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Written statement* submitted by Amuta for NGO Responsibility, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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TRANSPARENCY IN HUMAN RIGHTS REPORTING STILL LACKING

The UN Human Rights Council Commissions of Inquiry (COI) framework is broken and in need of a complete overhaul. In its efforts to reform this mechanism, the Office of the High Commission of Human Rights has ignored the most problematic issues. Unless these structural failures are addressed, they will continue to have little to no impact in reducing civilian harm in armed conflict or bolstering the standing on the already discredited UNHRC.

To be considered credible, any fact-finding effort must adhere to the principles of "do no harm," independence, impartiality, objectivity, discretion, transparency, confidentiality, integrity, and professionalism. The Lund-London Guidelines of the International Bar Association emphasize that in order for a fact-finding mission to comply with its obligations, the people involved must be individuals "who are and are seen to be unbiased." Moreover, all work under the Council's auspices must be guided by "universality," "non-selectivity," and "balance."

HRC-mandated COI's, however, fail to comply with many of these principles. One of the most glaring deficiencies is the lack of transparency throughout every stage of the process. Indeed, the secretive nature of HRC COIs is a glaring international anomaly. We could not find any examples of credible inquiries where the lack of transparency was as pronounced as that of the HRC COI process. Transparency is not only a cornerstone of good governance, but it is essential to prevent corruption, conflicts of interest, and bias.

Lack of transparency permeates almost every phase of HRC COIs, starting with the appointments process, through the writing, publication, and promotion of resulting COI reports. This statement will focus primarily on staffing.

Appointments

Unlike other UN appointments, the process for HRC commissions of inquiry is completely hidden. It is unknown how potential members are selected for COIs, how qualifications are reviewed and conflicts of interest screened, and who ultimately decides the appointments. There is no transparency regarding interactions with the HRC President and who carries the most influence regarding selection of mission members.

This failure has resulted in disastrous appointments when it comes to COIs, particularly those relating to Israel. In fact, it appears that a public record of animus directed at Israel is a requirement for at least one member of every team. As noted by legal scholar and former member of the Inter-American Commission on Human Rights, Christina Cerna:

> In my view Israel has a unique status in the UN Human Rights Council. Impartiality is not a requirement sought by the Council for the appointment of experts when it comes to Israel. I was selected as the consensus candidate of the Consultative Committee for the post of UN Special Rapporteur on the Occupied Palestinian Territories earlier this year, but the Organization of Islamic Cooperation and the League of Arab States both officially opposed me, which killed my candidacy. They opposed me for "lack of expertise," although my entire professional life has been involved with human rights, but because I had never said anything pro-Palestinian and consequently was not known to be "partial" enough to win their support. The candidate that they officially supported was considered to be partial in their favor. No other special procedures mandate is similarly biased. At the end of the day, neither I nor the OIC candidate was appointed, but the Indonesian diplomat, Makarim Wibisono, who was appointed, was considered sufficiently "pro-Palestinian" to be acceptable to the OIC. Consequently, I don't think Bill Schabas could have been selected to lead the "independent" inquiry if he hadn't made the comments he had made about Netanyahu.

Staffing

Another key transparency failure for HRC COIs are the extraordinary efforts taken by OHCHR and the COIs in order to keep the positions and identities of staff members and consultants aiding the Secretariats hidden. Dozens of individuals are involved in COIs including consultants, NGO lobbyists, researchers, legal advisors, media advisors, investigators, supposed experts on forensics and military issues, archivists, writers, graphic artists, and PR operatives. Yet none of these people or their roles is identified. The failure to do so makes it impossible for outside sources to independently evaluate whether these individuals are objective and free from conflicts of interest, and have the requisite expertise. Given that these unnamed individuals do the bulk of the information collection, compiling of data, witness interviews, and drafting of the report, this failure to disclose is a clear violation of fact-finding standards and ethical principles.

Expertise

Another serious concern plaguing the workings of HRC COIs is the lack of expertise in military operations and the laws of armed conflict (LOAC)/international humanitarian law (IHL). Like staffers, these experts are not identified. Despite the fact that is impossible to conduct an inquiry or issue a report that is supposed to examine violations of international humanitarian law without military and legal expertise, it is unknown whether COIs involving armed conflict even retain experts on these matters. If individuals are retained ostensibly to provide such expertise, by failing to identify them, it is impossible to evaluate the qualifications of those consulted.

Leading scholar and military advisor Professor Michael Schmitt describes why military experience is critical to report on armed conflict:

> An investigator who does not understand, for example, weapons options, fuzing, guidance systems, angle of attack, optimal release altitudes, command and control relationships, communications capabilities, tactical options, available intelligence options, enemy practices, pattern of life analysis, collateral damage estimate methodology, human factors in a combat environment, and so forth, will struggle to effectively scrutinize an air strike.[1]

Similarly, lack of expertise regarding LOAC/IHL is just as problematic as a lack of military experience. Knowledge of human rights law and international criminal law is insufficient to carry out the work of the HRC mandate. According to Professor David Kaye, IHL has become "highly technical, susceptible to different legal interpretations and embodied in a complicated inter-woven network of conventions as well as entrenched in general international law."[2] Key IHL provisions are often difficult to interpret and are undermined by a lack of consensus. Many concepts have been hotly debated and involve much controversy, including the very relevant and applicable principles of proportionality and direct participation of civilians in hostilities. Customary international law is even less-well understood: There is considerable disagreement on state practice and how it is to be measured[3]; in many cases, a customary rule will be claimed even though a significant number of states do not abide by it.[4] Often the necessary conditions of state practice and *opinion juris* are conflated. Furthermore, those invoking customary law often rely upon tendentious and selective sources.

The lack of military and legal expertise has been apparent in almost every HRC COI. Moreover, there is extensive reliance in the COI reports on legal and military claims made by NGOs and others who do not possess the requisite information, professionalism, or expertise to make the claims that they do.

[1] Schmitt, Michael N., *Investigating Violations of International Law in Armed Conflict*, 2 Harv. Nat'l Sec. J. 31, 84 (2011).

[2] David Kaye, 'Complexity in the Law of War' in Russell A Miller and Rebecca M Bratspies (eds), Progress in International Law (Martinus Nijhoff 2008) 681

[3] Eric Posner & Jack Goldsmith, *The Limits of International Law* (Oxford 2006) at 23.

[4] Id. at 24.

Conclusion

Lack of transparency is not only a violation of best practices for fact finding and the mandates of the UN and the HRC, but practically speaking, it produces shoddy results. Without providing the basis on which independent evaluation and analysis can occur, the claims, conclusions, and recommendations made in COI reporting are worthless. In addition, the failure to be transparent is yet more evidence of the documented bias and politicization endemic at the HRC and associated frameworks. The only reasonable conclusion one can draw from COI staffing secrecy, therefore, is that not only are these mechanisms unethical, unprofessional, and unwilling to engage in substantive reform, but they also have something to hide.