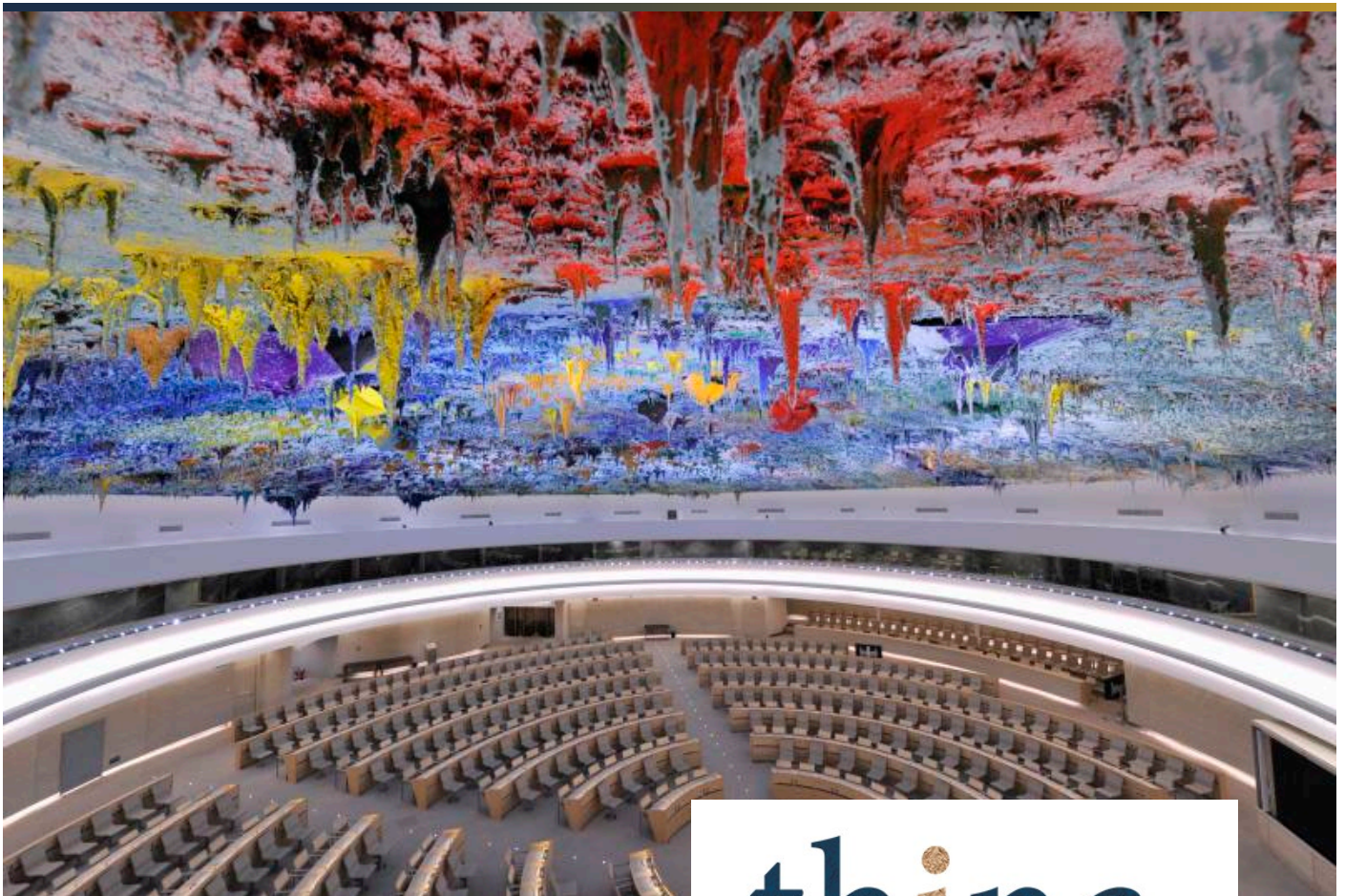


The UNHRC ongoing Commission of Inquiry into Israel and the Occupied Palestinian Territories (Res. S-30/1)

- A fundamentally flawed institution

BRIEFING PAPER | April 2022

CONCLUSIONS and RECOMMENDATIONS



thinc.

ISRAEL and INTERNATIONAL LAW

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Briefing Paper – Conclusions and Recommendations

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, we have analyzed the principle instruments on which the COI is founded, namely

- Res 60/251, establishing the UNHRC itself,
- Res S-30/1, in which the UNHRC establishes the COI, and
- the COI's Terms of Reference (TOR),

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. 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. In the meantime, 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. 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.

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