

Terms of Reference

I. LEGISLATIVE AUTHORITY

The Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (COI OPTEJI), 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 6 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.