used the residents of Gaza as human shields: points highlighted in the statements by Austria, Bulgaria and the Czech Republic opposing Res S-30/1 (Annex 1, sub-part 2) and the statements of Australia and the United States addressing funding of the COI (Annex 1, sub-part 3).

4. **The COI is unnecessary.** There are already many institutions within the UN system focused on Israel and the “Occupied Palestinian territories”. As raised by the Netherlands in their opposing statement to Res S-30/1 (Annex 1, sub-part 2), there is no need for another duplicative institution investigating the “underlying root causes of tensions”.
5. **The COI’s budget is excessive.** The COI’s budget is exceptional and excessive: a point widely raised, i.a. by France in their abstention from Res S-30/1 and by the United States in their opposition to UN funding of the COI (Annex 1, sub-part 3).
6. **The COI will be unable to ascertain the truth.** The quality of the COI’s findings of “facts” and “evidence”, as well as its legal analysis, will inevitably be compromised. Given Hamas’ history of disinformation and manipulation of data, as well as Israel’s legitimate decision not to cooperate with the COI, it will simply be impossible for the COI to compile credible evidence and test that evidence for its veracity. And in assessing the legality of the conduct of hostilities, the COI will have no choice but to speculate when assessing the reasonableness of attack judgements. These factors seem to have contributed to Germany and the UK’s lack of confidence in this mechanism (see Annex 1, sub-part 2).
7. **The COI will lead to injustice.** In order to fulfil its mandate, the COI will necessarily breach fundamental human rights of accused persons to due process and a fair trial. Resolution S-30/1 essentially obliges the COI to prepare evidence and make legal findings to maximize the likelihood that Israelis will be prosecuted for crimes. The assumption that crimes have been committed means that, in effect, the COI has been set up as a kind of “star chamber “ – hearing unverifiable “evidence” submitted by anonymous accusers, identifying absent “perpetrators”, and preparing charges behind closed doors.
8. **The COI is biased.** The Commission’s members, especially its Chairperson Navi Pillay, have a record of outspoken bias against Israel. The legal standard of reasonable apprehension of bias, when applied to records of each, leaves the credibility of the Commission severely diminished and its findings void *ab initio*. In

other words, this Commission is *a priori* biased against Israel, as held by Australia and the US (Annex 1, sub-part 3) and therefore itself a breach of the rule of law.

9. **The COI is illegal.** The COI's mandate to prepare evidence for criminal proceedings and to investigate the "root causes" of the conflict exceeds the UNHRC's limited human rights jurisdiction. The COI's mandate is at least in part *ultra vires* and thus, on yet another ground, illegal.
10. **The COI will promote conflict, not reconciliation.** Engaging criminal, human rights and humanitarian law instrumentally in order to force a predetermined outcome of a complex and multilayered political dispute is an inappropriate use of the UN system. Moreover, "criminalizing" the conflict has failed to bring the parties closer in the past, and is unlikely to do so in the future. The narrow focus of this COI on retributive justice and "ending impunity" for (perceived or alleged) crimes means that it, like its dozens of predecessors, will fail to resolve or even narrow this complex conflict. Indeed, it may even deepen the conflict, diminishing the likelihood of enduring peace and security.
11. **The COI's mandate is based on flawed legal assumptions.** The COI's mandate is based on the assumptions that "the State of Palestine" exists and that Israel has no valid sovereignty claims with respect to the "Occupied Palestinian Territories". These assumptions are simply incorrect. The future status of these territories are the subject of bilateral negotiations, pursuant to the binding Oslo agreements, and they are the subject of contestation before international tribunals, including the ICJ and ICC (Chapter 4.14). In these circumstances, it is premature and inappropriate for the UNHRC to adopt legal positions on either issue.
12. **The COI is immoral.** This new mechanism is yet another example of how the UNHRC is treating the State of Israel differently (and less favorably) than every other UN member state. Under the UN Charter, the UNHRC and all member states are obliged to treat all UN member states equally. Singling out Israel, without demonstrably compelling and urgent reasons to do so, is both a morally and legally unacceptable assault on the sovereign equality of the State of Israel.

For these reasons, (i) this COI should not have been created, and (ii) its funding is an inappropriate and unjustifiable use of the UN's resources.

RECOMMENDATIONS

On the basis of the conclusions set out above, we recommend:

1. **The COI should be abolished.** Every opportunity should be found within the UNHRC to reverse the establishment of the COI or, failing that, to revisit its mandate.

2. **The budget of the COI should be removed.** Challenges to, and review of, the budget for the COI can potentially occur within:
 - The UN Committee for Programme and Coordination (CPC): a subsidiary organ of the General Assembly and of the Economic and Social Council, under which the UNHRC is located, it is responsible for planning, programming and coordination of their activities. It comprises 34 UN members elected by the General Assembly on the basis of geographical representation. The CPC could be requested to review the COI and report to the General Assembly;
 - The UN Advisory Committee on Administrative and Budgetary Questions (ACABQ) is an expert Committee of 21 UN Members elected by the General Assembly on the basis of a geographical representation and its work is to assist the requirements of the General Assembly and other bodies to which it reports. The ACABQ could be requested to review the proposed programme budget and reports; and/or
 - The UNGA Fifth Committee is an open-ended committee of all UN Members and has responsibility for UN administrative and budgetary matters. The Fifth Committee could be requested to review and make recommendations to the General Assembly.
3. **The COI should be discredited.** UN Member States can take unilateral steps, which may include:
 - Making political statements condemning the COI in its entirety;
 - Withholding national funding to the UN in the full amount of the budget of the COI;
 - Condemning the UNHRC for its unjustified bias and discrimination against Israel.
4. **The UNHRC should be reviewed.** Finally, and perhaps most importantly, we recommend that the time has come for an urgent review of the UNHRC itself, which created this COI. Review of the UNHRC should seek, inter alia, to rectify its under-representation of investigations into many larger scale though less politically convenient human rights situations. The UNHRC's inherent and systemic bias against Israel must be brought to an end.

1. Introduction

In May 2021 the UN Human Rights Council (UNHRC) created an ongoing Commission of Inquiry (COI) -

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, and all underlying root causes of recurrent tensions, instability and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity.¹

In December 2021, the UN General Assembly approved a budget for the COI that far exceeds the budgets adopted for other UNHRC fact-finding missions and Commissions of Inquiry.²

This Commission of Inquiry is remarkable in several ways. It is “ongoing”, meaning that it has a permanent character. It investigates not only a specific event (the 2021 Gaza conflict), but also all “root causes of tensions”. Further, it has received UN funding far exceeding any comparable commission.

The establishment of this controversial COI raises many serious policy and legal concerns. In Chapter 2, we sketch the broader historical context; Chapter 3 explains the UNHRC’s bias against Israel; Chapter 4 describes the main features of the COI; and Chapter 5 highlights the legal and policy concerns that we see arising from the establishment of the COI. Our Conclusions and Recommendations are set out in Chapters 6 and 7.

¹ UNHRC Resolution A/HRC/S-30/L.1. Available at: <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/112/74/PDF/G2111274.pdf?OpenElement>>. See also: <<https://www.ohchr.org/en/press-releases/2021/05/human-rights-council-establishes-international-commission-inquiry?LangID=E&NewsID=27119>>.

² Secretary of the Human Rights Council Mr. Goro Onojima, Oral Statement of programme budget implications arising from draft resolution A/HRC/S-30/L.1 of the Human Rights Council, 29 September 2021, operative para. [6.]. See also: Al Jazeera, UN rights council to investigate crimes during Gaza conflict, 27 May 2021, available at: <<https://www.aljazeera.com/news/2021/5/27/un-rights-council-to-investigate-crimes-during-gaza-conflict>>.

2. Background: Israel's existential conflict

The so-called “Israel-Palestinian conflict” is, at least in part, an existential conflict.³ It revolves around the question of whether the Jewish State of Israel, established in 1948, is a legitimate state maintaining a right to existence.

Since 1948, the State of Israel has been subjected to violence, warfare, and terror attacks deliberately targeting its civilians. Use of force and terror against the Jewish State long preceded the 1967 Six Day war: dating back to the mid-19th century as the Jewish people took their first steps in larger numbers to return home. The violence escalated after the League of Nations adopted the Mandate for Palestine in 1922, recognizing the Jewish people's unique connection with the land of “Palestine” and right to “reconstitute” their homeland.

Today, these attacks are spearheaded by states including Iran and Syria as well as terror organizations often acting as their proxies: Hamas, Islamic Jihad, Hezbollah, Fatah's Al Aksa Martyrs Brigades, the Popular Front for the Liberation of Palestine, and even Al Qaeda. All of these organizations—even the Palestine Liberation Organization (PLO)—reject the right of the Jewish state to exist within any borders.

Unfortunately, many so-called Palestinian moderates and supporters also refuse to recognize Israel as a Jewish state. In so doing, they oppose the November 29, 1947 UN General Assembly resolution 181 calling for two states, which was accepted by the Jewish nation and rejected by the Arab states.

These brief observations indicate the complex and hostile context within which Israel seeks to negotiate with the Palestinian Liberation Organisation (PLO) which represents the Palestinian people, for an agreement to end the conflict and in as much recognize Israel's right to exist, bring to an end the system of military administration (occupation) and realize Palestinian self-determination.

The “hard power” terror war against Israel's existence is bolstered by a corresponding “soft power” political war, often led by civil society or non-governmental organizations (NGOs) claiming the mantle of universal humanitarian goals, but whose activities often suggest a similar goal of bringing about the end of

³ See for example: Carlill, Bren, 2021. *The Challenges of Resolving the Israeli-Palestinian Dispute – An Impossible Peace?* London: Palgrave Macmillan.

Israel as a Jewish State. Even those organizations and groups that do not share this goal routinely demonstrate a remarkable and troubling historic amnesia and an accordant bias against Israel. Many powerful and well-funded organizations are involved in these campaigns, such as Amnesty International and Human Rights Watch.

This “soft power” war crystallized at the NGO Forum of the 2001 UN World Conference Against Racism in Durban, South Africa, where officials from 1,500 NGOs gathered, and issued a resolution singling out Israel as “a racist, apartheid state” and labeling “Israel’s brand of apartheid as a crime against humanity.” These NGOs accused Israel of the “systematic perpetration of racist crimes including war crimes, acts of genocide and ethnic cleansing” and called upon the “international community to impose a policy of complete and total isolation of Israel as an apartheid state.” The Durban NGO Forum Declaration was the latest incarnation of the campaign that produced the Soviet-coordinated 1975 UN General Assembly declaration that “Zionism is racism.” Although this declaration was repealed in 1991, NGOs resuscitated the Durban Conference in order to advance the interests of those who demand that an Arab-dominated Palestinian state replace the Jewish State of Israel.⁴

⁴ See further: Anne Herzberg, “NGO ‘Lawfare:’ Exploitation of Courts in the Arab-Israeli Conflict,” *NGO Monitor Monograph Series*, (2d ed. 2010), available at: <<http://www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf>>.

3. The UN Human Rights Council and Israel

3.1 The UNHRC

The UNHRC was established by the UN General Assembly in 2006⁵ to promote “universal respect for the protection of all human rights and fundamental freedoms for all” and “address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon.”⁶

This came after decades of serious failings on the part of its predecessor, the UN 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.”⁷ In order to remedy these problems, Resolution 60/251 of 3 April 2006 – establishing the new Human Rights Council – mandated its work be guided by the principles of “universality, impartiality, objectivity and non-selectivity”, and “constructive international dialogue and cooperation”. The UNHRC’s institution-building package expanded on these principles, adding “transparency, accountability, [and] balance” to the values that are to guide the UNHRC’s work.⁸

General Assembly Resolution 75/151, passed on 18 December 2019, stresses that the promotion and protection of human rights must be “guided by the principles of non-selectivity, impartiality and objectivity,” and importantly must “not be used for political ends” (para 6). The resolution also emphasizes that there must be an “unbiased and fair approach to human rights” (para 8) and that there is a

⁵ United Nations, General Assembly, *Resolution establishing the Human Rights Council*, A/RES/60/251 (3 April 2006), available at: <https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf>, Annex 2 of this document.

⁶ International Justice Resource Centre, *UN Human Rights Council*, available at: <<https://ijrcenter.org/un-human-rights-council/>>.

⁷ Kofi Annan, *Secretary-General's Address to the Commission on Human Rights, Comments on creation of the Human Rights Council* (7 April 2005), available at: <<https://www.un.org/sg/en/content/sg/statement/2005-04-07/secretary-generals-address-commission-human-rights>>.

⁸ UNGA Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006) (Annex 2); United Nations, Human Rights Council, *Resolution 5/1 Institution-building of the United Nations Human Rights Council*, A/HRC/RES/5/1 (June 18, 2007), available at: <https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_5_1.doc>.

“continuing need for impartial and objective information on the political, economic and social situations and events of all countries” (para 9). These principles are applicable across all UN bodies and including independent experts and Special Rapporteurs (para 7).

3.2 The UNHRC’s history of bias against Israel

Despite these clear instructions, since 2006 the UNHRC has singled out Israel in a manner that is not applied to any other UN member state. In fact, this myopic focus on Israel suggests the UNHRC has become a platform for the “soft power” campaign waged by those who seek Israel’s destruction to achieve their objectives.

- Israel is the only country for which the UNHRC has a permanent annual agenda item (special agenda item No. 7);
- Israel receives five times more condemnatory resolutions than any other country in the UNHRC per year;
- Israel is the subject of four times more UNHRC commissions of inquiry than any other country;
- Israel is the recipient of the most UNHRC Special Sessions (9 in 2021 – about twice more than the next most scrutinized countries)⁹; and
- the UNHRC-appointed ‘Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967’ has the mandate of investigating only “Israel’s violations” – and not those of the Palestinian Authority (PA), Hamas or any other parties in the defined territory.¹⁰

Concerning UNHRC has appointed more commissions and missions to investigate Israeli conduct in light of humanitarian and human rights law, three form prominent precedents and one gained particular notoriety for the denunciation of its findings by its own chair:

- In 2006 a Commission of Inquiry was established “(a) to investigate the systematic targeting and killings of civilians by Israel in Lebanon; (b) to examine the types of weapons used by Israel and their conformity with

⁹ UN Watch Database, *7 Problems with the Human Rights Council*, available at: <<https://unwatch.org/database/problems/unhrc/>>.

¹⁰ HRC resolution 1993/2 *Question of the violation of human rights in the occupied Arab territories, including Palestine* (Feb 19, 1993), available at: <https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1993-2.doc>.

international law; and (c) to assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.” The Commission concluded that Israel violated obligations of international and humanitarian law and disregarded its international and individual responsibility.

- In 2009, a fact-finding mission was established following the 2008-2009 Gaza war. Under Judge Richard Goldstone, this mission concluded that Israeli political and military leaders had committed war crimes and crimes against humanity, and had deliberately targeted the people of Gaza “in furtherance of an overall policy aimed at punishing the Gaza population”.
- In 2010 a fact-finding mission was established to investigate violations of international law resulting from the interception by Israeli forces of the humanitarian aid flotilla bound for Gaza on 31 May 2010 during which nine people were killed and many others injured. The Mission concluded inter alia that “[t]he conduct of the Israeli military and other personnel towards the flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence. It betrayed an unacceptable level of brutality. Such conduct cannot be justified or condoned on security or any other grounds. It constituted a grave violation of human rights law and international humanitarian law.”

3.3 The Goldstone Report (2009)

The overt anti-Israel bias of the Durban NGO campaign against Israel on the UNHRC was illustrated by the Goldstone Fact-Finding Mission (2009).¹¹

As expected when the Goldstone process began, the allegations and recommendations repeated the themes of the NGO Forum declaration at the 2001 Durban Conference. Israel was singled-out and subject to unique criteria and methodologies that are not applied to other nations in considering counter-terror defense. Testimony on alleged war crimes was not subject to cross examination, blatant internal contradictions were ignored, and much of the “evidence” was never made public or subjected to critical analysis. At the time, Judge Richard Goldstone himself acknowledged that while the language and framework of the report and

¹¹ This section 3.3 is based on the analyses published by several international lawyers in: *The Goldstone Report “Reconsidered”: A Critical Analysis*, NGO Monitor and Jerusalem Center for Public Affairs, 2009.

proceedings were rigidly legalistic, the analyses and recommendations would not have been accepted by a duly constituted court of law.

The Commission rejected or willingly ignored the pervasive use of illicit and illegal tactics by Israel's opponents, most notably the deliberate use of civilians in an effort to shield lawful military objectives from attack, complicate attack decisions, and arguably even in an effort to compel Israeli forces to inflict civilian casualties as a price for striking high-value military objectives. This outlook directly affected what the Commission looked for as it gathered evidence, and how it went about the interviews conducted with Palestinians in the Gaza Strip. This was exacerbated by the overt failure to acknowledge the pervasive influence and control of Hamas over the Gaza population and how that control impacts the probative value of such interviews.

The result of the biased approach and procedural weaknesses was a report tainted by fundamental errors including:

- Failure to investigate Hamas' use of civilian shields and other abuses of international humanitarian law related to the conduct of hostilities;
- Credulity of Palestinian sources;
- Systematic attribution of malevolent intention to Israeli forces based almost exclusively on attack effects with insufficient consideration of attack justifications;
- Pervasive avoidance of any inquiry into Palestinian intentions or international humanitarian law violations;
- Exceptionally judgmental conclusions based on admittedly inadequate evidence.

These criticisms of the Report are far from speculative. Indeed, on April 2, 2011, Goldstone published an op-ed article in *The Washington Post*, in which he recanted the essential claims of the report. Eighteen months after the UN publication, Judge Goldstone acknowledged that "our fact-finding mission had no evidence" to verify the allegations supplied by the radical NGOs. He retracted the allegations that Israel had deliberately targeted civilians, confessed to having ignored the war crimes of Hamas, and recognized that the UNHRC is fundamentally biased against Israel.

4. The Main Features of the UNHRC's 2021 Commission of Inquiry

4.1 Creation of the Commission of Inquiry

Resolution A/60/251 (see Annex 2) was adopted at a Special Session of the UNHRC called by Pakistan on behalf of the Organisation of Islamic Cooperation (OIC),¹² within a week of an effective ceasefire being reached following significant conflict between Israel and Hamas and associated Palestinian groups operating in the Gaza Strip.

The resolution was adopted by only 24 of the 47 members of the UNHRC.

4.2 Terms of Reference

The scope of the COI's Mandate is set out in UNHRC Resolution S-30/1 cl. 1 (see Annex 3). Operative paragraph 1 sets out the main terms of the COI's 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, and all underlying root causes of recurrent tensions, instability and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity; ...

The COI has also produced a document called "Terms of Reference"¹³ (see Annex 4) further specifying its own interpretation of the COI's mandate and defining: the law

¹² The Council holds two types of sessions: Regular sessions (at least three at regular intervals each year), and Special Sessions. Special Sessions have a narrower remit and are designed to address urgent human rights situations arising between Regular Sessions and may be called at the request of any Council Member State with the support of at least one third of the Council membership. See IJRC, UN Human Rights Council, available at: <<https://ijrcenter.org/un-human-rights-council/>>.

¹³ United Nations, Human Rights Council, Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem and Israel, Terms of Reference, (no date), available at: <undocs.org/en/A/63/332. [https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIOPT/TORs-UN-Independent ICI Occupied Palestinian Territories.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIOPT/TORs-UN-Independent%20ICI%20Occupied%20Palestinian%20Territories.pdf)>.

it will apply; the standard of proof it will adopt; the cooperation it expects from the State of Israel and the “State of Palestine”; and its working methodology.

The COI’s Terms of Reference are much broader than those of any other Commission of Inquiry established by the UNHRC, including the UNHRC’s Independent Investigative Mechanism for Myanmar (IIMM) (Resolution 39/2 [2018]) which stands as the UNHRC’s only other ongoing investigation. The IIMM’s terms of reference are restricted by defined undertakings to “collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011.” This stands in contrast with the much broader Terms of Reference of the COI, which extend to “all alleged violations of international humanitarian and human rights law”, “leading up to and since 13 April 2021”, and beyond this, “all underlying root causes, etc.”.

As set out in sub-cll. 2(a)-(b) of the Terms of Reference, the COI will gather evidence by undertaking to:

- (a) Establish the facts and circumstances that may amount to such violations and abuses and of crimes perpetrated;*
- (b) Collect, consolidate and analyse evidence of such violations and abuses and of crimes perpetrated, and systematically record and preserve all information, documentation and evidence, including interviews, witness testimony and forensic material, in accordance with international law standards, in order to maximize the possibility of its admissibility in legal proceedings;*

As set out in sub-cll. 2(c)-(h) of the Terms of Reference, the COI will use evidence gathered to prepare for legal proceedings by undertaking to:

- (c) Have the capacity to document and verify relevant information and evidence, including through field engagement and by cooperating with judicial and other entities, as appropriate;*
- (d) Identify, where possible, those responsible, with a view to ensuring that perpetrators of violations are held accountable;*
- (e) Identify patterns of violations over time by analyzing the similarities in the findings and recommendations of all United Nations fact-finding missions and commissions of inquiry on the situation;*
- (f) Make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring legal accountability,*

including individual criminal and command responsibility, for such violations, and justice for victims;

(g) Make recommendations on measures to be taken by third States to ensure respect for international humanitarian law in the Occupied Palestinian Territory, including East Jerusalem, in accordance with article 1 common to the Geneva Conventions, and in fulfilment of their obligations under articles 146, 147 and 148 of the Fourth Geneva Convention, including by ensuring that they do not aid or assist in the commission of internationally wrongful acts;

(h) Report on its main activities on an annual basis to the Human Rights Council under agenda item 2 as of its fiftieth session, and to the General Assembly as of its seventy-seventh session.

4.3 The members of the Commission

President of the Human Rights Council, Ambassador Nazhat Shameem Khan (Fiji), appointed Navi Pillay (South Africa), Miloon Kothari (India) and Chris Sidoti (Australia) to serve as the COI's three members (their ineligibility for bias is considered in section 5.6, below). They are supported by a new secretariat which includes professional criminal investigators and legal analysts, each of whom are to undertake information gathering roles, including travel through the region.

4.4 Budget

On December 24, 2021, the UN General Assembly approved a budget of approximately 5 440 800 USD per year for the COI.¹⁴ This budget will cover the costs of the 18 secretariat positions to be appointed by the High Commissioner. The relevant costs include salaries, office space in Geneva, technical office hardware and software, vehicle rental, and a combined total of 790 days of travel per year and miscellaneous expenses for all staff.

¹⁴ As set out in the Director of UN Office of Programme Planning, Finance and Budget (OPPFB)'s speech to the Secretary of the UNHRC on 29 September 2021 at paragraph 5; and as approved as part of the proposed programme budget for 2022 (A/C.5/76/L.17) at the Fifth Committee in December 2021, available at: <<https://undocs.org/Home/Mobile?FinalSymbol=A%2FC.5%2F76%2FL.17&Language=E&DeviceType=Desktop&LangRequested=False>>.

The budget sets the cost of the COI as 11 812 700 USD total in its first three years, and 5 475 600 USD each year thereafter (1 016 500 USD in 2021, 5 320 600 USD in 2022, and 5 475 600 USD in 2023 and beyond).

Similar to the TOR's unprecedented breadth as described on p. 17, the COI's budget is also disproportionately extensive in comparison to similar mechanisms: costing more than all but one of the thirty-three investigative mechanisms¹⁵ ever created by the Human Rights Council in its 15-year history (the single exception is the distinguishable case of Myanmar, where the inquiry was created in 2018 after a year in which 25,000 Rohingya Muslims were killed¹⁶ and 700,000 were forced to flee the country as those remaining faced genocide,¹⁷ and where crimes against humanity had already been found to have occurred.)¹⁸

As of April 1, 2022, there are eight other commissions of inquiry, fact-finding missions and other investigative mechanisms of the UNHRC¹⁹: Belarus, Ethiopia, Libya, Myanmar, South Sudan, Syria, Ukraine and Venezuela respectively.²⁰

When the COI's budget was approved in December 2021, the median total budget for the other investigative mechanisms created by HRC resolutions was about 2.5 million USD. The COI annual budget stands at above twice the median total amount for comparable mechanisms.

¹⁵ UNHRC, *List of mandated COIs/Fact-Finding Missions*, available at: <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/ListHRCMandat.aspx>>.

¹⁶ Hannah Ellis-Peterson, *The Guardian*, *Myanmar's military accused of genocide in damning UN report*, available at: <<https://www.theguardian.com/world/2018/aug/27/myanmars-military-accused-of-genocide-by-damning-un-report>>.

¹⁷ Freedom House 2021, *Countries and Territories*, available at: <<https://freedomhouse.org/countries/freedom-world/scores>>.

¹⁸ General Assembly resolution 39/2, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, A/HRC//RES/39/2 (3 October 2018), available from: <undocs.org/A/HRC/RES/39/2>.

¹⁹ UNHRC, *International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and other Investigations*, available at: <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx>>.

²⁰ This list does not include two investigations begun in 2021 by the OHCHR which have not required creation of new bodies (in Sri Lanka and Democratic People's Republic of Korea) and the current implementation and monitoring body concerning the Democratic Republic of the Congo (2021) addressing findings and recommendations made by a previous team of experts.

5. Legal and policy implications

5.1 Lack of international support for the COI

This COI rests on a very weak foundation. It does not enjoy the support of a strong majority of states. In fact, only 24 of the UNHRC's 47 members voted in favor of its creation (Annex 1, sub-part 1). Over recent months, a significant number of UN Member states have formally criticised the COI.

While it is not necessary for a UNHRC Commission of Inquiry to enjoy universal support, it is highly undesirable to launch a massive, ongoing inquiry in the face of significant international criticism, disagreement related to the underlying issues and opposition to the inquiry.

Objections were voiced in formal statements by UN Member State representatives both when the original resolution was passed in May 2021, and when the budget was passed in December 2021. These positions were expressed not only by states that voted against the COI's formation and its funding, but also by some of those that abstained. Extracts from May 2021 by the following countries are included in Annex 1 of this document: Austria, the Bahamas, Bulgaria, Czech Republic, France, Germany, the Netherlands and the United Kingdom; and in December from: Australia, Albania, Canada and the United States.

This means that *a priori* the Commission's reports will be the subject of much controversy and criticism. The history of the Goldstone Report suggests that this controversy will compound concerns as to the COI's authority. All of this provides an extremely fragile political basis for the Commission's work: hardly the grounds on which the members of the UN General Assembly should be devoting such a massive amount of resources (far exceeding any other comparable Commission of Inquiry). Should an appropriate Commission of Inquiry have been established, it would have demonstrably entertained the concerns formally expressed by (the significant number of) states so as to maximize the international political support. As it is, the Commission's work is likely to further polarize debate about the Israeli-Palestinian conflict.

5.2 Imbalanced and selective focus on Israel

The COI has been established as an 'ongoing' commission with a permanent staff. Israel thus joins Myanmar as the only two countries (out of 193 UN member states) which will be permanently investigated by a commission having a permanent staff

at the Office of the UN High Commissioner of Human Rights. Myanmar is a distinguishable case as explained at 4.4. The Myanmar COI is the only investigative mechanism (out of thirty-three the HRC has created in its 15-year history) to cost more than the COI established by Res S-30/1.²¹

A selective focus and inherent bias are apparent if one compares Russia, which has clearly conducted multiple aggressive operations involving pervasive violations of international law over the last decade; operations that violated (and continue to violate) the sovereignty of neighboring states, and yet is not the subject of an ongoing commission of inquiry.

No other conflict in the world is the subject of as much UN scrutiny as that of Israel-Palestine. The UN already has a myriad of permanent bodies established to promote Palestinian interests. These include: the Division of Palestinian Rights, the Committee on the Exercise of the Inalienable Rights of the Palestinian People; the United Nations Information System on the Question of Palestine; the UNHRC “Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967,” the “Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories”; the Office for the Coordination of Humanitarian Affairs in the Occupied Palestinian Territory (OCHA oPt); the Office of the Special Coordinator for the Middle East Peace Process (UNSCO); and the “United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory.”

Additionally, the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), which has a 2022 budget of 1.6bn USD, operates exclusively for the assistance of Palestinians.

The UNHRC itself already has a unique and disproportionate focus on Israel. Its special agenda item 7 (as introduced in 3.2 above) – the only country-specific permanent item on the Council’s agenda – requires Israel be singled out at every meeting. Further, of the thirty-two HRC mandated investigative probes, nine so far have concerned Israel. It is worth recalling two of these in particular that were discredited due to evident bias: namely the 2009 Goldstone Report which was later disavowed in no uncertain terms by its chief author Richard Goldstone; and

²¹ UNHRC, *List of mandated COIs/Fact-Finding Missions*, available at: <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/ListHRCMandat.aspx>>.

secondly the 2014 COI's Schabas Mission, from which the Inquiry's Chair William Schabas resigned after it was revealed that he had a conflict of interest due to a contractual relationship with the PLO on a matter relevant to the 2014 COI.²²

In contrast, there are no commissions of inquiry into allegations of human rights abuses of Uyghurs in Xinjiang, nor equivalent mandates toward Hamas. The COI will be assigned three times the number of permanent staff as the 2013 Commission of Inquiry into North Korea which reported findings including an estimated 80,000 - 120,000 citizens being held in camps as political prisoners.²³

Several Secretaries General of the United Nations have already acknowledged persistent bias against Israel. In 1992, while speaking to the American Jewish Committee, Kofi Annan said, "I know that to some of you in this audience, and in the Jewish community at large, it has sometimes seemed as if the United Nations serves all the world's peoples but one: the Jews. The exclusion of Israel from the system of regional groupings; the intense focus given to some of Israel's actions, while other situations sometimes fail to elicit the similar outrage; these and other circumstances have given a regrettable impression of bias and one-sidedness."²⁴ In 2013, Ban Ki-Moon responded to a student's question by confirming the persistence of United Nations bias against Israel, referring to it as "an unfortunate situation."²⁵

In this context, rather than establishing an additional body to criticize Israel's alleged shortcomings and prepare materials for legal action against Israelis, serious consideration should be given to the need for rectifying the current under-representation of investigation into many larger-scale though less politically

²² William Schabas, *Resignation letter to President of HRC*, (2 February 2015), available at:

<https://www.mediafire.com/file/sb2m45eb4k58xdo/ru%25CC%2588cker.scha%25bas.2.2.15.resignation_letter.pdf/file>.

²³ UNHRC, *Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, (7 February 2014), para [61], available at: <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.63.doc>>.

²⁴ Kofi Annan, *Speech to New York Group Acknowledges Sense of Exclusion and Calls For Mutual Understanding, Recognizing Jewish Contribution to World Body*, (15 December 1999), United Nations Press Release SG/SM/7260, available at: <<https://www.un.org/press/en/1999/19991215.sgsm7260.doc.html>>.

²⁵ Omri Efram, *UN chief admits bias against Israel*, yNet news, (16 August 2013), available at: <<https://www.ynetnews.com/articles/O,7340,L-4418776,00.html>>.

convenient allegations of human rights abuses; as well as increasing the effectiveness of existing bodies that focus on the Israel-Palestinian conflict.

5.3 Israel, Hamas, and the Conduct of Hostilities

The inevitability that the COI will adopt the narrative of the conflict propounded by Hamas, i.e. that Israel was the aggressor, committed pervasive violations of international humanitarian law (Law of Armed Conflict – LOAC) in the conduct of the hostilities – is almost self-evident. This is the result of the confluence of a number of factors: the imbalanced terms of Res S-30/1 focusing on Israel, together with the pre-determined positions adopted by the COI's members (especially the Chairperson) regarding Israel's culpability and the UNHRC's history of distorted and "outcome oriented" interpretations of international humanitarian law, and the UNHRC's history of flawed compliance assessment processes. There is every reason to assume the COI will be corrupted by these same influences, and will once again ignore the fact that Israel, in a legitimate act of self-defense, was compelled to engage in hostilities against an enemy that itself pervasively violated international humanitarian law. Hamas employed illegal tactics that actually exacerbated the risk to the civilian population not only in Israel but under its own control, and tactics calculated to facilitate a strategic disinformation campaign to frame Israel as the violator of international law.

BRIEF OVERVIEW OF THE CONFLICT

- The military conflict commenced on 10th May 2021, when Hamas launched rockets on Jerusalem.
- This was preceded by a month of unrest in which there was a political struggle between Hamas in Gaza and the Palestinian Authority (PA) in the West Bank, as well heightened tensions between Palestinian civilians and Israeli police in East Jerusalem during Ramadan.
- On 10th May 2021, Hamas launched a deliberate attack against civilians and civilian property in Israel using a barrage of 150 rockets at Israel from the Gaza Strip, including six aimed at the City of Jerusalem.
- The ensuing 11-day conflict was the fourth major round of hostilities since Israel unilaterally withdrew from Gaza in 2005 in compliance with UN Security Council Resolution 242 and Hamas violently seized power there in 2007.
- The conflict saw significantly increased operational tempo, from both sides, compared to the previous round of hostilities in 2014. Hamas and Palestinian Islamic Jihad (PIJ) fired as many rockets, and Israel hit as many targets, in 11

days as in 50 days during the conflict seven years prior. This was in large measure the result of advances in the weapons and tactics implemented by the Israel Defense Forces (IDF) to enable a more precise and effective achievement of operational objectives in Gaza in a way that mitigates the necessity to conduct combined arms maneuver operations and in so doing the risk to civilians and civilian property in Gaza.

- Despite the shortened timeframe of the operations and the substantially reduced level of collateral damage and incidental injury resulting from these IDF efforts, accusations that the IDF violated International Humanitarian Law (IHL) grew louder and more pervasive in the media and seemed to be rapidly embraced by many observers.
- The reality was quite distinct from this distorted perception. Due in large part to operational and technological innovations, Israel managed quickly to accomplish its military objectives while substantially reducing the number of civilian casualties.
- The bigotry of disparate expectations nonetheless provided the foundation upon which Hamas claimed a strategic victory, having bolstered its image vis-à-vis the PA as the defender of Jerusalem and Palestinians, and delegitimized Israeli operations. It also debuted several new and updated capabilities, including drones and electronic warfare.

NO REFERENCE TO HAMAS

Resolution S-30/1 does not even mention Hamas. It only refers only to the State of Israel concerning “alleged violations and abuses”. This is remarkable, given that Hamas exists in order to destroy the Jewish State of Israel,²⁶ and, like a number of Palestinian entities, is classified by many countries as a terrorist organisation.²⁷ The imbalanced, incomplete and distorted wording of Res S-30/1 indicates that the actions of Hamas and other Palestinian entities such as the PLO, Fatah, PIJ and the Popular Front for the Liberation of Palestine (PLFP) will not be scrutinized in a

²⁶ Text of Hamas Charter available at:

<https://avalon.law.yale.edu/20th_century/hamas.asp>.

²⁷ Hamas is currently designated as a terrorist organisation by Canada, the EU, Israel, Japan, the Organisation of American States, the United Kingdom and the United States. Australia announced in February 2022 that it will designate Hamas as a terrorist organisation. The PFLP has been designated a terrorist organisation by the United States, Japan, Canada, Australia and the European Union.

serious fashion, and certainly not to the same extent as Israel; even though objective facts indicate pervasive IHL violations by these non-state organized armed groups.

THE REFERENCE TO 13 APRIL 2021

The Mandate specifically refers to “13 April 2021” as a reference point for inquiry, without explaining why this date is relevant. This was the first day of Ramadan in 2021, during which Israeli police clashed with Palestinian rioters in the Old City.

Hamas later argued that Israel infringed Palestinian human rights by denying Temple Mount access, and that these Israeli actions justified its subsequent rocket fire from the Gaza Strip against Israeli civilians on 10 May.²⁸ According to a recent independent study of the Gaza Assessment Task Force:²⁹ “Even before the conflict began, Hamas focused on portraying Israel’s response to the clashes in East Jerusalem between Palestinians and Israeli police as ‘war crimes’ and a ‘massacre.’” Such false portrayals ultimately proved surprisingly effective, allowing Hamas to establish the narrative of Israel as the aggressor and Palestinians as innocent victims. Moreover, Hamas sought to establish the narrative that Palestinians were demanding intervention to protect them against Israeli violence. This narrative laid the groundwork for Hamas to justify its eventual rocket attacks as ‘defensive.’³⁰

²⁸ Joseph Kraus, *EXPLAINER: What’s behind the clashes in Jerusalem?*, Associated Press (May 10, 2021), available at: <<https://apnews.com/article/jerusalem-middle-east-lifestyle-government-and-politics-43d4cab031c28da0abf98d694dd169ac>>.

²⁹ The Gaza Assessment Task Force is an independent policy project, comprised of senior, retired U.S. military officers. It was commissioned by The Jewish Institute for National Security of America (JINSA) in 2021 to travel to Israel to examine the actions of both sides in the May 2021 Gaza conflict and publish their findings and recommendations. Their report, *Gaza Conflict 2021 Assessment: Observations and Lessons* can be accessed at: <<https://jinsa.org/wp-content/uploads/2021/10/Gaza-Assessment.v8-1.pdf>>.

³⁰ For example, on May 3, Hamas spokesperson Sami abu Zhuri tweeted, “The occupation’s attempts to violate #AlAqsaMosque, field executions, mass displacement (#SheikhJarrah neighborhood) are enough to blow up the region. The international community must intervene to stop Israeli #terrorism. The #Palestinian people will face these crimes by all means.” On May 10, before firing rockets at Israel, abu Zuhri tweeted, “What is happening in Al-Aqsa Mosque is a real massacre and war crimes, and we call on all our people to take to the streets and clash with the occupation, and these crimes will have their repercussions.” Sami Abu Zhuri, Twitter, May 3, 2021, available at: <<https://twitter.com/SamiZuhri/status/1389208562098921474>>. Sami Abu Zhuri, Twitter, May 10, 2021, available at: <<https://twitter.com/SamiZuhri/status/1391674682173128708>>.

Rather than in response to Israel, the Hamas rocket fire was triggered by internal Palestinian rivalry. “Hamas sought this conflict to pursue broad political and informational objectives, namely to: weaken the PA and seed the ground for Hamas to increase its influence in the West Bank; burnish its self-proclaimed leadership of, and bolster its popularity among, the broader anti-Israel movement; delegitimize Israel as a violator of Palestinian rights and international law; and divert attention from economic conditions in the Gaza Strip.”³¹ Hamas’ indiscriminate rocket fire directed at Jerusalem on 10th May 2021 indicates its strategic goals in the conflict were not related to protecting against any threat to Gaza but tied closely to intra-Palestinian rivalry and the situation in Jerusalem. It even named its operation “Sword of Jerusalem.”

By suggesting that 13th April 2021, and not 10th May 2021, was the start of the conflict, Res S-30/1 accepts and endorses the Hamas narrative. The COI is in effect required by Res S-30/1 to adopt the position that it *was* Israel’s alleged “massacre” and riot control of Palestinians on and near the Al Aqsa Mosque *and not* Hamas’s firing of missiles that was the starting-point of the conflict. The COI’s inquiries are thus *a priori* framed in a way that is selective and prejudicial to Israel.

INCORRECT “EFFECTS-BASED” APPLICATION OF LOAC

The imbalance in the COI’s mandate – focusing exclusively on Israel waiving the proverbial talisman of tolerance for the IHL violations committed by Hamas – reflects the same bias and selectivity that marked the Goldstone mandate in 2009. The likelihood is that the COI will, as the UNHRC has done in the past, focus almost exclusively on the destructive consequences of attacks launched by the IDF in Gaza and extrapolate from those effects the conclusion that Israel committed IHL violations during the conduct of hostilities by causing excessive and legally unjustified incidental death and injury to civilians and destruction of civilian property, which many commentators condemned during the conflict as war crimes.

However, this is an inappropriate and incorrect approach to assessing IHL compliance or non-compliance. The fact that one party to a conflict causes more damage or casualties does not mean it is illegal. The law of armed conflict requires militaries to distinguish between – and only attack – military, not civilian, targets. Commanders are obliged to make a good-faith effort to take all feasible precautions

³¹ Gaza Assessment Task Force, *Gaza Conflict 2021 Assessment: Observations and Lessons* (2021), page 21.

to mitigate civilian risk. International law tolerates harm to civilians provided it's not deliberate, indiscriminate or avoidable.

Israel took extraordinary precautions to ensure it was only targeting military targets, and to minimise loss and casualties, while Hamas took extraordinary measures to ensure Israel would cause maximum loss and casualties. A good example was the Al-Jalaa building, occupied by media companies like Al Jazeera, but where Hamas had housed a strategic electronic jamming system to be used against the Iron Dome defense system. Because it housed an important military facility, Israel was entirely justified in using proportional force against it. Yet the destruction of the building was widely, and immediately, condemned in the media.

International law does not preclude unavoidable civilian casualties. It is a sad but undeniable reality of war that international law tolerates harm to civilians if it's not deliberately inflicted, caused by indiscriminate attacks and avoidable with feasible precautions.

The COI mandate completely fails to address this phenomenon. And the fact that the COI will be entirely dependent on evidence provided by parties that are hostile to Israel means that the COI will inevitably be skewed against Israel.

The ironic result of this distorted interpretation of IHL (or LOAC) is that “[t]he side that actually implemented measures to comply with the LOAC civilian risk mitigation imperative [is] routinely condemned as illegitimate, while the side that not only routinely ignored those obligations but often sought to *deliberately* inflict death or injury on civilians [is] painted as the overall victim of illegitimate violence.”³²

The Gaza Assessment Task Force concluded that the reality is the reverse: it was Israel that took utmost precautions to comply with international law, while Hamas deliberately used “human shields” to create the maximum Palestinian casualties:

- The Gaza Assessment Task Force found that IDF military operations in Gaza reflected a consistent and good faith commitment to respect and implement the Law of Armed Conflict and its principles of necessity, humanity, distinction, and proportionality. The IDF implemented a systematic process for adhering to LOAC, beginning with training at all levels of command. As a result of all these

³² Professor Geoffrey Corn and Robert Ashley, *LOAC and Legitimacy: When Combat Becomes a Supporting Effort to Information*, Articles of War website, Lieber Institute West Point, Jan 18 2022, available at: <https://lieber.westpoint.edu/loac-legitimacy-combat-supporting-effort/>.

precautions, Israel maintained an impressively low civilian-to-belligerent casualty ratio of just under 1:1—all the more impressive considering Hamas embedded its military assets among Gaza’s civilian population, using them as human shields. According to Israeli estimates, there were 264 total deaths in Gaza during the conflict. Of these, 99 were confirmed enemy belligerents (37 percent), 40 were believed to fall into this same category (15 percent), and 120 were civilians (45 percent). Of the confirmed civilian casualties, 20 (17 percent) were killed by rockets misfired by Hamas itself. In total, 1,950 individuals were wounded in Gaza. Just as tellingly, despite striking 20 high-rise towers in Gaza that the IDF assessed as military objectives because of their use or intended future use by Hamas military assets, no civilians were killed and no surrounding buildings were destroyed due to care taken by the IDF to warn inhabitants and design their strikes.

- The Gaza Assessment Task Force also found that Hamas, in contrast, serially violated the law of armed conflict (LOAC) by directing attacks against Israeli civilians, launching indiscriminate attacks against Israel, and exposing Gazan civilians to avoidable risk to either intentionally complicate Israeli military operations or exploit civilian casualties in order to make false claims of Israeli war crimes.³³

5.4 No justification for an “ongoing” inquiry into “underlying root causes of tensions”

The Mandate serves as a *carte blanche* — in perpetuity — to investigate any allegations against Israel in the past or in the future, whether in the West Bank or Gaza or in all of Jerusalem, and even within the recognized pre-1967 borders of the State of Israel.

The Resolution and surrounding debate do not provide justification for the COI being an “ongoing” Inquiry. With the exception of the Myanmar mechanism, the COI’s open-ended character is unique compared to UNHRC investigative bodies such as those for Libya, South Sudan, Syria, Venezuela, and Yemen which must be renewed annually. Countries including Australia, Canada, and Germany have

³³ Gaza Assessment Task Force, *Gaza Conflict 2021 Assessment: Observations and Lessons* (2021), pages 17-24.

criticized the mandate's open-ended nature.³⁴ There is no mechanism for reviewing the ongoing nature of the mandate.

The COI will investigate “all underlying root causes of recurrent tensions, instability and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity”. Not only does such an investigation exceed the purposes for which the UNHRC was established, it is an unrealistic goal.

The Israel-Palestine dispute is a complex, multi-layered set of conflicts that have been in existence for over 100 years. It involves many international actors, including other states and non-state actors in the region. Many committees and institutions have been created over the decades to investigate the conflict. Any investigation into these issues would require a more clearly defined set of criteria and objectives, as well as metrics for measurement of success. The COI, as established by the UNHRC, is not equipped to deal with these issues.

The May 2021 conflict between Israel and Hamas was a contained conflict. That limited conflict provides, in and of itself, no justification for establishing a permanent inquiry into alleged international law infringements “in Israel”, or into the “root causes” of the Israel-Palestinian dispute as a whole.

In fact, the UNHRC has provided no compelling reasons why yet another body should be established (and funded) to investigate the underlying causes of a 100-year dispute that is already the subject of investigation and study by a myriad of UN organs which, so far, have failed to demonstrate that they are having any success in advancing a negotiated resolution of the conflict between Israel and the Palestine Liberation Organisation.

5.5 Evidentiary and Procedural Problems

The COI is much more than a fact-finding mission. As Res S-30/1 and the Terms of Reference show, the COI is being set up to carry out quasi-judicial tasks: it will seek to gather evidence, interpret and apply international law, and make “recommendations” about violations of international law. The judicial nature of the

³⁴ UN WebTV, *Explanations of votes by Belarus and Sri Lanka respectively on the resolution to create the Commission of Inquiry at the special session of the Human Rights Council*, 23 December 2021, available at: <https://media.un.org/en/asset/k1d/k1di8emm3g>.

work is shown by the fact that one of the COI's tasks is to gather evidence in order that it can be used in criminal proceedings.

Resolution S-30/1 confers on the COI extremely wide-ranging powers relating to the collection of evidence of "alleged" international crimes. The inter-locking provisions of the resolution far exceed those of resolutions establishing previous mechanisms – even the Myanmar mechanism established in 2018. The width of these powers, and lack of checks and balances, is extremely dangerous because it opens the door to abuse of the rights of Israel and of Israeli leaders to due process. In seeking to protect the interests of victims, and "end impunity", the UNHRC is infringing the rights of alleged Israeli "criminals" to due process.

It is important to note, before looking at the provisions of the resolution in detail, that paragraph 2 of this mandate conflates and confuses three related but distinct processes in criminal proceedings: (a) fact-finding: the gathering and preserving of information that may serve as evidence of crimes or legal violations; (b) the gathering of *prima facie* evidence that may form the basis of a decision to prosecute (charging decision); and (c) the preparation of evidence in the course of criminal proceedings.

The novel terms of the resolution, as compared with the Myanmar mechanism, are as follows:

- Paragraph (1) states that the COI must investigate all "alleged" violations and abuses of international humanitarian or human rights law. The word "alleged" does not appear in the resolution establishing the Myanmar mechanism. Paragraph 2(a) adds that the COI shall establish facts and circumstances of "crimes perpetrated". The Myanmar mechanism refers only to "*the most serious international crimes*", thus building in a significant limitation. Together, these provisions mean that this COI will be obliged to investigate any alleged violation or abuse of humanitarian or human rights law or "crime perpetrated" – no matter how weak or unrealistic the allegation. Given that Hamas and other groups hostile to Israel have already "alleged" many Israeli war crimes – many of them based on highly tendentious definitions of crimes, and biased interpretation of the facts – the COI will be led into establishing facts of "crimes" that – on any balanced view of the facts – would not even be considered *prima facie* as crimes under any normal criminal law system.
- According to paragraph 2(b), the COI shall collect and analyze evidence of violations and crimes "in order to maximize the possibility of its admissibility in legal proceedings". This is a highly problematic clause. The COI will be faced

with a huge number of widely-formulated “allegations”. Instead of objectively assessing the factual veracity and legal validity of these allegations, the COI will instead be pressured to ensure that the evidence it compiles is used to form the basis of criminal prosecutions.

- The resolution emphasizes that the COI is responsible for “ending impunity and ensuring legal accountability” (para 2(f)) and ensuring that “perpetrators are held accountable” (para 2(d)).

The COI has announced that it will apply the “reasonable grounds” test as the standard of proof (see Annex 4). This standard is much lower than the standard required for a finding of culpability in criminal proceedings (“beyond reasonable doubt”). Given that (as shown above) the COI is required to identify crimes, ensure that perpetrators are identified and prosecuted, and “maximize the possibility” of admissibility of evidence in legal proceedings, findings and conclusions of the COI will be highly prejudicial and irreparably damaging.

Even with this lower standard of proof, the COI will be faced with extreme difficulties in compiling information and testing it for its veracity. Israel (as it is entitled to do) has indicated it will not cooperate with this inquiry.³⁵ This presents the COI with a fundamental problem. Given Hamas’s history of manipulating information, and Israel’s non-participation, on what basis can the COI guarantee that the evidence it collates, collects and stores will be true and accurate? It simply will be unable to do so. And yet it is required, by the terms of its mandate, to reach and publish conclusions.

In fact, the COI has stated that it will reach and publish legal and factual conclusions (based on evidence) without any of the protections of an open trial, confrontation of witnesses, criminal-level standards and burdens of proof, rules of admissibility or advice of counsel.

Together with the obligation to investigate all “allegations”, the low standard of proof adopted (see below), the fact that the COI will be unable to test evidence for its veracity, and the absence of due process, this COI has been set up as a kind of “star chamber”, hearing unverifiable “evidence” submitted by anonymous accusers, identifying absent “perpetrators”, and preparing charges behind closed doors.

³⁵ Under international law, Israel is not obliged to cooperate with this Commission of Inquiry, but has a right to refuse cooperation. No State can be compelled to submit its disputes to judicial settlement without its consent: Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 25, para. 33.

All of this means that, in order to fulfil its mandate, the COI will necessarily breach the basic human right of the accused in criminal proceedings to due process and a fair trial. This transgresses some of the most fundamental principles of the rule of law.

There is great irony – and tremendous illegitimacy – in a UNHRC COI committing itself in advance to violating the human rights of those who are accused of crimes.

5.6 Bias of the members of the Commission

The criteria upon which the members of the Commission were selected and the process of selection were not disclosed to the Council. Each of the Commissioners has a record supporting outspoken criticism of Israel. Applying the standard of reasonable apprehension of bias to the records of each person selected to conduct this investigative mechanism leaves the credibility of the Commission severely diminished.

NAVI PILLAY (SOUTH AFRICA)

Ms Pillay developed a reputation for enthusiastically highlighting accusations of Israeli war crimes during her service as UN High Commissioner for Human Rights from 2008 to 2014, in 2010 declaring “the Israeli government treats international law with perpetual disdain”. There is no report of Ms Pillay commenting on human rights abuses in countries such as Algeria, Egypt and Iran which, unlike Israel, received the “Not Free” rating from the Freedom House.³⁶ Ms Pillay has not only denied UNHRC bias against Israel but angrily dismissed criticism of such bias as “propaganda,” while referring to criticism of the Durban conference’s antisemitism as a “disparaging media and lobbying campaign”³⁷ containing “ferocious, and often distorted, criticism” by “certain lobby groups focused on single issues”.³⁸ This angry defence is blind to rejection at the Durban Conference itself by then UN High Commissioner for Human Rights, Mary Robinson, former president of Ireland, of

³⁶ Freedom House 2021, *Countries and Territories*, available at: <<https://freedomhouse.org/countries/freedom-world/scores>>.

³⁷ UN News, *UN rights chief urges all States to take part in anti-racism conference*, (2 March 2009), available at: <<https://news.un.org/en/story/2009/03/292712-un-rights-chief-urges-all-states-take-part-anti-racism-conference>>.

³⁸ Durban Review Conference Press Release, High Commissioner for Human Rights stresses need to tackle discrimination and inequality, and prevent genocide, (8 September 2008), available at: <https://www.un.org/en/durbanreview2009/pr_8-9-08.shtml>.

the NGO Forum report due to its racist treatment of Israel. Ms Pillay's prior record on Israel was a significant factor in the Obama Administration reportedly blocking her from renewal³⁹ as UN High Commissioner for Human Rights. As recently as June 2020, Ms Pillay signed a BDS petition entitled, "Sanction Apartheid Israel!".⁴⁰ In June 2021, Ms Pillay wrote a letter to U.S. President Biden, calling on the U.S. to "address the root causes of the violence" by ending Israel's "ever-expanding discrimination and systematic oppression."⁴¹

A recent petition to the COI by UN Watch documents evidence of bias and requests Navi Pillay to recuse herself from the COI on the grounds of bias or appearance of bias.⁴² Ms. Pillay has thus far refused to do so.

MILOON KOTHARI (INDIA)

Miloon Kothari served as the first UN Special Rapporteur on adequate housing (2000-2008), during which time he was vocal in condemning Israeli military actions, including a statement in 2006 which called on partner countries to "reconsider the continuation of military cooperation with Israel".⁴³ In his lengthy 2002 report as Special Rapporteur, Mr Kothari framed Israel's military campaign

³⁹ Members of US Congress Josh Gottheimer, Vicky Hatzler et. al, *Letter to US Secretary of State the Hon. Anthony Blinken* (25 January 2022) available at: <<https://jewishinsider.nyc3.digitaloceanspaces.com/wp-content/uploads/2022/01/24225849/Gottheimer-UN-COI-Letter.pdf>>.

The letter was signed by 38 other members of the US Congress: Robert B Aderholt; Colin Allred; Don Bacon; Gus M. Bilirakis; Ben Cline; Tom Cole; Jim Costa; Henry Cuellar; Mike Gallagher; Andrew R Garbarino; Jared Golden; Vicente Gonzalez; Mark E. Green, M.D.; David P. Joyce; John Katko; Doug Lamborn; Ted W. Lieu; Elaine Luria; Kathy Manning; Cathay McMorris Rodgers; Stephanie Murphy; Donald Norcross; Tom O'Halleran; Scott H. Peters; Kathleen Rice; Mike D. Rogers; Kim Schrier, M.D.; Brad Sherman; Albio Sires; Darren Soto; Abigail D. Spanberger; Elise Stefanik; Bryan Steil; Haley Stevens; Thomas R. Suozzi; Ritchie Torres; Fred Upton; Juan Vargas; Filemon Vela; and Ann Wagner.

⁴⁰ UN Watch, *Request for Navi Pillay to recuse herself for bias of the appearance thereof*, (14 February 2022) p. 14, available at: <<https://unwatch.org/wp-content/uploads/2022/02/Request-for-Navi-Pillay-to-Recuse-Herself-on-Grounds-of-Bias.pdf>>.

⁴¹ *Id.*, p. 8.

⁴² *Ibid.*

⁴³ OHCHR, *UN Expert urges Israel to stop destruction of houses and infrastructure in Gaza, calls for military sanctions*, (10 November 2006), available at: <<https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1029&LangID=E>>.

against Palestinian terrorist groups as criminal oppression of the Palestinians.⁴⁴ In the report, he falsely claimed that, “the basic theocratic character of the Israeli legal system establishes ethnic criteria as the grounds for the enjoyment of full rights.” He also attributed the outbreak of the second intifada to a fictional “Noble Sanctuary massacre” carried out by Israel.

CHRISTOPHER SIDOTY (AUSTRALIA)

In 2018, for the Palestinian organisation named Independent Commission for Human Rights, Mr Sidoty praised the Commission for “courageously denouncing violations by the occupying Israeli forces.” Mr Sidoty serves on the advisory board of the NGO, Australian Centre for International Justice which actively campaigns against Israel.⁴⁵

5.7 The COI’s mandate exceeds the UNHRC’s limited jurisdiction

UNHRC Res. S-30/1 ss. 2(a)-(f) purports to empower the COI to actively prepare evidence for lawsuits against perpetrators of alleged humanitarian law and human rights violations in the ‘Occupied Palestinian Territory’ including East Jerusalem, and in Israel. It also purports to give the COI power to investigate potential infringements of international criminal law, as shown by the reference in the Preamble to articles 146-148 Fourth Geneva Convention with respect to “penal sanctions and grave breaches” – both in Israel and in the so-called Occupied Palestinian Territories.

However, it is highly questionable whether the UNHRC has the jurisdiction to confer these powers on the COI.

The UNHRC was established by UNGA Res 60/251 (2006)⁴⁶ with a limited jurisdiction: to promote compliance with human rights law by

⁴⁴ Mr Miloon Kothari for the United Nations Economic and Social Council Commission on Human Rights, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, (12 June 2002), paras. [7, 44, 83(c)(v)], available at: <http://www.hlrn.org/img/documents/E_CN.4_2003_5_Add.1_EN.pdf>.

⁴⁵ Australian Centre for International Justice, *Advocating for a just approach to Palestine*, available at: <<https://acij.org.au/our-work/international-accountability/palestine/accountability-for-crimes-in-palestine/>>.

⁴⁶ See Annex 2.

‘mak(ing) recommendations to the General Assembly for the further development of international law in the field of human rights’ (s. 5(c)) and to ‘work(ing) in close cooperation in the field of human rights with Governments, regional organisations, national human rights institutions and civil society’ (s. 5(h)).

The UNHRC was established under the grounds that its work would be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation.

CRIMINAL LAW VIOLATIONS

The Terms of Reference state that the COI will “apply the principal crimes of international criminal law as defined in applicable international treaties, the Rome Statute of the International Criminal Court, and international customary law.”

However, the UNHRC was not established to investigate international criminal law violations, and thus cannot confer on a COI the power to do so.

Further, it is highly problematic that the COI will attempt to investigate the crimes enumerated in the Rome Statute of the International Criminal Court (ICC). If that is the purview of any international tribunal it is the purview of the ICC itself. It is not the task of the UNHRC, or any body established by it, to interpret and apply the provisions of the Rome Statute, let alone investigate and make findings in relation to possible infringements of the Rome Statute. For good reason, the Rome Statute imposes significant jurisdictional and admissibility “hurdles” that must be crossed before proceedings can be initiated concerning alleged crimes.⁴⁷

Moreover, the jurisdiction of the ICC in relation to alleged crimes committed on the territory of the “State of Palestine” is currently the subject of dispute within the ICC; the recent (2021) ruling of the Court’s Pre-Trial Chamber was, on its own terms, provisional only. If, as a number of states and a significant body of international lawyers contend, the ICC does not have jurisdiction over crimes committed in “Palestine”, then certainly the UNHRC does not have the jurisdiction to do so. In any event, as Israel is not a party to the Rome Statute, the ICC does not have jurisdiction over crimes alleged to have been committed “in Israel”.

⁴⁷ These include the various jurisdictional tests, as well as admissibility criteria of “complementarity”, “gravity” and “interests of justice”.

“ROOT CAUSES OF TENSION”

The COI’s mandate to investigate “all underlying root causes of recurrent tensions, instability and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity” goes far beyond the UNHRC’s purposes and principles of working “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.” On the face, this undertaking is unavoidably political in character: a criticism that is exacerbated by the politically biased profiles of the COI’s members.

5.8 Undue focus on criminal law, not on human rights

Paragraph 8 of the Preamble to UNHRC Res S-30/1 states:

Firmly convinced that justice and respect for the rule of law and human rights are the indispensable bases for peace, and stressing that long-standing and systemic impunity for international law violations has thwarted justice, created a protection crisis and undermined all efforts to achieve a just and peaceful solution that warrants action in line with international law and relevant United Nations resolutions, ...

The statement that “long-standing and systemic impunity for international law violations has ... undermined all efforts to achieve a just and peaceful solution” is highly contentious. The UNHRC provides no evidence for the claim that Israel’s perceived non-compliance with international law is the reason that Israel and the PLO have been unable to reach agreement on the permanent status issues identified in the Oslo Accords, namely: “Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest” (Oslo II, Article V.3).

On the contrary, it is strongly arguable that there are many other causes for the lack of agreement between the parties. These include the PLO’s continued refusal to acknowledge the right of existence of the Jewish State of Israel, as evidenced (inter alia) by its failure to amend the Palestine National Charter as promised by Yasser Arafat in 1993, and its many conflicting and incoherent territorial claims which

reveal a “consistent pattern of Palestinian equivocation” and “a conscious effort to maintain ambiguity” evidencing lack of good faith.⁴⁸

Engaging criminal, human rights and humanitarian law instrumentally in order to force a predetermined outcome of a complex and multilayered political dispute is an inappropriate use of the UN system, and in any event is destined to be unsuccessful.

Moreover, “criminalizing” the conflict is unlikely to bring the parties closer. On the contrary, it will undermine trust and confidence – the necessary pre-conditions for a lasting peace agreement. As a result, there is a serious risk that the COI’s mandate will not promote but rather *undermine* efforts to achieve an agreed solution to the Israel-Palestine conflict.

Criminal justice is only one approach to achieving justice. This is because “prosecutions apply an exceedingly narrow notion of justice. A nation’s experience of criminal “justice” may be highly divisive and subjective, as highlighted by the mixed reactions to indictments at the ICTY in the Former Yugoslavia. In the Israeli-Palestinian context, where terrorism, military occupation, collective memory, and religious identity form part of the conflict, social, economic, and political justice may be just as important as legal justice in the criminal sense.”⁴⁹

Indeed, it is strongly arguable that “questions of history, memory, and recognition of the past are essential to Israelis and Palestinians, and yet are largely outside the legal purview of the International Criminal Court. Beyond punishment and sentencing of individual offenders, a vital requirement of each nation is acknowledgement of historic rights, acceptance of responsibility, and some form of atonement for the past. In essence, the parties’ demands of justice are more than just retributive, but rather involve national and historic claims, which are far better captured by a restorative view of justice.”⁵⁰

⁴⁸ See Observations, Prof. Eyal Benvenisti, 16th March 2020, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01062.PDF>.

⁴⁹ Bracka, Jeremie. ‘Transitional Justice for Israel/Palestine: Truth-Telling and Empathy in Ongoing Conflict’ (2021) *Springer Series in Transitional Justice* Ser 195.

⁵⁰ See: Jeremie Bracka, ‘A False Messiah? The ICC in Israel/Palestine and the Limits of International Criminal Justice’ (2021) 54(2) *Vanderbilt Journal of Transnational Law* 283.

The narrow focus of this COI on retributive justice and “ending impunity” for (perceived or alleged) crimes means that it, like its dozens of predecessors, will fail to resolve or even narrow this complex conflict. Indeed, it may even deepen the conflict, increasing, rather than diminishing, the likelihood of tension, conflict and insecurity.

5.9 Flawed international law assumptions

The COI mandate is based on certain international law assumptions which, as the ongoing ICC “Situation in Palestine” proceedings demonstrate, are the subject of dispute. These have not been resolved by any institution having authority to do so.

First, the COI Terms of Reference (Annex 3) refers to the “Statehood of Palestine”. As is well known, and was accepted by the ICC Pre-Trial Chamber, Palestine might not constitute a State under general principles of international law.⁵¹

Second, the status of what UNHRC Res. S-31/6 refers to as the “Occupied Palestinian Territory”. The COI, like the work of the Special Rapporteur, proceeds on the opinion that Israel has no sovereignty claims to these territories. However, the status of the territories is still a matter of dispute.

It should also be noted that the territorial status of these territories is not only the subject of bilateral negotiations between Israel and the PLO under the binding Oslo Accords, it is the subject of contestation before the ICC.⁵² Even the 2021 Ruling of the ICC Pre-Trial Chamber concerning the Court’s jurisdiction in the “Situation in

⁵¹ In its *Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ in 2004 did not find that Palestine held statehood. The ICC prosecutor Fatou Bensouda, respecting an investigation of the Situation in Palestine in 2019 chose to base her argument on an alternative to Palestinian statehood; and in 2021 concerning the decision on Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine also chose not to make the finding that Palestine fulfilled the requirements for statehood.

⁵² According to the Pre-Trial Chamber Majority: “It is further opportune to emphasize that the Chamber’s conclusions pertain to the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor pursuant to articles 13(a), 14 and 53(1) of the Statute. When the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time.” (Para 131).

Palestine” did not conclude that the geographic jurisdiction of a State of Palestine is established under general principles of international law.⁵³

In these circumstances, it is inappropriate for the UNHRC to adopt legal positions concerning either the statehood of Palestine or the sovereign territorial status of the territories captured in 1967.

5.10 Israel’s sovereign equality

The principle of sovereign equality is fundamental to the UN Charter, and is affirmed both in the Charter's introduction and in Chapter I of the Charter, entitled "Purposes and Principles".⁵⁴ The Charter declares: "We the peoples of the United Nations determined... to reaffirm faith... in the equal rights... of nations large and small." This principle is incorporated in the Charter by Article 2:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

- 1. The Organization is based on the principle of the sovereign equality of all of its Members.*
- 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.*

Both the International Court of Justice (ICJ) and commentators on the Charter have acknowledged the importance of Article 2.1 in the Charter's structure.⁵⁵

Article 2 refers to both the "Organisation" and its "Members", and thus imposes obligations on both UN Members, that is: on States, and on the United Nations itself

⁵³ Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’ ICC-01/18-143, 5 February 2021 at para 108.

⁵⁴ This section draws on the Opinion of Sir Robert Jennings (Judge (1982-1995) and President (1991-1994) of the International Court of Justice and Former Whewell Professor of International Law) regarding the Exclusion of Israel from the United Nations Regional Group System (1999).

⁵⁵ In the *Aerial Incident* case, the Court noted that: "The equality of rights and obligations is, unless otherwise expressly provided, a fundamental feature of the Charter." (ICJ Reports (1959) 177). Goodrich, Hambro and Simons observed that Article 2 "is of fundamental importance in the total economy of the Charter. It lays down basic principles which the Organization, functioning through various organs, must respect." (L. Goodrich, E. Hambro and P. Simons, *Charter of the United Nations* (1969) at 36.)

(including its components), an organization having international legal personality and therefore a subject of international law.

Thus, when pursuing Charter purposes, which are set out in Article 1, both the United Nations and its Members are obliged to act in accordance with the principles set out in the sub-paragraphs of Article 2. This means that the UNHRC, being a component of the UN, is obliged to ensure that it complies with the principle of sovereign equality. Article 2.2 of the Charter expressly places the obligation on UN Members: "to ensure to all of them the rights and benefits resulting from membership".

Concomitant to the creation of obligations is the creation of opposing rights; just as Article 2 imposes duties on the United Nations (including its subsidiary organs) and its Members, UN Members are entitled to the rights which flow from the principles set out in Article 2. Israel thus is entitled to be treated equally before the law.

Commentators generally agree that sovereign equality refers to the notion that States, as members of the international community, are equal to each other as subjects of international law. This equality is not equality of power, territory or economy: States are, by their nature, unequal as regards their territorial, financial, military or other characteristics. Rather, this equality is as members of the international community, whatever the differences between States. Thus, sovereign equality refers to the legal equality of States, as opposed to political equality, and is often described as "juridical equality", i.e., equality before the law; in the case of States, international law. That the principle of sovereign equality should be equated to juridical equality in a Charter context is made clear by the UN General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which in this regard "is part of the constitutional law of the United Nations, and should be read as a whole and with the Charter itself." The Declaration describes the elements of sovereign equality as follows:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements:

(a) States are juridically equal; ...

The consequences of the juridical equality of UN Members are both explicit and implicit in the Charter. One implied legal consequence of the Article 2.1 sovereign

equality obligation is a rule of non-discrimination. This duty is a corollary of juridical equality. Discrimination arises where those who are in all material respects the same are treated differently. According to the International Law Commission (ILC), non-discrimination is a "general rule which follows from the equality of States" and a "general rule inherent in the sovereign equality of States." The ILC has also referred to States being "bound by the duty arising from the principle of non-discrimination" and being under a "general duty not to discriminate between States."

There can be little doubt that the UNHRC discriminates against the State of Israel. Singling out Israel (as the UNHRC does on a continual basis), without demonstrably compelling and urgent reasons to do so, is an infringement of the right of that State to sovereign equality. In light of the particular characteristics of this COI, as described in the previous sections of this paper, the establishment of this COI constitutes a further demonstration that the State of Israel is being treated differently (and less favorably) than every other UN member state.

The observations made in this Briefing Paper indicate the COI's institutional selectivity and bias against Israel, and the likely imbalance and non-objectivity of its outcomes. The inquiry is excessively funded and unique in scope, is created on the background of decades of HRC inquiries that are disproportionately focused on Israel, is manned by politically motivated commissioners, and is actioning a mandate to create evidence that will by definition violate the human rights of the accused. Extending the COI's scope to investigate all alleged international humanitarian, human rights, and criminal law violations in Israel alone constitutes a violation of the sovereign equality of the State of Israel – all are evidence that the UN General Assembly (UNGA) and UNHRC (and their members) are infringing the sovereign equality of the State of Israel.

The incessant focus on Israel must come to an end if the UNGA and UNHRC are to retain any semblance of legitimacy.

6. Conclusions

Our analysis leads to the following conclusions:

1. **The COI is highly contentious.** Political support for the Commission is weak. In fact, only 24 of the UNHRC's 47 members voted in favor of its creation (Annex 1, sub-part 1). Over recent months, a significant number of UN Member states have formally criticised the COI (Annex 1, sub-parts 2 and 3). While it is not necessary for a UNHRC Commission of Inquiry to enjoy universal support, it is highly undesirable to launch a massive, ongoing inquiry in the face of significant international criticism, disagreement related to the underlying issues and opposition to the inquiry.
2. **The COI is wasteful.** The devotion of so many resources to the Israel-Palestinian conflict is totally out of proportion to the seriousness of the alleged international law violations, compared with other territories and conflicts where serious human rights violations have been alleged.
3. **The COI's mandate is imbalanced.** In particular, its mandate does not sufficiently reflect Hamas' deliberate attacks against civilians and civilian property, indiscriminate attacks, and deliberate use of civilians in an effort to shield lawful military objectives from attack and to compel the infliction of civilian casualties in triggering the 2021 conflict. The sole reference to the State of Israel in association with "alleged violations and abuses" and "Occupied Palestinian Territories" give little confidence that actions of Hamas and other Palestinian entities such as the PLO, Fatah, Palestinian Islamic Jihad or the Popular Front for the Liberation of Palestine (PLFP) will be credibly scrutinized in a serious fashion: certainly not to the same extent as Israel. This is despite the fact that Israeli armed forces routinely and consistently acted in good-faith compliance with the legal obligation to implement feasible precautionary measures to mitigate the risk of casualties, and despite Hamas deliberately used the residents of Gaza as human shields: points highlighted in the statements by Austria, Bulgaria and the Czech Republic opposing Res S-30/1 (Annex 1, sub-part 2) and the statements of Australia and the United States addressing funding of the COI (Annex 1, sub-part 3).
4. **The COI is unnecessary.** There are already many institutions within the UN system focused on Israel and the "Occupied Palestinian territories". As raised by the Netherlands in their opposing statement to Res S-30/1 (Annex 1, sub-part 2), there is no need for another duplicative institution investigating the "underlying root causes of tensions".

5. **The COI's budget is excessive.** The COI's budget is exceptional and excessive: a point widely raised, i.a. by France in their abstention from Res S-30/1 and by the United States in their opposition to UN funding of the COI (Annex 1, sub-part 3).
6. **The COI will be unable to ascertain the truth.** The quality of the COI's findings of "facts" and "evidence", as well as its legal analysis, will inevitably be compromised. Given Hamas' history of disinformation and manipulation of data, as well as Israel's legitimate decision not to cooperate with the COI, it will simply be impossible for the COI to compile credible evidence and test that evidence for its veracity. And in assessing the legality of the conduct of hostilities, the COI will have no choice but to speculate when assessing the reasonableness of attack judgements. These factors seem to have contributed to Germany and the UK's lack of confidence in this mechanism (see Annex 1, sub-part 2).
7. **The COI will lead to injustice.** In order to fulfil its mandate, the COI will necessarily breach fundamental human rights of accused persons to due process and a fair trial. Resolution S-30/1 essentially obliges the COI to prepare evidence and make legal findings to maximize the likelihood that Israelis will be prosecuted for crimes. The assumption that crimes have been committed means that, in effect, the COI has been set up as a kind of "star chamber" – hearing unverifiable "evidence" submitted by anonymous accusers, identifying absent "perpetrators", and preparing charges behind closed doors.
8. **The COI is biased.** The Commission's members, especially its Chairperson Navi Pillay, have a record of outspoken bias against Israel. The legal standard of reasonable apprehension of bias, when applied to records of each, leaves the credibility of the Commission severely diminished and its findings void *ab initio*. In other words, this Commission is *a priori* biased against Israel, as held by Australia and the US (Annex 1, sub-part 3) and therefore itself a breach of the rule of law.
9. **The COI is illegal.** The COI's mandate to prepare evidence for criminal proceedings and to investigate the "root causes" of the conflict exceeds the UNHRC's limited human rights jurisdiction. The COI's mandate is at least in part *ultra vires* and thus, on yet another ground, illegal.
10. **The COI will promote conflict, not reconciliation.** Engaging criminal, human rights and humanitarian law instrumentally in order to force a predetermined outcome of a complex and multilayered political dispute is an inappropriate use of the UN system. Moreover, "criminalizing" the conflict has failed to bring the parties closer in the past, and is unlikely to do so in the future. The narrow focus of this COI on retributive justice and "ending impunity" for

(perceived or alleged) crimes means that it, like its dozens of predecessors, will fail to resolve or even narrow this complex conflict. Indeed, it may even deepen the conflict, diminishing the likelihood of enduring peace and security.

11. **The COI's mandate is based on flawed legal assumptions.** The COI's mandate is based on the assumptions that "the State of Palestine" exists and that Israel has no valid sovereignty claims with respect to the "Occupied Palestinian Territories". These assumptions are simply incorrect. The future status of these territories are the subject of bilateral negotiations, pursuant to the binding Oslo agreements, and they are the subject of contestation before international tribunals, including the ICJ and ICC (Chapter 4.14). In these circumstances, it is premature and inappropriate for the UNHRC to adopt legal positions on either issue.
12. **The COI is immoral.** This new mechanism is yet another example of how the UNHRC is treating the State of Israel differently (and less favorably) than every other UN member state. Under the UN Charter, the UNHRC and all member states are obliged to treat all UN member states equally. Singling out Israel, without demonstrably compelling and urgent reasons to do so, is both a morally and legally unacceptable assault on the sovereign equality of the State of Israel.

For these reasons, (i) this COI should not have been created, and (ii) the funding of this COI is an inappropriate and unjustifiable use of the UN's resources.

7. Recommendations

On the basis of the conclusions set out above, we recommend:

1. **The COI should be abolished.** Every opportunity should be found within the UNHRC to reverse the establishment of the COI or, failing that, to revisit its mandate.
2. **The budget of the COI should be removed.** Challenges to, and review of, the budget for the COI can potentially occur within:
 - The UN Committee for Programme and Coordination (CPC): a subsidiary organ of the General Assembly and of the Economic and Social Council, under which the UNHRC is located, it is responsible for planning, programming and coordination of their activities. It comprises 34 UN members elected by the General Assembly on the basis of geographical representation. The CPC could be requested to review the COI and report to the General Assembly;
 - The UN Advisory Committee on Administrative and Budgetary Questions (ACABQ) is an expert Committee of 21 UN Members elected by the General

Assembly on the basis of a geographical representation and its work is to assist the requirements of the General Assembly and other bodies to which it reports. The ACABQ could be requested to review the proposed programme budget and reports; and/or

- The UNGA Fifth Committee is an open-ended committee of all UN Members and has responsibility for UN administrative and budgetary matters. The Fifth Committee could be requested to review and make recommendations to the General Assembly.
3. **The COI should be discredited.** UN Member States can take unilateral steps, which may include:
 - Making political statements condemning the COI in its entirety;
 - Withholding national funding to the UN in the full amount of the budget of the COI;
 - Condemning the UNHRC for its unjustified bias and discrimination against Israel.
 4. **The UNHRC should be reviewed.** Finally, and perhaps most importantly, we recommend that the time has come for an urgent review of the UNHRC itself, which created this COI. Review of the UNHRC should seek, inter alia, to rectify its under-representation of investigations into many larger scale though less politically convenient human rights situations. The UNHRC's inherent and systemic bias against Israel must be brought to an end.

Annexes

[Annex 1 Objections to COI expressed by UN member states](#)

- [1. Voting for initial resolution](#)
- [2. Opposition to UNGA res. S-30/1, May 27 2021](#)
- [3. Opposition to COI funding, December 2021](#)

[Annex 2 UNGA Resolution 60/251 on UNHRC](#)

[Annex 3 UNHRC Resolution S-30/1 on COI](#)

[Annex 4 COI Terms of Reference](#)

Annex 1 - Objections to COI expressed by UN member states

This annex summarizes key objections to the COI that have been made by UN member states. It is set out in three sub-parts:

1. Voting for the initial resolution (UNGA Res S-30/1, May 27 2021, as set out in Annex 3);
2. Opposition expressed to Res. S-30/1 during the UNHRC Special Session in May 2021; and
3. Opposition to funding the COI expressed at the UNGA's Fifth Committee in December 2021.

1. Voting for initial resolution

The 30th Special Session of the UNHRC in May 2021 was called for the sole purpose of passing Resolution S-30/1 at the request of Pakistan and the "State of Palestine". Of the 47 UNHRC voting states in this session, 24 voted in favour, 9 against and 14 abstained. Thus, only a bare majority of the total UNHRC states voted in favour of the resolution.

RES. S-30/1 VOTING			
	For	Against	Abstention
1.	Argentina	Austria	Bahamas
2.	Armenia	Bulgaria	Brazil
3.	Bahrain	Cameroon	Denmark
4.	Bangladesh	Czech Republic	Fiji
5.	Bolivia	Germany	France
6.	Burkina Faso	Malawi	India
7.	China	Marshall Islands	Italy
8.	Côte D'Ivoire	United Kingdom	Japan
9.	Cuba	Uruguay	Nepal
10.	Eritrea		Netherlands

RES. S-30/1 VOTING			
	For	Against	Abstention
11.	Gabon		Poland
12.	Indonesia		Republic of Korea
13.	Libya		Togo
14.	Mauritania		Ukraine
15.	Mexico		
16.	Namibia		
17.	Pakistan		
18.	Philippines		
19.	Russian Federation		
20.	Senegal		
21.	Somalia		
22.	Sudan		
23.	Uzbekistan		
24.	Venezuela		

It should be noted that while almost half of the states voting in favour (11/24, those colored magenta above) were members of the Organisation of Islamic Cooperation (OIC); no western democracies voted in favour of the resolution. Moreover, 22 of the 24 states voting in favour of the resolution are not considered to be “fully free” democracies on the Freedom House scale.⁵⁶

⁵⁶ Freedom House 2021, *Countries and Territories*, available at: <https://freedomhouse.org/countries/freedom-world/scores>.

2. Opposition to UNGA res. S-30/1, May 27 2021

AUSTRIA

Extract from explanation of vote by Austria against Resolution S-30/1,

"...Today's special session unfortunately continues the regrettable practice of singling out Israel for criticism in the Human Rights Council by addressing only the human rights situation in the occupied Palestinian territory, including East Jerusalem...

We unequivocally condemn the firing of rockets by Hamas and other terrorist groups from Gaza into Israel and regret that the resolution presented today does not include any statement to this effect. The mandate of the proposed Commission of Inquiry covers all violations and abuses of international humanitarian law and international human rights law in occupied Palestinian territory, including East Jerusalem, and in Israel, and therefore, all acts relevant on both sides.

*Nevertheless, **the context in the preamble and the title of the special session clearly single out and target Israel, yet again. The selective approach contributes to hardening positions and weakens the Council's important voice** when calling for respect of human rights and humanitarian law.*

Austria attaches great importance to the rule of law and compliance with international humanitarian and human rights law by states and non-state actors. Unfortunately, for all the reasons enumerated, therefore, we are not convinced that this resolution lends itself to enhancing respect for international law and human rights. Therefore, Austria will vote against this resolution..."⁵⁷

BULGARIA

Explanation of vote by Bulgaria against Resolution S-30/1,

"As already stated, Bulgaria deeply regrets the loss of life, both on the Palestinian and Israeli sides as a consequence of the recent hostilities. We also believe that effective prevention of similar escalations of violence in the future

⁵⁷ UN WebTV, Explanation of vote by Austria on the resolution to create the Commission of Inquiry at the special session of the Human Rights Council, 27 May 2021.

is only possible following an agreed political solution, bringing sustainable peace, and ending for once and all the Palestinian-Israeli conflict.

*We are not convinced that this objective would be served through the establishment of **yet another international investigative mechanism, with insufficiently defined scope, territorial limits, and time frame of its activities, and which moreover, is not mandated to comprehensively investigate the violations by all perpetrators responsible for the recent escalation, including the deliberate targeting with massive rocket fire of civilians and civilian infrastructure by Hamas and other terrorist organizations.** That is why Bulgaria will vote no on the proposed resolution...*"⁵⁸

CZECH REPUBLIC

Extract from explanation of vote by the Czech Republic against Resolution S-30/1,

"...the Czech Republic did not support the request to convene this special session on the grave human rights situation in the occupied Palestinian territory, including East Jerusalem. We cannot endorse a selective and one-sided approach that has no potential to contribute to the promotion of Israeli-Palestinian coexistence in the near future.

It is obvious that Hamas and other terrorist groups in Gaza bear the primary responsibility for the recent outbreak of violence.

Indiscriminate launching of rockets and mortars from highly populated civilian neighborhoods into civilian population centers in Israel clearly violates international humanitarian law. The Czech Republic strongly condemns these attacks against which Israel has a full and legitimate right to self-defense.

*The Czech Republic cannot accept establishment of an ongoing commission of inquiry with a **vague mandate** to investigate all alleged violations of international human rights and humanitarian law in the occupied Palestinian territory, including East Jerusalem and in Israel. As others, we see accountability as an indispensable foundation for the effective protection of human rights. **Israel, a democratic country with an independent***

⁵⁸ UN WebTV, Explanation of vote by Bulgaria on the resolution to create the Commission of Inquiry at the special session of the Human Rights Council, 27 May 2021.

legal system, has appropriate means to effectively confront and address human rights violations when they appear.⁵⁹

GERMANY

Extract from explanation of vote by Germany against Resolution S-30/1,

"...Germany strongly condemns the indiscriminate firing of rockets from Gaza on Israel. Israel had a legitimate right to defend itself against these attacks...

*As to the resolution before us, Germany holds strong reservations. The Human Rights Council has an important role in dealing with acute crises and related human rights violations. **The present resolution, however, does not address the recent escalation and omits any context.***

*Instead, it would **mandate a Commission of Inquiry that stretches indefinitely into the future and the past. Furthermore, the task to be undertaken would far exceed previously mandated CoIs.** At the recent 46th Human Rights Council, we appreciated the constructive negotiation spirit on the Middle East resolutions. By the way of thorough negotiations in good faith, good results were achieved. We regret that we did not come together in the same spirit and with enough time to negotiate this resolution. For these reasons, Germany cannot support the resolution presented. Germany therefore calls for a vote on the resolution and will vote against it..."*⁶⁰

UNITED KINGDOM

Extract from explanation of vote against Res. S-30/1 by the United Kingdom,

*"...It is, Madame Chairman, extremely regrettable that this resolution establishes a Commission of Inquiry with such an **overly expansive mandate.** An investigation with such a mandate **risks hardening positions on both sides and leaving us further away from the just and lasting resolution** to the Israel- Palestinian conflict which we all wish*

⁵⁹ UN WebTV, Explanation of vote by Czech Republic on the resolution to create the Commission of Inquiry at the special session of the Human Rights Council, 27 May 2021.

⁶⁰ UN WebTV, Explanation of vote by Germany on the resolution to create the Commission of Inquiry at the special session of the Human Rights Council, 27 May 2021.

to see. And that, Madame Chairman, is why the United Kingdom has decided to vote against this resolution today..."⁶¹

BAHAMAS

Extract from explanation of abstention from vote on Res. S-30/1 by the Bahamas,

*"... The Bahamas agrees that an investigation is necessary. We hold that it **should be done within existing resources and should not be open-ended**. The determination for the investigation to continue or not should be based on the reports of the Secretary General or the High Commission of Human Rights. The Bahamas will therefore abstain on res A/HRC/S-30/L.1. ..."⁶²*

FRANCE

Extract from explanation of abstention from vote on Res. S-30/1 by France,

*"...The resolution before us today during the Special Session of the Council proposes a Commission of Inquiry whose **mandate is too broad and whose goals are too vague**. In terms of the text, we've deemed (that) **the mechanism proposed (is) insufficient to shed enough light on the recent cycle of violence**. Despite tight negotiating timeframes and the late submission of the Resolution, France believes there needs to be specific time barriers for the commission. We regret that our proposals along those lines were not reflected. The text presented for adoption does not seem satisfactory, therefore. A vote has been called (and) on the calling of a vote, France will abstain on this text..."⁶³*

THE NETHERLANDS

Extract from explanation of abstention from vote on Res. S-30/1 by the Kingdom of the Netherlands,

⁶¹ Web TV, Explanation of vote by the United Kingdom on the resolution to create the Commission of Inquiry at the special session of the Human Rights Council, 23 May 2021.

⁶² Web TV, Explanation of abstention from vote by the Bahamas on the resolution to create the Commission of Inquiry at the special session of the Human Rights Council, 23 May 2021.

⁶³ Web TV, Explanation of abstention from vote by France on the resolution to create the Commission of Inquiry at the special session of the Human Rights Council, 23 May 2021.

“...The Human Rights Council is created to address possible violations and we therefore are of the opinion that the recent events do warrant the Council’s attention. We appreciate that the Resolution (which) aimed at setting up the Commission of Inquiry—as tabled by the Palestinian delegation—contains elements that will lead to clarity with regards to possible violations thereby paving the way of accountability.

However, we have decided to abstain for the following reasons:

*Firstly, the resolution gives the Commission of Inquiry an **unusually broad, ongoing Mandate and a wide range of tasks that is unprecedented compared to similar bodies.** While we appreciate the willingness by the Palestinian delegation to take some of our considerations on board, this important concern was not addressed.*

*Secondly, the Netherlands cannot support this Resolution because **the scope of investigation is not limited to recent events, while it is customary to limit the mandate of such commissions to a particular series of events or a specific period of time.** In the past the Council has already allocated ample time and resources to previous events. Installing a new Commission and **tasking it to revert back to those events is not in line with necessary efficiency and rationalization efforts, and contributes disproportionate attention to Israel and the Middle East peace process in the Council.***

*Finally, **the other work of this Commission will overlap with other efforts like those of the UN and Special Rapporteur. The Netherlands aims to improve the functioning of the Human Rights Council and make it more efficient. A possible overlap is not in line with this...***⁶⁴

⁶⁴ Web TV, Explanation of abstention from vote by the Bahamas on the resolution to create the Commission of Inquiry at the special session of the Human Rights Council, 23 May 2021.

3. Opposition to COI funding, December 2021

During voting in the UN General Assembly's Fifth Committee in December 2021, the representative of Israel put forward an oral amendment⁶⁵ that would have reduced the COI's budget to zero USD. The amendment was defeated with 125 member states Against, 34 Abstentions, and 8 votes For (Hungary, Israel, Marshall Islands, Micronesia, Nauru, Palau, Papua New Guinea, United States). Voting on administrative and budgetary matters concerning organs of the UN (including the UNHRC and consequently the COI) occurs in the Fifth Committee of the UN General Assembly (at which all UN Member States are present), meaning that non-Members of the UNHRC had the opportunity to make statements criticizing the creation and budgeting of the COI, including those highlighted below.

AUSTRALIA

Particularly strong statement by Australia, explaining its abstention from oral amendment put forward by the representative of Israel to the draft resolution contained in Section IX of document A/C.5/76/L.17:

*“Australia has abstained on the amendment to the resolution in relation to resources for resolution S-30/1 of the UN Human Rights Council. Australia’s principled, consistent, and long-standing position in the UN and other international forums is that we oppose anti-Israel bias. We are currently not members of the UN Human Rights Council and therefore did not vote on the resolution that established the Commission of Inquiry on the occupied Palestinian territory, including East Jerusalem, and Israel. The Australian government believes **the Commission of Inquiry’s mandate is excessively broad. It is one-sided, open-ended, and over-resourced.** And we affirm Israel’s rights to self-defense in accordance with international law, and the need for Palestinians to be able to live in peace and with dignity.*

Australia consistently supports human rights resourcing, even for mandates that we may not support. And in the Fifth Committee, we endeavoured, as we always do, to find consensus. We note the Committee agreed to endorse the recommendation of the Advisory Council on Administrative and Budget

⁶⁵ Web TV, Explanation of abstention from vote by France on the resolution to create the Commission of Inquiry at the special session of the Human Rights Council, 23 May 2021.

Questions to reduce the overall level of resources for implementation of this particular mandate. Australia is committed to advancing human rights globally and we are committed to a strong, multilateral human rights system. Our commitment reflects our national values and is a foundational principle of Australia's engagement with the international community.”⁶⁶

ALBANIA

Extract from explanation by Albania regarding abstention to Israel's oral amendment (translation from French language):

*“with respect to the proposed resolution, in full consistency with our position expressed in Geneva, Albania remains unconvinced by the mandate of the Commission of Inquiry, both from the point of view of its geographical coverage and also of its duration, as well as the level of the membership of the Commission. This **lack of balance** does not enable us to support the text and for this reason, Albania abstained.”⁶⁷*

CANADA

Extract from explanation by Canada regarding abstention to Israel's oral amendment:

*“...we have significant concerns with the Commission of Inquiry just referenced by our colleague from Israel and other speakers, the way it was established, and how it is being resourced. It is Canada's firm view that the Commission of Inquiry established by A/HRC/RES/S-30/1 on the Israeli-Palestinian conflict is an unacceptable outlier. **Its scope, unprecedented ongoing nature, budget, and proposed numbers of posts are significantly larger than all the other investigations we approved resources for today.** It represents a continuation of a long-line of such investigations into the same conflict, for which there is a vast volume of UN and independent reporting and analysis, negating*

⁶⁶ UN WebTV, Explanation of abstention by Australia on Israeli amendment proposing to remove funding for the Commission of Inquiry from a General Assembly draft budget resolution, U.N. budget (Fifth) Committee of the General Assembly, December 23, 2021.

⁶⁷ UN WebTV, Explanation of abstention by Albania on Israeli amendment proposing to remove funding for the Commission of Inquiry from a General Assembly draft budget resolution, U.N. budget (Fifth) Committee of the General Assembly, December 23, 2021.

the need for investigators to restart at the conflict's origins, first principles, or root causes. Canada shares the concerns expressed by others that ***the expansive mandate of this COI risks hardening positions and moving us further away from a just and lasting resolution to the Israeli-Palestinian conflict.*** For these reasons, and in keeping with Canada's long-standing opposition to the disproportionate focus on Israel, we abstained on the amendment proposed by Israel...⁶⁸

UNITED STATES

Extract from explanation by the United States regarding its vote Yes to Israel's oral amendment:

*"...We stand with Israel in rejecting the unprecedented, open-ended mandate of this Commission of Inquiry, which is why we voted yes on Israel's oral amendment on the budget. The COI was created by the UN Human Rights Council early this year, **perpetuates a practice of unfairly singling out Israel in the UN**, and like prior U.S. administrations, we strongly oppose such treatment of Israel.*

*The United States will continue to oppose this COI and looks for opportunities in Geneva to revisit its mandate, which unfortunately was passed while the United States did not have a seat on the Human Rights Council. At the same time, we want to express our appreciation for the good faith effort of the ACABQ and others at the UN to reduce the inflated budget and staffing levels of this commission. Moving forward, the United States will work in Geneva, where the debate over this COI's mandate belongs, to persuade more member states that it is **inherently biased and an obstacle to the cause of true peace**. In the meantime, Israel can continue to count on the United States to do everything possible to shield it from discriminatory and unbalanced criticism, whether at the Human Rights Council, or elsewhere in the United Nations system..."⁶⁹*

⁶⁸ UN WebTV, Explanation of vote by Canada on Israeli amendment proposing to remove funding for the Commission of Inquiry from a General Assembly draft budget resolution, U.N. budget (Fifth) Committee of the General Assembly, December 23, 2021.

⁶⁹ UN WebTV, Explanation of vote by the United States on Israeli amendment proposing to remove funding for the Commission of Inquiry from a General Assembly draft budget resolution, U.N. budget (Fifth) Committee of the General Assembly, December 23, 2021.

Further statement by the United States at the end of the UN General Assembly Fifth Committee:

*“...The current US Administration has opposed the COI in multiple clear statements, including its December 24 vote to entirely defund the COI. At that time, Ambassador Patrick Kennedy explained: “The U.S. stands with Israel in rejecting the **unprecedented open-ended mandate** of this Commission of Inquiry, which **perpetuates a practice of unfairly singling out Israel in the UN.**” Kennedy added that “[t]he United States will continue to oppose this COI and look for opportunities in Geneva to revisit its mandate [and] to persuade more Member States that it is inherently biased and an obstacle to the cause of peace...”⁷⁰*

⁷⁰ Ambassador Patrick Kennedy, *Remarks at the Closing Session of the UN General Assembly Fifth Committee, United States Mission to the United Nations*, available at: <https://usun.usmission.gov/remarks-at-the-closing-session-of-the-un-general-assembly-fifth-committee/>.

Annex 2 - UNGA Resolution 60/251 on UNHRC

United Nations

A/RES/60/251



General Assembly

Distr.: General
3 April 2006

Sixtieth session
Agenda items 46 and 120

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/60/L.48)]

60/251. Human Rights Council

The General Assembly,

Reaffirming the purposes and principles contained in the Charter of the United Nations, including developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all,

Reaffirming also the Universal Declaration of Human Rights¹ and the Vienna Declaration and Programme of Action,² and recalling the International Covenant on Civil and Political Rights,³ the International Covenant on Economic, Social and Cultural Rights³ and other human rights instruments,

Reaffirming further that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis,

Reaffirming that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms,

Emphasizing the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or other status,

Acknowledging that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing,

¹ Resolution 217 A (III).

² A/CONF.157/24 (Part I), chap. III.

³ See resolution 2200 A (XXI), annex.

A/RES/60/251

Affirming the need for all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, cultures and religions, and emphasizing that States, regional organizations, non-governmental organizations, religious bodies and the media have an important role to play in promoting tolerance, respect for and freedom of religion and belief,

Recognizing the work undertaken by the Commission on Human Rights and the need to preserve and build on its achievements and to redress its shortcomings,

Recognizing also the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization,

Recognizing further that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings,

Acknowledging that non-governmental organizations play an important role at the national, regional and international levels, in the promotion and protection of human rights,

Reaffirming the commitment to strengthen the United Nations human rights machinery, with the aim of ensuring effective enjoyment by all of all human rights, civil, political, economic, social and cultural rights, including the right to development, and to that end, the resolve to create a Human Rights Council,

1. *Decides* to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly; the Assembly shall review the status of the Council within five years;

2. *Decides* that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;

3. *Decides also* that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system;

4. *Decides further* that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, 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;

5. *Decides* that the Council shall, inter alia:

(a) Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned;

(b) Serve as a forum for dialogue on thematic issues on all human rights;

(c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;

(d) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and

protection of human rights emanating from United Nations conferences and summits;

(e) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session;

(f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;

(g) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;

(h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;

(i) Make recommendations with regard to the promotion and protection of human rights;

(j) Submit an annual report to the General Assembly;

6. *Decides also* that the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session;

7. *Decides further* that the Council shall consist of forty-seven Member States, which shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly; the membership shall be based on equitable geographical distribution, and seats shall be distributed as follows among regional groups: Group of African States, thirteen; Group of Asian States, thirteen; Group of Eastern European States, six; Group of Latin American and Caribbean States, eight; and Group of Western European and other States, seven; the members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms;

8. *Decides* that the membership in the Council shall be open to all States Members of the United Nations; when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto; the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights;

9. *Decides also* that members elected to the Council shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership;

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10. *Decides further* that the Council shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council;

11. *Decides* that the Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and also decides that the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities;

12. *Decides also* that the methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results-oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms;

13. *Recommends* that the Economic and Social Council request the Commission on Human Rights to conclude its work at its sixty-second session, and that it abolish the Commission on 16 June 2006;

14. *Decides* to elect the new members of the Council; the terms of membership shall be staggered, and such decision shall be taken for the first election by the drawing of lots, taking into consideration equitable geographical distribution;

15. *Decides also* that elections of the first members of the Council shall take place on 9 May 2006, and that the first meeting of the Council shall be convened on 19 June 2006;

16. *Decides further* that the Council shall review its work and functioning five years after its establishment and report to the General Assembly.

*72nd plenary meeting
15 March 2006*

Annex 3 - UNHRC Resolution S-30/1 on COI

United Nations

A/HRC/RES/S-30/1



General Assembly

Distr.: General
28 May 2021

Original: English

Human Rights Council
Thirtieth special session
27 May 2021

Resolution adopted by the Human Rights Council on 27 May 2021

S-30/1. Ensuring respect for international human rights law and international humanitarian law in the Occupied Palestinian Territory, including East Jerusalem, and in Israel

The Human Rights Council,

Guided by the purposes and principles of the Charter of the United Nations and the Universal Declaration of Human Rights,

Reaffirming that all States have an obligation to promote and protect human rights and fundamental freedoms, as affirmed in the Charter and in the Universal Declaration of Human Rights, the International Covenants on Human Rights and other applicable instruments,

Reaffirming also the applicability of international human rights law and international humanitarian law, in particular the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem,

Reaffirming further that all High Contracting Parties to the Fourth Geneva Convention are under the obligation to respect and ensure respect for the obligations arising from the said Convention in relation to the Occupied Palestinian Territory, including East Jerusalem, and recalling their obligations under articles 146, 147 and 148 with regard to penal sanctions and grave breaches,

Recalling all relevant resolutions of the Human Rights Council, the General Assembly and the Security Council,

Recalling also the report of the Secretary-General submitted to the General Assembly pursuant to Assembly resolution ES-10/20 of 13 June 2018,¹ and the need for the operationalization of the protection options contained therein,

Recalling further the Guiding Principles on Business and Human Rights, which place responsibilities on all business enterprises to respect human rights by, inter alia, refraining from contributing to human rights abuses arising from conflict,

Firmly convinced that justice and respect for the rule of law and human rights are the indispensable bases for peace, and stressing that long-standing and systemic impunity for international law violations has thwarted justice, created a protection crisis and undermined all efforts to achieve a just and peaceful solution that warrants action in line with international law and relevant United Nations resolutions,

¹ A/ES-10/794.



A/HRC/RES/S-30/1

1. *Decides* to urgently establish an ongoing independent, international commission of inquiry, to be appointed by the President of the Human Rights Council, 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, and all underlying root causes of recurrent tensions, instability and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity;
2. *Also decides* that the commission of inquiry shall:
 - (a) Establish the facts and circumstances that may amount to such violations and abuses and of crimes perpetrated;
 - (b) Collect, consolidate and analyse evidence of such violations and abuses and of crimes perpetrated, and systematically record and preserve all information, documentation and evidence, including interviews, witness testimony and forensic material, in accordance with international law standards, in order to maximize the possibility of its admissibility in legal proceedings;
 - (c) Have the capacity to document and verify relevant information and evidence, including through field engagement and by cooperating with judicial and other entities, as appropriate;
 - (d) Identify, where possible, those responsible, with a view to ensuring that perpetrators of violations are held accountable;
 - (e) Identify patterns of violations over time by analysing the similarities in the findings and recommendations of all United Nations fact-finding missions and commissions of inquiry on the situation;
 - (f) Make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring legal accountability, including individual criminal and command responsibility, for such violations, and justice for victims;
 - (g) Make recommendations on measures to be taken by third States to ensure respect for international humanitarian law in the Occupied Palestinian Territory, including East Jerusalem, in accordance with article 1 common to the Geneva Conventions, and in fulfilment of their obligations under articles 146, 147 and 148 of the Fourth Geneva Convention, including by ensuring that they do not aid or assist in the commission of internationally wrongful acts;
 - (h) Report on its main activities on an annual basis to the Human Rights Council under agenda item 2 as of its fiftieth session, and to the General Assembly as of its seventy-seventh session;
3. *Calls upon* all relevant parties to cooperate fully with the commission of inquiry and to facilitate its access;
4. *Calls upon* all States, and encourages civil society, the media and other relevant stakeholders, to cooperate fully with the commission of inquiry to allow it to effectively fulfil its mandate and, in particular, to provide it with any information or documentation they may possess or come to possess, as well as any other form of assistance pertaining to their respective mandates;
5. *Calls upon* relevant organs, bodies and agencies of the United Nations system to cooperate fully with the commission of inquiry and to respond promptly to any request made by it, including with regard to access to all relevant information and documentation;
6. *Requests* the Secretary-General to allocate the resources necessary for the implementation of the present resolution and for the Office of the United Nations High Commissioner for Human Rights to provide the logistical and technical resources necessary to support the functioning of the commission of inquiry;
7. *Urges* all States to refrain from transferring arms when they assess, in accordance with applicable national procedures and international obligations and standards, that there is a clear risk that such arms might be used to commit or facilitate serious violations

or abuses of international human rights law or serious violations of international humanitarian law;

8. *Calls upon* all States, international agencies and other donors to urgently mobilize humanitarian support for the Palestinian civilian population in the Occupied Palestinian Territory, including East Jerusalem, and to address their prevailing needs, and calls upon Israel, the occupying Power, to ensure the unimpeded delivery of that humanitarian assistance;

9. *Requests* the United Nations High Commissioner for Human Rights to provide an oral update on the progress made in the implementation of the present resolution to the Human Rights Council at its forty-eighth session;

10. *Decides* to remain seized of the matter.

*2nd meeting
27 May 2021*

[Adopted by a recorded vote of 24 to 9, with 14 abstentions. The voting was as follows:

In favour:

Argentina, Armenia, Bahrain, Bangladesh, Bolivia (Plurinational State of), Burkina Faso, China, Côte d'Ivoire, Cuba, Eritrea, Gabon, Indonesia, Libya, Mauritania, Mexico, Namibia, Pakistan, Philippines, Russian Federation, Senegal, Somalia, Sudan, Uzbekistan and Venezuela (Bolivarian Republic of)

Against:

Austria, Bulgaria, Cameroon, Czechia, Germany, Malawi, Marshall Islands, United Kingdom of Great Britain and Northern Ireland and Uruguay

Abstaining:

Bahamas, Brazil, Denmark, Fiji, France, India, Italy, Japan, Nepal, Netherlands, Poland, Republic of Korea, Togo and Ukraine]

Annex 4 - COI Terms of Reference



Terms of Reference

I. LEGISLATIVE AUTHORITY

The Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (COI OPT/EJI), herein the “Commission”, was created by Resolution A/HRC/RES/S-30/1 of the Human Rights Council on 28 May 2021.¹

II. MANDATE

Paragraph 1 of Resolution S-30/1 states that the Human Rights Council:

“Decides to urgently establish an ongoing independent, international commission of inquiry, to be appointed by the President of the Human Rights Council, 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, and all underlying root causes of recurrent tensions, instability and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity.”

In Paragraph 2 of the same resolution, the Council

“also decides that the commission of inquiry shall:

- (a) Establish the facts and circumstances that may amount to such violations and abuses and of crimes perpetrated;
- (b) Collect, consolidate and analyse evidence of such violations and abuses and of crimes perpetrated, and systematically record and preserve all information, documentation and evidence, including interviews, witness testimony and forensic material, in accordance with international law standards, in order to maximize the possibility of its admissibility in legal proceedings;
- (c) Have the capacity to document and verify relevant information and evidence, including through field engagement and by cooperating with judicial and other entities, as appropriate;
- (d) Identify, where possible, those responsible, with a view to ensuring that perpetrators of violations are held accountable;
- (e) Identify patterns of violations over time by analysing the similarities in the findings and recommendations of all United Nations fact-finding missions and commissions of inquiry on the situation;
- (f) Make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring legal accountability, including individual criminal and command responsibility, for such violations, and justice for victims;

¹ <https://undocs.org/A/HRC/RES/S-30/1>

(g) Make recommendations on measures to be taken by third States to ensure respect for international humanitarian law in the Occupied Palestinian Territory, including East Jerusalem, in accordance with article 1 common to the Geneva Conventions, and in fulfilment of their obligations under articles 146, 147 and 148 of the Fourth Geneva Convention, including by ensuring that they do not aid or assist in the commission of internationally wrongful acts;

(h) Report on its main activities on an annual basis to the Human Rights Council under agenda item 2 as of its fiftieth session, and to the General Assembly as of its seventy seventh session;”

After consultations, and taking into account comparable past experiences, the members of the Commission have interpreted the application of their mandate as follows:

i. Subject-matter mandate (*ratione materiae*)

Paragraph 1 of Resolution S-30/1 states that the Commission will investigate “all alleged violations of international humanitarian law and all alleged violations and abuses of international human rights law [...] and all underlying root causes of recurrent tensions, instability and protraction of conflict [...]”.

By “violations ... of international human rights law”, according to the common definition, the resolution refers to all human rights violations by state agents or entities covered by national and international law. By “abuses of international human rights law”, the resolution refers to actions committed by non-state entities or their members or other individual non-state actors.

Paragraph 2 (a) of Resolution S-30/1 further asks the Commission to “establish the facts and circumstances that may amount to such violations and abuses and of crimes perpetrated”. Given the reference to “alleged violations of international humanitarian law and all alleged violations and abuses of international human rights law”, this Commission will interpret the expression of “crimes” as being primarily of an international nature and will interpret it as “the most serious crimes of concern to the international community as a whole”, as defined in the Rome Statute.²

In light of its continuing nature, in investigating “all underlying root causes of recurrent tensions, instability and protraction of conflict”, and “patterns of violations over time”, the Commission shall give priority to broad questions. It will seek to identify overall patterns, policies, historical legacies and structural inequalities that affect the enjoyment of human rights of all individuals in the Occupied Palestinian Territory, including East Jerusalem, and in Israel, and that have led to instability and protracted conflict. In doing so, the Commission will examine, *inter alia*, the findings and recommendations of all United Nations fact-finding missions and commissions of inquiry on the situation and of other UN entities and mechanisms. While preserving its independence, it will also coordinate with other existing United Nations mechanisms.

Paragraph 2 (f) of Resolution S-30/1 calls on the Commission to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring legal accountability, including individual criminal and command responsibility, for such violations, and justice for victims.

Paragraph 2 (g) of Resolution S-30/1 further calls on the Commission to “make recommendations on measures to be taken by third States to ensure respect for international humanitarian law in the Occupied Palestinian Territory, including East Jerusalem, in accordance with article 1 common to the

² Article 5(1) of the Rome Statute of the International Criminal Court.

Geneva Conventions, and in fulfilment of their obligations under articles 146, 147 and 148 of the Fourth Geneva Convention, including by ensuring that they do not aid or assist in the commission of internationally wrongful acts”.

In fulfilment of this part of the mandate, the Commission will make recommendations, in particular on accountability measures, with a view to avoiding and ending impunity and ensuring legal accountability, including individual criminal and command responsibility, for such violations, and justice for victims. It will also make recommendations on measures to be taken by third states, to ensure respect for international humanitarian law in accordance with article 1 common to the Geneva Conventions, and with specific regard to their obligations under articles 146, 147, and 148 of the Fourth Geneva Convention.

ii. Actors investigated (*ratione personae*)

Paragraph 2(d) of Resolution S-30/1 tasks the Commission with identifying, “where possible, those responsible, with a view to ensuring that perpetrators of violations are held accountable”.

In doing so, the Commission will examine allegations of violations of international humanitarian law and all alleged violations and abuses of international human rights law committed by all parties in the Occupied Palestinian Territory, including East Jerusalem, and in Israel, along with territories under the effective control of the concerned states. This will include acts or omissions by both States and non-state entities. It will also include identifying individuals allegedly responsible for such violations and abuses, with a view to ensuring that perpetrators are held accountable.

iii. Geographic scope (*ratione loci*)

Paragraph 1 of Resolution S-30/1 lays out the geographical scope of the Commission to “investigate in the Occupied Palestinian Territory, including East Jerusalem, and in Israel”.

The Commission will therefore investigate violations of international humanitarian law, and violations and abuses of international human rights law committed throughout these territories, as well as apply international criminal law in identifying individual criminal and command responsibility for such violations and abuses. In addition, given the extra-territorial applicability of all three bodies of law, and taking particular note of the jurisprudence of the International Court of Justice on the applicability of international human rights law in occupied territory, the Commission will also consider territories which are not part of the *de jure* territory of the concerned states but which fall within their effective control.³

iv. Temporal scope (*ratione temporis*)

Paragraph 1 of Resolution S-30/1 specifies that the Commission will investigate “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, and all underlying root causes [...]”.

³ On the extra-territorial applicability of international human rights law, see ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 2004, paras. 111-113; ICJ, Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgement of 19 December 2005, para. 178; see also the 2019 Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, paras. 43- 50; and Human Rights Council, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, paras. 38- 41.

The Commission interprets this as it having no temporal restrictions, and that both incidents leading up to and following 13 April 2021, as well as all underlying root causes of recurrent tensions, instability and protraction of conflict can be investigated. The Commission will also investigate incidents that may have occurred or will occur since the date of its establishment by Resolution S-30/1.

III. APPLICABLE LAW

With respect to the mandate entrusted to the Commission by the Human Rights Council, described above, international humanitarian law, international human rights law, and international criminal law will constitute the law applicable to the Commission's mandate. It will also consider other obligations under international law as applicable and where relevant.

Regarding international humanitarian law, both the State of Israel and the State of Palestine are party to the four Geneva Conventions of 1949. The State of Palestine acceded to Additional Protocols I, II and III. The State of Israel has ratified Additional Protocol III.⁴ Along with treaty law, the Commission will also apply customary international humanitarian law. Relevant provisions and rules of international humanitarian law are also binding upon non-state actors that are parties to a conflict.

Regarding international human rights law, both Israel and Palestine are state parties to seven of the core human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child. Both states have also ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.⁵

In addition to treaty law, the Commission will also apply customary international human rights law.

Regarding international criminal law, the State of Palestine acceded to the Rome Statute of the International Criminal Court on 2 January 2015, with the Statute entering into force on 1 April 2015. The State of Palestine accepted jurisdiction over alleged crimes committed in the occupied Palestinian Territory, including East Jerusalem, since June 13, 2014. Israel is not a state party.

The Commissioners will apply the principal crimes of international criminal law as defined in applicable international treaties, the Rome Statute of the International Criminal Court, and customary international law. The Rome Statute of the International Criminal Court provides detailed elements for most of these crimes, and its subsequent ratification by a majority of member states of the United Nations reflects on the whole the definition of these crimes under customary international law.⁶ In

⁴ For a full list of international humanitarian law treaties, and additional protocols ratified or acceded to by the State of Israel or the State of Palestine, see <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp>

⁵ For a full list of international human rights treaties signed or ratified by the State of Israel, see: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=84&Lang=EN; for signed or ratified by the State of Palestine, see: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=217&Lang=en.

⁶ The Commission of Inquiry on human rights in the Democratic People's Republic of Korea adopted the "lowest common denominator" approach, applying the elements of the crimes of the Rome Statute where it is narrower than customary international law, and vice versa; while the Group of Eminent International and Regional Experts on Yemen took the position that the Rome Statute was a reflection of customary international law. See also the ICRC Study on customary IHL, rule 156.

situations, where the International Criminal Court is found to lack jurisdiction, the Commission will apply the elements of the crimes within the Rome Statute so long as they reflect customary international law.

IV. STANDARD OF PROOF

Paragraph 2 (b) of Resolution S-30/1 calls on the Commission to “collect, consolidate and analyse evidence of such violations and abuses and of crimes perpetrated, and systematically record and preserve all information, documentation and evidence, including interviews, witness testimony and forensic material, in accordance with international standards, in order to maximize the possibility of its admissibility in legal proceedings”.

In the course of its work, the Commission has decided to adopt the same standard of proof as the majority of international commissions of inquiry on human rights, that is one of “reasonable grounds”. This means that findings will be included in the reports where the “reasonable grounds” standard of proof has been met, namely where, based on a body of verified information, an objective and ordinary prudent observer would have reasonable grounds to conclude that the facts took place as described and, where legal conclusions are drawn, that these facts meet all the elements of a violation or abuse, and any individual identified is responsible for the violation or abuse.

In applying the standard of proof adopted, the Commission will pay particular attention to corroborating relevant information it receives or has collected. It will do so by verifying every piece of information by obtaining consistent information from at least two other independent and reliable sources. In some cases, information provided by a reliable primary source may need to be corroborated by only one additional independent and reliable source, which may include the investigator’s own findings.⁷

While acknowledging the COI as a human rights investigation, and the distinct and complementary role of judicial investigative processes, in line with its mandate the Commission will also develop methodologies and standard operating procedures aimed at ensuring that information and evidence collected and preserved will be done so in a manner which maximises the possibility of its admissibility in legal proceedings. It will undertake first hand interviews with witnesses and victims of violations of international humanitarian law and violations and abuses of international human rights law. It will also collect information and documentation relevant to its inquiries from all states, relevant bodies and agencies of the United Nations system, civil society, the media, and other relevant stakeholders. The Commission will develop an information and evidence repository along with standard operating procedures to ensure that information or evidence collected or received is stored in a manner which meets international standards for evidence preservation.

V. COMPOSITION

i. Members of the Commission

On 22 July 2021, the President of the Human Rights Council announced the appointment of Navi Pillay (South Africa), Miloon Kothari (India) and Chris Sidoti (Australia) to serve as the three members of the Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel. The

⁷ Office of the United Nations High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law*, 2015, pages 62-63.

President of the Council indicated that Ms Pillay would serve as Chair of the three-person Commission.⁸

ii. The Secretariat

Paragraph 1 of Resolution S-30/1 requests “the Secretary-General to allocate the resources necessary for the implementation of the present resolution and for the Office of the United Nations High Commissioner for Human Rights to provide the logistical and technical resources necessary to support the functioning of the commission of inquiry”. The Office of the United Nations High Commissioner for Human Rights has therefore put at the disposal of the Commission a secretariat with specialised skills as well as the administrative, technical and logistical assistance needed for the implementation of its mandate.

VI. COOPERATION BY CONCERNED STATES

In Paragraph 3 of Resolution S-30/1, the Human Rights Council called upon “all relevant parties to cooperate fully with the commission of inquiry and to facilitate its access”.

Given the territorial scope of the investigation listed in Paragraph 1 of Resolution S-30/1, in the exercise of its mandate, the Commission expects to benefit from the following:

- a) Freedom of movement throughout the Occupied Palestinian Territory, including East Jerusalem, and Israel. If either the Governments of the State of Israel or the State of Palestine refuse or delay the Commission’s access to their territories, the Commission will seek to visit countries in the region and any other country it believes would be useful for the successful conduct of its investigations;
- b) Unhindered access to all places and establishments, and freedom to meet and interview representatives of national, local and military authorities, community leaders, nongovernmental organisations and other institutions, and any person whose testimony is considered necessary for the fulfilment of its mandate;
- c) Unhindered access for individuals and organisations wishing to meet the Commission;
- d) Free access to all sources of information, including documentary material and physical evidence;
- e) Appropriate security arrangements for the Commission's members, staff and documents;
- f) Protection of victims and witnesses and all those who come into contact with the Commission, and an undertaking that no such person shall, as a result of such contact, suffer harassment, threats, acts of intimidation, ill-treatment or other reprisals.

In its reports to the Human Rights Council and the General Assembly, the Commission will report on the level of cooperation received from the Governments of the State of Israel and of the State of Palestine, along with any other State it approaches.

⁸ <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27331&LangID=E>

VII. REPORTING OBLIGATIONS

Paragraph 2 (h) of Resolution S-30/1 of the Human Rights Council provides for the Commission to “report on its main activities on an annual basis to the Human Rights Council under agenda item 2 as of its fiftieth session, and to the General Assembly as of its seventy-seventh session”.

In light of these provisions, the Commission will present two separate annual reports - one to the United Nations Human Rights Council at its June session, starting from its fiftieth session in 2022; and one to the United Nations General Assembly at its annual session- starting at its seventy-seventh session in 2022. The reports will include recommendations on measures to be taken by relevant parties to ensure respect for international humanitarian law and international human rights law, “with a view to avoiding and ending impunity and ensuring legal accountability, including individual criminal and command responsibility, for such violations and abuses, and justice for the victims”, in accordance with paragraphs 2 (f) and (g) of Resolution S-30/1.

The Commission will take into account the reporting obligations of the United Nations Secretary-General, the High Commissioner for Human Rights, the Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967 and other relevant UN bodies. The Commission will ensure, as and when appropriate, that it does not duplicate, unless it deems it necessary to reinforce its own findings and recommendations, the findings and recommendations of such UN bodies and investigative mechanisms.

The Commission will also consider the possibility of presenting its reports to bodies other than the Human Rights Council and the United Nations General Assembly, including the United Nations Security Council, as appropriate. It will also consider issuing additional conference room papers, or oral statements as deemed necessary.

VIII. COOPERATION

In Paragraph 4 of Resolution S-30/1, the Human Rights Council calls upon all states, and encourages civil society, the media, and other relevant stakeholders, “to cooperate fully with the commission of inquiry to allow it to effectively fulfil its mandate and, in particular, to provide it with any information or documentation they may possess or come to possess, as well as any other form of assistance pertaining to their respective mandates”.

Paragraph 5 further “calls upon relevant organs, bodies and agencies of the United Nations system to cooperate fully with the commission of inquiry, and to respond promptly to any request made by it, including with regard to access to all relevant information and documentation”.

As an independent body, the Commission will conduct its own investigations independently and separately from the Office of the High Commissioner for Human Rights and other United Nations offices and agencies. However, in doing so, the Commission expects to receive the full cooperation of all United Nations Member States, departments and bodies, and of all other relevant national and international institutions and actors in the delivery of its mandate.

IX. METHODS OF WORK

Taking note of the above, the Commission will pursue its investigations and the collection and analysis of information and evidence placed before it guided by the principles of independence, impartiality, objectivity and integrity and the principle of “do no harm”, including in relation to guarantees of confidentiality and the protection of victims and witnesses.

The Commission will seek to receive information from as broad a range of stakeholders as possible. In addition to conducting first hand interviews with witnesses and victims, it will examine available secondary and open source materials. It will request information and documentation as appropriate from civil society; the media; member states of the United Nations; organs, bodies and agencies of the United Nations; and other relevant experts and stakeholders. For these purposes, the Commission will seek the cooperation of concerned authorities to conduct field visits to all the geographical areas that are included in its mandate. The Commission will also seek the cooperation of relevant authorities to conduct field visits to other countries or territories where it will meet victims, witnesses, experts and other stakeholders relevant to the implementation of its mandate. It may hold roundtables, consultations, and public hearings with victims, witnesses, experts and other relevant partners as it would find helpful in the implementation of its mandate. It will also invite all United Nations Member States and other relevant stakeholders, along with interested persons or organisations, to make written and oral submissions that could be of assistance to the Commission in the discharge of its mandate.

Information and evidence collected will be reviewed and analysed, and all information and evidence will be stored, protected and maintained safely and securely, in accordance with international practice standards in this area.

Given its mandate to ensure perpetrators of violations and abuses are held accountable, the Commission may develop protocols for the sharing of information with domestic, regional, or international accountability mechanisms subject to baseline requirements of fairness, due process, non-applicability of the death penalty and compliance with other applicable human rights standards.

With the handling of any information received, the informed consent of information providers to further external use(s) or sharing pursuant to the mandate will be fundamental. The Commission will be sensitive and alert to any protection concerns that victims and survivors may have as a result of its engagement with them, further to the cardinal principle of 'do no harm'. Specific concerns will be considered and addressed as they arise, in conjunction as appropriate with affected persons.